Constitution
of the
State of New Mexico

Adopted January 21, 1911

PREAMBLE

We, the people of New Mexico, grateful to Almighty God for the blessings of liberty, in order to secure the advantages of a state government, do ordain and establish this constitution.

ARTICLE I
Name and Boundaries

The name of this state is New Mexico, and its boundaries are as follows:

Beginning at the point where the thirty-seventh parallel of north latitude intersects the one hundred and third meridian west from Greenwich; thence along said one hundred and third meridian to the thirty-second parallel of north latitude; thence along said thirty-second parallel to the Rio Grande, also known as the Rio Bravo del Norte, as it existed on the ninth day of September, one thousand eight hundred and fifty; thence, following the main channel of said river, as it existed on the ninth day of September, one thousand eight hundred and fifty, to the parallel of thirty-one degrees forty-seven minutes north latitude; thence west one hundred miles to a point; thence south to the parallel of thirty-one degrees twenty minutes north latitude; thence along said parallel of thirty-one degrees twenty minutes, to the thirty-second meridian of longitude west from Washington; thence along said thirty-second meridian to the thirty-seventh parallel of north latitude; thence along said thirty-seventh parallel to the point of beginning.

ARTICLE II
Bill of Rights

Section 1. [Supreme law of the land.]

The state of New Mexico is an inseparable part of the federal union, and the constitution of the United States is the supreme law of the land.

ANNOTATIONS

Judgment offending public policy of New Mexico. — The fact that a judgment entered by a foreign court could not have been entered by a New Mexico court,

because it would have offended the public policy of New Mexico, will not permit the courts of New Mexico to deny it full faith and credit as required under U.S. Const., art. IV, § 1. Delaney v. First Nat'l Bank, 73 N.M. 192, 386 P.2d 711 (1963).

Comparable provisions. — Utah Const., art. I, § 3.

Law reviews. — For article, "Reticent Revolution: Prospects for Damage Suits Under the New Mexico Bill of Rights," see 25 N.M.L. Rev. 173 (1995).

For article, "The Federalism Revolution," see 31 N.M.L. Rev. 7 (2001).

For article, "Supreme Court Update," see 31 N.M.L. Rev. 31 (2001).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 16 Am. Jur. 2d Constitutional Law §§ 2, 70; 16A Am. Jur. 2d Constitutional Law § 440.

Implied cause of action for damages for violation of provisions of state constitutions, 75 A.L.R.5th 619.

Existence of pendent jurisdiction of federal court over state claim when joined with claim arising under laws, treaties, or Constitution of United States, 75 A.L.R. Fed. 600.

16 C.J.S. Constitutional Law § 3.

Sec. 2. [Popular sovereignty.]

All political power is vested in and derived from the people: all government of right originates with the people, is founded upon their will and is instituted solely for their good.

ANNOTATIONS

Cross references. — See Kearny Bill of Rights, cl. 1 in Pamphlet 3.

Comparable provisions. — Montana Const., art. II, § 1.

Utah Const., art. I, § 2.

Wyoming Const., art. I, § 1.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 16 Am. Jur. 2d Constitutional Law § 2; 16A Am. Jur. 2d Constitutional Law §§ 625 to 627.

16 C.J.S. Constitutional Law § 3; 16A C.J.S. Constitutional Law §§ 444 to 451; 29 C.J.S. Elections § 1.

Sec. 3. [Right of self-government.]

The people of the state have the sole and exclusive right to govern themselves as a free, sovereign and independent state.

ANNOTATIONS

Conservancy districts. — Laws 1923, ch. 140, § 301 (later repealed), creating conservancy districts, did not violate this section. In re Proposed Middle Rio Grande Conservancy Dist., 31 N.M. 188, 242 P. 683 (1925).

Comparable provisions. — Montana Const., art. II, § 2.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 72 Am. Jur. 2d States, Territories and Dependencies §§ 4, 5, 14 to 17.

81A C.J.S. States §§ 16, 20 to 28.

Sec. 4. [Inherent rights.]

All persons are born equally free, and have certain natural, inherent and inalienable rights, among which are the rights of enjoying and defending life and liberty, of acquiring, possessing and protecting property, and of seeking and obtaining safety and happiness.

ANNOTATIONS

Rights described in this section are not absolute, but are subject to reasonable regulation. Otero v. Zouhar, 102 N.M. 493, 697 P.2d 493 (Ct. App. 1984), aff'd in part and rev'd in part on other grounds, 102 N.M. 482, 697 P.2d 482 (1985).

Unreasonable interference with others. — This section means that each person may seek his safety and happiness in any way he sees fit so long as he does not unreasonably interfere with the safety and happiness of another. 1966 Op. Att'y Gen. No. 66-15.

Deprivation of "happiness" not tort claim. — Vague references to "safety" or "happiness" in this section are not sufficient to state a claim under 41-4-12 NMSA 1978 (liability of law enforcement officers). Waiver of immunity based on such constitutional grounds would emasculate the immunity preserved in the Tort Claims Act. Blea v. City of Espanola, 117 N.M. 217, 870 P.2d 755 (Ct. App. 1994).

Graduated income tax provisions are in no way related to or in conflict with the inherent rights provision in this section. Such income tax provisions do not prevent or deny a person's natural inherent and inalienable rights. 1968 Op. Att'y Gen. No. 68-9.

Economic policy adopted by state. — A state is free to adopt an economic policy that may reasonably be deemed to promote the public welfare and may enforce that policy by appropriate legislation without violation of the due process clause so long as such legislation has a reasonable relation to a proper legislative purpose and is neither arbitrary nor discriminatory. Rocky Mt. Whsle. Co. v. Ponca Whsle. Mercantile Co., 68 N.M. 228, 360 P.2d 643, appeal dismissed, 368 U.S. 31, 82 S. Ct. 145, 7 L. Ed. 2d 90 (1961).

Laws 1937, ch. 44, § 2, Fair Trade Act (49-2-2, 1953 Comp., now repealed), was unconstitutional and void as an arbitrary and unreasonable exercise of the police power without any substantial relation to the public health, safety or general welfare insofar as it concerned persons who were not parties to contracts provided for in Laws 1937, ch. 44, § 1 (49-2-1, 1953 Comp., now repealed). Skaggs Drug Center v. General Elec. Co., 63 N.M. 215, 315 P.2d 967 (1957).

The right of association emanating from the first amendment is not absolute. Its exercise, as is the exercise of express first amendment rights, is subject to some regulation as to time and place. Futrell v. Ahrens, 88 N.M. 284, 540 P.2d 214 (1975).

The right of association has never been held to apply to the right of one individual to associate with another, and certainly it has never been construed as an absolute right of association between a man and woman at any and all places and times. Futrell v. Ahrens, 88 N.M. 284, 540 P.2d 214 (1975).

Right is not waiver of government tort immunity. — Assuming the right to intimate association is encompassed within N.M. Const., art. II, §§ 4 and 17, as a matter of law, the plaintiffs, children of the deceased killed by law enforcement officers, were unforeseeable as injured parties and defendant officers had no duty towards them. The plaintiffs' allegations of violations of their constitutional right to associate with their father and receive his love, guidance, and protection are not sufficient to waive immunity. Lucero v. Salazar, 117 N.M. 803, 877 P.2d 1106 (Ct. App. 1994).

Constitutional rights of teachers and students. — Neither students nor teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate; school officials do not possess absolute authority over their students, and among the activities to which schools are dedicated is personal communication among students, which is an important part of the educational process. Futrell v. Ahrens, 88 N.M. 284, 540 P.2d 214 (1975).

A regulation of the board of regents of the New Mexico state university which prohibited visitation by persons of the opposite sex in residence hall, or dormitory, bedrooms maintained by the regents on the university campus, except when moving into the residence halls and during annual homecoming celebrations, where the regents placed no restrictions on intervisitation between persons of the opposite sex in the lounges or lobbies of the residence halls, the student union building, library or other buildings, or at any other place on or off the campus, and no student was required to live in a residence

hall, did not interfere appreciably, if at all, with the intercommunication important to the students of the university, the regulation was reasonable, served legitimate educational purposes and promoted the welfare of the students at the university. Futrell v. Ahrens, 88 N.M. 284, 540 P.2d 214 (1975).

Although personal intercommunication among students at schools, including universities, is an important part of the educational process, it is not the only, or even the most important, part of that process. Futrell v. Ahrens, 88 N.M. 284, 540 P.2d 214 (1975).

Status of resident for divorce purposes. — The New Mexico legislature may constitutionally confer the status of resident for divorce purposes upon those continuously stationed within this state by reason of military assignment. Wilson v. Wilson, 58 N.M. 411, 272 P.2d 319 (1954).

Tort liability not found. — Although the language of this section is broader than that of the Fourteenth Amendment to the United States Constitution, the plaintiff can not support a liability action against a school board or its officers when the plaintiff's decedent, while interviewing for the job of security officer and attempting to complete a physical agility test, suffered a heart attack and subsequently died. Simple negligence in the performance of a law enforcement officer's duty does not amount to commission of a tort. Tafoya v. Bobroff, 865 F. Supp. 742 (D.N.M. 1994), aff'd, 74 F.3d 1250 (10th Cir. 1996).

Supremacy of federal constitution. — This section's guarantee of the right of "seeking and obtaining safety" does not prevail over the state's duty under the Extradition Clause of Art. IV of the United States Constitution, which has been long held to be mandatory on the states. New Mexico ex rel. Ortiz v. Reed, 524 U.S. 151, 118 S. Ct. 1860, 141 L. Ed. 2d 131 (1998).

Right to protect property. — The right to protect property being a specifically mentioned right, its presence in this section might provide the basis for additional protection against unreasonable searches and seizures. State v. Sutton, 112 N.M. 449, 816 P.2d 518 (Ct. App. 1991).

Reclamation district contract. — A provision of a reclamation contract allowing a reclamation district to enter into a lawful contract with the United States for the improvement of the district and the increase of its water supply does not violate this section or art. II, § 18. Middle Rio Grande Water Users Ass'n v. Middle Rio Grande Conservancy Dist., 57 N.M. 287, 258 P.2d 391 (1953).

Cause of action as property right. — Cause of action which Indian acquires when tort is committed against him is property which he may acquire or become invested with, particularly if tort is committed outside of reservation by a state citizen who is not an Indian; where Indian is killed as result of such tort, the cause of action survives. Trujillo v. Prince, 42 N.M. 337, 78 P.2d 145 (1938).

Recovery of damages as property right. — A tort victim's interest in full recovery of damages calls for a form of scrutiny somewhere between minimum rationality and strict scrutiny. Therefore, intermediate scrutiny should be applied to determine the constitutionality of the cap on damages in Subsection A(2) of 41-4-19 NMSA 1978 of the Tort Claims Act. Trujillo v. City of Albuquerque, 110 N.M. 621, 798 P.2d 571 (1990).

Ordinance denying right to canvass. — Green River ordinance was held valid despite contention that it deprived photographer who employed solicitors to canvass residential areas of right to acquire and enjoy property. Green v. Town of Gallup, 46 N.M. 71, 120 P.2d 619 (1941).

Comparable provisions. — Idaho Const., art. I, § 1.

Iowa Const., art. I, § 1.

Montana Const., art. II, § 3.

Utah Const., art. I, § 1.

Law reviews. — For survey, "The Statute of Limitations in Medical Malpractice Actions," see 6 N.M. L. Rev. 271 (1976).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 16A Am. Jur. 2d Constitutional Law §§ 439 to 446, 552 to 573.

Civil Rights: constitutionality of civil rights ordinance, 93 A.L.R.2d 1028.

Validity of regulation by public-school authorities as to clothes or personal appearance of pupils, 58 A.L.R.5th 1.

Observation through binoculars as constituting unreasonable search, 59 A.L.R.5th 615.

16A C.J.S. Constitutional Law §§ 444 to 454; 16B C.J.S. Constitutional Law §§ 472 to 500; 16C C.J.S. Constitutional Law §§ 977 to 991.

Sec. 5. [Rights under Treaty of Guadalupe Hidalgo preserved.]

The rights, privileges and immunities, civil, political and religious guaranteed to the people of New Mexico by the Treaty of Guadalupe Hidalgo shall be preserved inviolate.

ANNOTATIONS

Law reviews. — For comment, "Education and the Spanish-Speaking - An Attorney General's Opinion on Article XII, Section 8 of the New Mexico Constitution," see 3 N.M. L. Rev. 364 (1973).

Sec. 6. [Right to bear arms.]

No law shall abridge the right of the citizen to keep and bear arms for security and defense, for lawful hunting and recreational use and for other lawful purposes, but nothing herein shall be held to permit the carrying of concealed weapons. No municipality or county shall regulate, in any way, an incident of the right to keep and bear arms. (As amended November 2, 1971 and November 2, 1986.)

ANNOTATIONS

The 1971 amendment, which was proposed by H.J.R. No. 5, § 1 (Laws 1971, p. 1378) and adopted at the special election held on November 2, 1971, with a vote of 55,349 for and 20,521 against, substituted "No law shall abridge the right of the citizen to keep and" for "The people have the right to," deleted "their" before "security and defense," and inserted "for lawful hunting and recreational use and for other lawful purposes."

The 1986 amendment, which was proposed by S.J.R. No. 10 (Laws 1985) and adopted at the general election held on November 4, 1986, by a vote of 179,716 for and 111,517 against, added the last sentence.

Reasonable regulation of right to bear arms. — A law which prohibits one from carrying a firearm into a liquor establishment is a reasonable regulation and not an infringement upon the right to bear arms, under either the federal or the state constitution. State v. Dees, 100 N.M. 252, 669 P.2d 261 (Ct. App. 1983) (decided prior to 1986 amendment, which added the last sentence).

Section 30-7-3 NMSA 1978, prohibiting unlawful carrying of a firearm in an establishment licensed to dispense alcoholic beverages, is not an unconstitutional infringement upon the right to bear arms under the New Mexico constitution; regulation of the right to bear arms is not a deprivation of that right. State v. Lake, 1996-NMCA-055, 121 N.M. 794, 918 P.2d 380.

Conviction for negligent weapon use constitutional. — Possession of firearms by intoxicated persons presents a clear danger to the public. The state constitution does not support a right to engage in this type of behavior. Therefore, the defendant's conviction for negligent use of a deadly weapon did not violate his right to bear arms under the state constitution, since there was evidence that he was intoxicated, he pointed the gun at another person, and he appeared to be loading the gun. State v. Rivera, 115 N.M. 424, 853 P.2d 126 (Ct. App. 1993).

Carrying of concealed weapons. — Constitution neither forbids nor grants the right to bear arms in a concealed manner. State ex rel. New Mexico Voices for Children, Inc. v. Denko, 2004-NMSC-011, 135 N.M. 439, 90 P.3d 458.

Ordinances prohibiting the carrying of concealed weapons have generally been held to be a proper exercise of police power and do not deprive citizens of the right to

bear arms as their effect is only to regulate the right, however, as applied to arms, other than those concealed, an ordinance which purports to completely prohibit the right to bear arms is void. City of Las Vegas v. Moberg, 82 N.M. 626, 485 P.2d 737 (Ct. App. 1971).

It is lawful to carry a gun in a vehicle. State v. Gutierrez, 2004-NMCA-081, 136 N.M. 18, 94 P.3d 18, cert. denied, 2004-NMCERT-004, ___N.M.____, ____P.3d_____.

Seizure of gun does not have to be related to initial traffic stop when it is justified on safety grounds during a search incident to arrest. State v. Gutierrez, 2004-NMCA-081, 136 N.M. 18, 94 P.3d 18, cert. denied, 2004-NMCERT-004, 135 N.M. 160, 85 P.3d 802.

Tort by minor. — Parent who keeps loaded firearm in home and who is without knowledge that his minor child was indiscreet or reckless in handling firearms is not liable for tort committed by the minor. Lopez v. Chewiwie, 51 N.M. 421, 186 P.2d 512 (1947).

Scope of restriction on regulation by municipalities and counties. — The language used in the last sentence of this section simply takes from municipalities and counties the authority they otherwise would have under their police powers to regulate matters which are incidents of right to bear arms. It does not, by its terms, restrict such regulation to the legislature, although the practical result of the prohibition is to allow firearm regulation only by the state and state agencies with the requisite statutory authority. 1990 Op. Att'y Gen. No. 90-07.

The last sentence of this section, prohibiting a municipality or county from regulating "in any way, an incident of the right to keep and bear arms," includes buying and selling firearms. 1990 Op. Att'y Gen. No. 90-07.

Comparable provisions. — Idaho Const., art. I, § 11.

Montana Const., art. II, § 12.

Utah Const., art. I, § 6.

Wyoming Const., art. I, § 24.

Law reviews. — For article, "The Right (?) to Keep and Bear Arms," see 27 N.M.L. Rev. 491 (1997).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 79 Am. Jur. 2d Weapons and Firearms §§ 4, 5, 8, 27.

Gun control laws, validity and construction of, 28 A.L.R.3d 845.

Validity of state statutes restricting the right of aliens to bear arms, 28 A.L.R.4th 1096.

Fact that weapon was acquired for self-defense or to prevent its use against defendant as defense in prosecution for violation of state statute prohibiting persons under indictment for, or convicted of, crime from acquiring, having, carrying, or using firearms or weapons, 39 A.L.R.4th 967.

Sufficiency of prior conviction to support prosecution under state statute prohibiting persons under indictment for, or convicted of, crime from acquiring, having, carrying, or using firearms or weapons, 39 A.L.R.4th 983.

Validity of state statute proscribing possession or carrying of knife, 47 A.L.R.4th 651.

Validity of state gun control legislation under state constitutional provisions securing the right to bear arms, 86 A.L.R.4th 931.

Validity, construction and application of state or local law prohibiting manufacture, possession, or transfer of "assault weapon," 29 A.L.R.5th 664.

Federal constitutional right to bear arms, 37 A.L.R. Fed. 696.

16 C.J.S. Constitutional Law § 148; 16B C.J.S. Constitutional Law § 511; 94 C.J.S. Weapons §§ 2, 3, 8, 10.

Sec. 7. [Habeas corpus.]

The privilege of the writ of habeas corpus shall never be suspended, unless, in case of rebellion or invasion, the public safety requires it.

ANNOTATIONS

Cross references. — As to supreme court's power to issue habeas corpus, see N.M. Const., art. VI, § 3.

For district court's power to issue habeas corpus, see N.M. Const., art. VI, § 13.

See Kearny Bill of Rights, cl. 9 in Pamphlet 3.

For statutory habeas corpus provisions generally, see 44-1-1 to 44-1-38 NMSA 1978.

"Special proceeding" under 39-3-7 NMSA 1978. — A habeas corpus proceeding is not a special statutory proceeding as contemplated by Laws 1937, ch. 197 (39-3-7 NMSA 1978), which authorized appeals from final judgment of district court to supreme court. In re Forest, 45 N.M. 204, 113 P.2d 582 (1941).

Writ properly refused. — Where, prior to trial, defendant requested a writ of habeas corpus ad testificandum requiring the appearance of a witness who was then incarcerated, but witness would claim the fifth amendment upon the subject indicated, the court stated that it would be a useless gesture and refused the request. Murdock v. United States, 283 F.2d 585 (10th Cir. 1960), cert. denied, 366 U.S. 953, 81 S. Ct. 1910, 6 L. Ed. 2d 1246 (1961).

Comparable provisions. — Idaho Const., art. I, § 5.

Iowa Const., art. I, § 13.

Utah Const., art. I, § 5.

Wyoming Const., art. I, § 17.

Law reviews. — For note, "Post-Conviction Relief After Release From Custody: A Federal Message and a New Mexico Remedy," see 9 Nat. Resources J. 85 (1969).

For article, "Habeas Corpus in New Mexico," see 11 N.M.L. Rev. 291 (1981).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 39 Am. Jur. 2d Habeas Corpus §§ 1 to 7.

Whether habeas corpus is a civil or criminal remedy as affecting state's right to appeal from discharge, 10 A.L.R. 401, 30 A.L.R. 1322.

Appeal from conviction, right to, as affected by discharge on habeas corpus, 18 A.L.R. 873, 74 A.L.R. 638.

Habeas corpus to test constitutionality of ordinance under which a petitioner is held, 32 A.L.R. 1054.

Appeal from conviction, power to grant writ of habeas corpus pending, 52 A.L.R. 876.

Habeas corpus as remedy for delay in bringing accused to trial or to retrial after reversal, 58 A.L.R. 1512.

Federal court, discharge on habeas corpus in, from custody under process of state court for acts done under federal authority, 65 A.L.R. 733.

Statutory remedy as exclusive of remedy by habeas corpus otherwise available, 75 A.L.R. 567.

Liability for statutory penalty of judge, court administrative officer or other custodian of person, in connection with habeas corpus proceedings, 84 A.L.R. 807.

Assistance of counsel, relief in habeas corpus for violation of accused's rights to, 146 A.L.R. 369.

Conviction of offense other than that charged in indictment or information, habeas corpus as remedy, 154 A.L.R. 1135.

Mistreatment of prisoner lawfully in custody as ground for habeas corpus, 155 A.L.R. 145.

Former jeopardy as ground for habeas corpus, 8 A.L.R.2d 285.

Court's power and duty, pending determination of habeas corpus proceeding on merits, to admit petitioner to bail, 56 A.L.R.2d 668.

Anticipatory relief in federal courts against state criminal prosecutions growing out of civil rights activities, 8 A.L.R.3d 301.

Modern status of rule relating to jurisdiction of state court to try criminal defendant brought within jurisdiction illegally or as result of fraud or mistake, 25 A.L.R.4th 157.

When is a person in custody of governmental authorities for purpose of exercise of remedy of habeas corpus, 26 A.L.R.4th 455.

Propriety of federal court's considering state prisoner's petition under 28 USC § 2254 where prisoner has exhausted state remedies as to some, but not all, claims in petition, 43 A.L.R. Fed. 631.

Review by federal civil courts of court-martial convictions, 95 A.L.R. Fed. 472.

39 C.J.S. Habeas Corpus §§ 2 to 5.

Sec. 8. [Freedom of elections.]

All elections shall be free and open, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.

ANNOTATIONS

Cross references. — For Election Code, see Chapter 1.

Vote is supreme right. — The supreme right guaranteed by state constitution is the right of a citizen to vote at public elections. State ex rel. Walker v. Bridges, 27 N.M. 169, 199 P. 370 (1921).

Fundamental errors outside of Election Code trigger constitutional violation. — Election is only "free and equal" if the ballot allows the voter to choose between the

lawful candidates for that office; therefore, ballet errors by county clerk that are outside the Election Code are violations of N.M. Const., art. II, § 8. Gunaji v. Macias, 2001-NMSC-028, 130 N.M. 734, 31 P.3d 1008.

Standing. — While constestants in an election do not enjoy directly as political candidates the protection of N.M. Const., art. II, § 8, they have standing to assert the rights of those voters whose votes were incorrectly tabulated. Gunaji v. Macias, 2001-NMSC-028, 130 N.M. 734, 31 P.3d 1008.

Remedy. — The remedy for ballot errors outside the Election Code but in violation of N.M. Const., art. II, § 8 is not a new election but rather to analogize from the Election Code, specifically 1-14-13 NMSA 1978, and reject the votes in the tainted precinct. Gunaji v. Macias, 2001-NMSC-028, 130 N.M. 734, 31 P.3d 1008.

Write-in candidates in conservancy district elections. — Conservancy district board rule prohibiting write-in candidates for election to the board is invalid as contrary to the legislative intent expressed by 1-1-19 NMSA 1978, making the Election Code, Chapter 1 of NMSA 1978, applicable to special district elections and to the constitutional mandate in this section of "free and open" elections. Gonzales v. Middle Rio Grande Conservancy Dist., 106 N.M. 426, 744 P.2d 554 (Ct. App. 1987).

Comparable provisions. — Idaho Const., art. I, § 19.

Montana Const., art. II, § 13.

Utah Const., art. I, § 17.

Wyoming Const., art. I, § 27.

Law reviews. — For note, "Why Gunaji v. Macias Matters to Candidates and Voters: Its Impact on New Mexico Election Law", see 33 N.M.L. Rev. 431 (2003).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 25 Am. Jur. 2d Elections § 2 et seq.

Criminal responsibility of one cooperating in violation of election law which he is incapable of committing personally, 5 A.L.R. 786, 74 A.L.R. 1110, 131 A.L.R. 1322.

Constitutionality of corrupt practices acts, 69 A.L.R. 377.

Women's suffrage amendment to federal or state constitution as affecting preexisting constitutional or statutory provisions which limited rights or duties to legal or male voters, 71 A.L.R. 1332.

Propriety of test or question asked applicant for registration as voter other than formal questions relating to specific conditions of his right to registration, 76 A.L.R. 1238.

Constitutionality of statutes in relation to registration before voting at election or primary, 91 A.L.R. 349.

Purging voters' registration lists, remedy and procedure for, 96 A.L.R. 1035.

Nonregistration as affecting legality of votes cast by persons otherwise qualified, 101 A.L.R. 657.

Statutory provisions relating to form or manner in which election returns from voting districts or precincts are to be made, failure to comply with, 106 A.L.R. 398.

Failure of officers to give notice of election as a punishable offense, 134 A.L.R. 1257.

Excess or illegal ballots, treatment of, when it is not known for which side of a proposition they were cast, 155 A.L.R. 677.

Voting by persons in the military service, 155 A.L.R. 1459.

Conspiracy to prevent exercise of right respecting election as within federal statutes denouncing conspiracy, 162 A.L.R. 1373.

Official ballots or ballots conforming to requirements, failure to make available as affecting validity of election of public officer, 165 A.L.R. 1263.

Power of election officers to withdraw or change returns, 168 A.L.R. 855.

Military establishments, state voting rights of residents of, 34 A.L.R.2d 1193.

What constitutes "conviction" within constitutional or statutory provision disfranchising one convicted of crime, 36 A.L.R.2d 1238.

Validity of percentage of vote or similar requirements for participation by political parties in primary elections, 70 A.L.R.2d 1162.

Validity and effect of statutes exacting filing fees from candidates for public office, 89 A.L.R.2d 864.

Absentee Voters' Laws, validity of, 97 A.L.R.2d 218.

Effect of conviction under federal law, or law of another state or country on right to vote or hold public office, 39 A.L.R.3d 303.

Students: residence of students for voting purposes, 44 A.L.R.3d 797.

29 C.J.S. Elections § 6.

Sec. 9. [Military power subordinate; quartering of soldiers.]

The military shall always be in strict subordination to the civil power; no soldier shall in time of peace be quartered in any house without the consent of the owner, nor in time of war except in the manner prescribed by law.

ANNOTATIONS

Cross references. — As to military affairs generally, see Chapter 9, Article 9 NMSA 1978.

Comparable provisions. — Idaho Const., art. I, § 12.

Iowa Const., art. I, § 14.

Utah Const., art. I, § 20.

Montana Const., art. II, § 32.

Wyoming Const., art. I, § 25.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 53A Am. Jur. 2d Military and Civil Defense § 355.

6 C.J.S. Armed Services § 7.

Sec. 10. [Searches and seizures.]

The people shall be secure in their persons, papers, homes and effects, from unreasonable searches and seizures, and no warrant to search any place, or seize any person or thing, shall issue without describing the place to be searched, or the persons or things to be seized, nor without a written showing of probable cause, supported by oath or affirmation.

ANNOTATIONS

I. GENERAL CONSIDERATION.

Cross references. — See Kearny Bill of Rights, cl. 11 in Pamphlet 3.

For issuance, contents, execution and return of search warrants see Rule 5-211.

General purpose of section is to secure the preservation of the personal security and liberty of the individual by forbidding the issuance of a warrant for his arrest except upon probable cause shown under oath and by preventing as far as possible the institution of baseless and unfounded prosecutions. 1963-64 Op. Att'y Gen. No. 63-123.

State and federal clauses compared. — The protections afforded under this section are more extensive than those under the Fourth Amendment of the United States Constitution. In re Shon Daniel K., 1998-NMCA-069, 125 N.M. 219, 959 P.2d 553, cert. denied, 125 N.M. 147, 958 P.2d 105 (1998).

Claim under state constitution not preserved. – A claim that an investigatory vehicle stop violated this section was not preserved where the court of appeals decided the case under the Fourth Amendment to the federal constitution and did not adequately articulate an interstitial analysis, as required by New Mexico law to support an independent claim under the state constitution. State v. Vandenberg, 2003-NMSC-030, 134 N.M. 566, 81 P.3d 19.

Not applicable to private intrusions. — The provisions of this section do not apply to intrusions by private persons. State v. Johnston, 108 N.M. 778, 779 P.2d 556 (Ct. App. 1989).

Statutory provisions read in pari materia. — This section and statutory provisions relative to issuance of warrants and verification of information are to be considered in pari materia. State v. Trujillo, 33 N.M. 370, 266 P. 922 (1928).

Reasonableness is the touchstone of any search. State v. Clark, 89 N.M. 695, 556 P.2d 851 (Ct. App. 1976).

If a search and seizure is reasonable, as that term is defined and understood, it will not violate the constitutional mandate, but reasonableness must be determined by the facts and circumstances of each case. State v. Kennedy, 80 N.M. 152, 452 P.2d 486 (Ct. App. 1969).

The reasonableness of the search depends on the facts and circumstances of each case. State v. Sedillo, 79 N.M. 289, 442 P.2d 601 (Ct. App. 1968).

Whether the search and seizure was reasonable must be determined on the basis of the facts of the case. State v. Everitt, 80 N.M. 41, 450 P.2d 927 (Ct. App. 1969).

The standard by which all search and seizure cases are to be determined is reasonableness. State v. Bidegain, 88 N.M. 384, 540 P.2d 864 (Ct. App.), rev'd on other grounds, 88 N.M. 466, 541 P.2d 971 (1975).

The reasonableness of each search and seizure is to be decided upon its own facts and circumstances in light of general standards. State v. Sanchez, 88 N.M. 378, 540 P.2d 858 (Ct. App.), rev'd on other grounds, 88 N.M. 402, 540 P.2d 1291 (1975), overruled on other grounds, State v. Attaway, 117 N.M. 141, 870 P.2d 103 (1994).

An unreasonable search and seizure cannot be made reasonable by what is discovered. State v. Baca, 87 N.M. 12, 528 P.2d 656 (Ct. App.), cert. denied, 87 N.M. 5, 528 P.2d 649 (1974).

United States Const., amend. IV, by its words, protects only against unreasonable searches and seizures, and what is reasonable depends upon the facts and circumstances of each case. Doe v. State, 88 N.M. 347, 540 P.2d 827 (Ct. App.), cert. denied, 88 N.M. 318, 540 P.2d 248 (1975).

Search and seizure is constitutionally lawful under either of three instances: if conducted pursuant to a legal search warrant, by consent or incident to a lawful arrest. State v. Sedillo, 79 N.M. 289, 442 P.2d 601 (Ct. App. 1968).

A search and seizure may be by consent, as an incident to a lawful arrest or pursuant to a legal search warrant. State v. Torres, 81 N.M. 521, 469 P.2d 166 (Ct. App.), cert. denied, 81 N.M. 506, 469 P.2d 151 (1970).

A search and seizure may be by consent as an incident to a lawful arrest or pursuant to a legal search warrant. State v. Harrison, 81 N.M. 324, 466 P.2d 890 (Ct. App. 1970).

State action. — Questioning of a 13-year-old student by his assistant principal in an empty classroom in the presence of a teacher is "state action," rendering U.S. Const., amend. IV, applicable through amend. XIV. Doe v. State, 88 N.M. 347, 540 P.2d 827 (Ct. App.), cert. denied, 88 N.M. 318, 540 P.2d 248 (1975).

Application to border searches. — The requirement of exigent circumstances under this section applied to federal border-patrol agent's search of defendant's truck at a checkpoint in New Mexico where the State sought to introduce evidence resulting from that search in a New Mexico state court. State v. Snyder, 1998-NMCA-166, 126 N.M. 168, 967 P.2d 843, cert. denied, 126 N.M. 533, 972 P.2d 352 (1998).

Under the New Mexico Constitution, after a federal border patrol agent has asked about a motorist's citizenship and immigration status, and has reviewed the motorist's documents, any further detention requires reasonable suspicion of criminal activity. State v. Cardenas-Alvarez, 2001-NMSC-017, 130 N.M. 386, 25 P.3d 225.

Applicability to juvenile proceedings. — United States Const., amend. IV, rights of persons to be secure against unreasonable searches and seizures, has been expressly applied to juvenile proceedings in this state by former 32-1-27 NMSA 1978. Doe v. State, 88 N.M. 347, 540 P.2d 827 (Ct. App.), cert. denied, 88 N.M. 318, 540 P.2d 248 (1975).

Where a search is sought to be justified on either of two grounds and the search is lawful under one of the asserted grounds, the search does not become unlawful because not sustainable under the other asserted ground. State v. Sedillo, 79 N.M. 289, 442 P.2d 601 (Ct. App. 1968).

Plea of guilty. — Irregularities in connection with defendant's arrest and detention cannot be raised after the entry of a voluntary plea of guilty. State v. Marquez, 79 N.M. 6, 438 P.2d 890 (1968).

Distinction between "mere evidence" and instrumentalities. — Nothing in the language of the fourth amendment supports the distinction between "mere evidence" and instrumentalities, fruits of crime or contraband. Privacy is disturbed no more by a search directed to a purely evidentiary object than it is by a search directed to an instrumentality, fruit or contraband. State v. Williamson, 78 N.M. 751, 438 P.2d 161, cert. denied, 393 U.S. 891, 89 S. Ct. 212, 21 L. Ed. 2d 170 (1968).

No good faith exception to exclusionary rule. — There is no good faith exception to the exclusionary rule under this section. State v. Gutierrez, 112 N.M. 774, 819 P.2d 1332 (Ct. App. 1991), aff'd, 116 N.M. 431, 863 P.2d 1052 (1993).

Roadblock was constitutional since the selection of the roadblock and procedures for conducting it were approved by police supervisory personnel; officers had no discretion as to which vehicles were stopped; pylons, special stop signs, room for safe stopping distance and other safeguards were provided; the location was chosen because of the number of DWI-related accidents in the area; the roadblock was conducted between the hours of 12:00 a.m and 3:00 a.m. on a Saturday morning; the officers wore uniforms and police cars with flashing lights were parked at the roadblock; the total detention time was no more than five minutes per vehicle; and the roadblock had been publicized in advance. State v. Madalena, 121 N.M. 63, 908 P.2d 756 (Ct. App. 1995).

Establishment of DWI roadblock did not require warrant since the evils that a warrant is designed to prevent were addressed by the requirement that the decision to set up a roadblock be made by supervisory personnel and by restrictions on the discretion of field officers in conducting the roadblock. State v. Bates, 120 N.M. 457, 902 P.2d 1060 (Ct. App. 1995).

Community caretaker doctrine. — The test of legitimacy under the community caretaker doctrine is whether the officers' actions were objectively reasonable and in good faith. State v. Nemeth, 2001-NMCA-029, 130 N.M. 261, 23 P.3d 936.

A response by law enforcement officers to a call seeking assistance in regard to a possible suicide inside a home can be characterized both as the rendering of emergency aid or assistance and the rendering of assistance out of a concern for a person's safety and welfare for purposes of application of the community caretaker exception to the Fourth Amendment warrant requirement. State v. Nemeth, 2001-NMCA-029, 130 N.M. 261, 23 P.3d 936.

An officer who acts in the community caretaker capacity is still subject to state and federal constitutional constraints with respect to a weapons frisk because it is distinct from a welfare check. State v. Boblick, 2004-NMCA-078, 135 N.M. 754, 93 P.3d 775, cert. denied, 2004-NMCERT-006, 135 N.M. 789, 93 P.3d 1292.

The search undertaken by the police officer was not a community caretaking encounter with defendant, consensual or otherwise, but rather, it was a search of his property while defendant was incapacitated. As police officer looked in the ER examination room,

saw the clothes lying on the floor, and of his own volition entered the room, picked up the pants, and searched the pockets, the state did not present substantial evidence as to the reasonableness of police officer's belief that his aid and assistance was necessary, and police officer's search of defendant's clothes was done for the purpose of investigating possible criminal activity or obtaining incriminatory evidence, rather than pursuant to a community caretaking function. State v. Gutierrez, 2005-NMCA-015, 136 N.M. 779, 105 P.3d 332, cert. denied, 2005-NMCERT-001, ___N.M.___, ___P.3d____.

Knock-and-announce requirement inherent. — This section incorporates a knock-and-announce requirement.The requirement that officers executing a search warrant announce their identity and purpose and be denied admission is a critical component of a reasonable search under this section. State v. Attaway, 117 N.M. 141, 870 P.2d 103 (1994).

Exclusion of evidence for failure to knock and announce. — If an officer does not knock and announce prior to forcible entry and exigent circumstances are not present, the fruits of that search would be excluded as a violation of the general constitutional reasonableness requirement. State v. Attaway, 117 N.M. 141, 870 P.2d 103 (1994).

Time insufficient to conclude refusal to answer knock on door, — Because ten seconds is such a short interval of time to wait for a person to answer a door at 6:15 on a weekend morning, and because the officers heard no sounds suggesting that defendant was awake, either to answer the door or to destroy evidence, under these circumstances and in the absence of exigency, ten seconds was not a sufficient interval to conclude that defendant refused to answer the door. Therefore, the search was not constitutionally reasonable, and the results of the search should have been suppressed. State v. Johnson, 2004-NMCA-064, 135 N.M. 615, 92 P.3d 61, cert. granted, 2004-NMCERT-005, 135 N.M. 565, 92 P.3d 10.

Danger to law enforcement exception to knock-and-announce. — There is a general exception to the rule of announcement based on an officer's objectively reasonable belief that full or partial compliance with the rule of announcement would increase the risk of danger to the officers effectuating the warrant. State v. Attaway, 117 N.M. 141, 870 P.2d 103 (1994).

The 10 to 15 second pause after knocking and announcing in this case was sufficient time for the officers to wait before executing their forcible entry into the house. The time interval, while extremely short for 6:00 A.M. on a Saturday morning, was sufficiently long given the highly specific indicia that the defendant posed a menace to police executing the warrant, since he was known to possess many weapons and had made threats against police. State v. Attaway, 117 N.M. 141, 870 P.2d 103 (1994).

Evidence that police officers had received previous information that the occupants of the residence had access to firearms amply supported the trial court's rejection of defendant's argument concerning their violation of the knock-and-announce rule. State v. Steinzig, 1999-NMCA-107, 127 N.M. 752, 987 P.2d 409.

Destruction of evidence exception to knock-and-announce. — If an officer has good reason to believe that evidence will be destroyed, that officer is justified in making an unannounced entry into a person's residence. "Good reason" will be defined by whether it was objectively reasonable for the officer to believe that evidence is being or will be destroyed based upon the particular circumstances surrounding the search. State v. Ortega, 117 N.M. 160, 870 P.2d 122 (1994).

Remedies of persons aggrieved by unlawful search and seizure. — A person aggrieved by an unlawful search and seizure may move for the return of the property and to suppress for the use of evidence anything so obtained on the ground that the property seized is not that described in the warrant. State v. Paul, 80 N.M. 521, 458 P.2d 596 (Ct. App.), cert. denied, 80 N.M. 746, 461 P.2d 228 (1969), cert. denied, 397 U.S. 1044, 90 S. Ct. 1354, 25 L. Ed. 2d 654 (1970), overruled on other grounds State v. Gunzelman, 85 N.M. 295, 512 P.2d 55 (1973).

Denial of motion to suppress. — In viewing the facts to determine the propriety of denying a motion to suppress, controverted questions of fact will not be resolved, but the facts found by the trial court will be weighed against the standards of reasonableness. State v. Deltenre, 77 N.M. 497, 424 P.2d 782 (1966), cert. denied, 386 U.S. 976, 87 S. Ct. 1171, 18 L. Ed. 2d 136 (1967).

Defendants were prejudiced by the unconstitutional denial of a hearing in their motion to suppress, when the trial court refused to guarantee that none of the testimony elicited from them therein would be admitted at their subsequent trial; a defendant cannot be required to elect between a valid fourth amendment claim or, in legal effect, a waiver of his fifth amendment privilege against self-incrimination. State v. Volkman, 86 N.M. 529, 525 P.2d 889 (Ct. App. 1974).

Police officers cannot just ask anyone for permission to search his effects. State v. Bidegain, 88 N.M. 384, 540 P.2d 864 (Ct. App.), rev'd on other grounds, 88 N.M. 466, 541 P.2d 971 (1975).

Carrying of loaded gun. — Under the state constitution of New Mexico a person can carry a loaded gun which is not concealed although there may be a local ordinance to the contrary. United States v. Romero, 484 F.2d 1324 (10th Cir. 1973).

Serial number check of lawfully seized weapon. — Where police officer was legally in possession of a gun, running a search on the serial number was not an additional intrusion under the U.S. Constitution because defendant no longer had a reasonable expectation of privacy in the weapon and the N.M. Constitution does not provide him with more protection than does the U.S. Constitution in connection with serial number checks of lawfully seized objects. State v. Gutierrez, 2004-NMCA-081, 136 N.M. 18, 94 P.3d 18, cert. denied, 2004-NMCERT-004, 135 N.M. 160, 85 P.3d 802.

A deputy game warden may patrol privately owned land for the purpose of looking out for wild game interests upon such land. 1947-48 Op. Att'y Gen. No. 4974.

Indian tribal law. — Because there is nothing in either the Zuni constitution or the Zuni tribal law and order code which authorizes the Zuni tribal court to issue a search warrant, the evidence seized from a house on the Zuni reservation pursuant to such a warrant is inadmissible at trial in a New Mexico court, and the motion to suppress the evidence obtained during the search should have been granted. State v. Railey, 87 N.M. 275, 532 P.2d 204 (Ct. App. 1975).

Search warrant for intoxicating liquor. — No statute authorizes issuance of search warrant for intoxicating liquor, and any such authority is to be found in this constitutional provision. 1933-34 Op. Att'y Gen. 119.

Error to dismiss charges where defendants appear at preliminary examination. — It was error for the trial court to dismiss robbery charges on the ground of an unverified information, where the prosecution had been commenced by criminal complaint, and defendants had already been arrested and had appeared at a preliminary examination before the information was filed. State v. Smallwood, 94 N.M. 225, 608 P.2d 537 (Ct. App. 1980).

The facts to be examined on appeal are those facts elicited before the trial court on the hearing on the motion to suppress. State v. Deltenre, 77 N.M. 497, 424 P.2d 782 (1966), cert. denied, 386 U.S. 976, 87 S. Ct. 1171, 18 L. Ed. 2d 136 (1967).

II. UNREASONABLE SEARCHES AND SEIZURES.

A. IN GENERAL.

Warrantless probation searches must be supported by reasonable suspicion as defined in New Mexico law to be an awareness of specific articulable facts, judged objectively, that would lead a reasonable person to believe criminal activity occurred or was occurring. State v. Baca, 2004-NMCA-049, 135 N.M. 490, 90 P.3d 509.

The state Constitution is not construed to require any higher degree of probability than reasonable suspicion as long as the suspected probation violation on which a warrantless search is based is reasonably related to the probationer’s rehabilitation or to community service. State v. Baca, 2004-NMCA-049, 135 N.M. 490, 90 P.3d 509.

Exigent circumstances are not required in connection with warrantless probation search supported by reasonable suspicion. State v. Baca, 2004-NMCA-049, 135 N.M. 490, 90 P.3d 509.

Probation revocation hearings. — The exclusionary rule of this section applies in probation revocation hearings. State v. Marquart, 1997-NMCA-090, 123 N.M. 809, 945 P.2d 1027.

Presence of defendant during search. — The fact that defendant is not present when a search occurs does not make the search unreasonable. State v. Everitt, 80 N.M. 41, 450 P.2d 927 (Ct. App. 1969).

Where search for one thing reveals another. — Where search is for one drug and a second drug is discovered, seizure of the second drug is lawful. State v. Alderete, 88 N.M. 619, 544 P.2d 1184 (Ct. App. 1976).

The search did not exceed defendant's consent where the defendant affirmatively volunteered to be searched and did not express any restriction to the search or protest the search of his pockets or his wallet. State v. Fairres, 2003-NMCA-152, 134 N.M. 668, 81 P.3d 611, cert. denied, 2003-NMCERT-003, 135 N.M. 51, 84 P.3d 668.

Where the owner of the vehicle gave an unrestricted consent to its search, it is established law in New Mexico that if officers, conducting a lawful search for property illegally possessed, discover other property illegally possessed, the latter may be seized also. State v. Warner, 83 N.M. 642, 495 P.2d 1089 (Ct. App.), cert. denied, 83 N.M. 631, 495 P.2d 1078 (1972).

"Plain view" doctrine. — It is not a search to observe that which occurs openly in a public place and which is fully disclosed to visual observation, and there is no seizure in disregard of any lawful right when officers retrieve and examine the packets which have been dropped in a public place. State v. Garcia, 76 N.M. 171, 413 P.2d 210 (1966).

The constitutional prohibition is directed to unreasonable searches and seizures so that people may be secure in their persons, houses, papers and effects, and does not apply to items viewed in an open field. State v. Aragon, 89 N.M. 91, 547 P.2d 574 (Ct. App.), cert. denied, 89 N.M. 206, 549 P.2d 284 (1976), overruled on other grounds State v. Rickerson, 95 N.M. 666, 625 P.2d 1183.

There is no seizure in the sense of the law when the officers examined the contents of a napkin after it had been dropped to the street. State v. Garcia, 76 N.M. 171, 413 P.2d 210 (1966).

Where police officer testified that when he knocked on the door and entered at the invitation of the appellant, he did so only for the purpose of talking to whoever was present concerning blood found in a car parked outside, but where at that time he had been advised of the assault on the complaining witness in the case and when he saw the appellant and the bloody clothes, both on him and in the room, appellant was placed under arrest and the clothes were gathered up and taken to the police station along with appellant, there was no illegal search and seizure, and, accordingly, the clothing taken from appellant's room was admissible in the trial of the charges against him. State v. Blackwell, 76 N.M. 445, 415 P.2d 563 (1966).

A package thrown from a car as it stops is not procured through a search; neither is there a seizure, and the contents thereof are admissible evidence. State v. Garcia, 76 N.M. 171, 413 P.2d 210 (1966).

Where heroin seized during a search pursuant to a warrant was physically located on property upon which there was an unoccupied house, and not within the curtilage as specified in the warrant, it was held that although the warrant did not authorize a search outside the curtilage, the can containing the heroin was viewed from a place the officer had a right to be under the warrant, and consequently, it was not discovered as a result of an illegal search. State v. Aragon, 89 N.M. 91, 547 P.2d 574 (Ct. App.), cert. denied, 89 N.M. 206, 549 P.2d 284 (1976), overruled on other grounds State v. Rickerson, 95 N.M. 666, 625 P.2d 1183.

The plain view doctrine does not apply to marijuana found in defendant's car, which marijuana was enclosed in a burlap-like sack, where neither of the police officers involved can testify that he was able to see inside the bag. State v. Coleman, 87 N.M. 153, 530 P.2d 947 (Ct. App. 1974).

Where the marijuana seized was not in plain view until the officers ordered the defendants out of the car and proceeded to enter the car themselves, the plain view doctrine did not apply since in order for the plain view rule to be applicable, the officers must lawfully be in the position that enabled them to see what is allegedly in plain view. State v. Ledbetter, 88 N.M. 344, 540 P.2d 824 (Ct. App. 1975).

Where stolen rings and clothes were seen next to codefendant at the time he was discovered hiding in the closet, the items were in plain view, and there was no subsequent search. State v. Hansen, 87 N.M. 16, 528 P.2d 660 (Ct. App. 1974).

Where contraband was discovered when officers opened a cedar chest, a metal pill box in a purse in an overnight case while searching for heroin, the "plain view" doctrine did not justify its seizure of the contraband. However, seizure of the contraband was permissible under the facts of the case because where permission has been given to search for a particular object, the ensuing search remains valid as long as its scope is consistent with an effort to locate that object and other evidence observed in the course of such a lawful search may also be seized. State v. Alderete, 88 N.M. 619, 544 P.2d 1184 (Ct. App. 1976).

Protection available for open fields. — This section uses the word "homes", while the federal constitution uses the word "houses". The difference in wording between the federal and state constitutions is some evidence that the state constitutional provision may be interpreted as extending to open fields, providing broader protection than the federal. State v. Sutton, 112 N.M. 449, 816 P.2d 518 (Ct. App. 1991).

Defendant did not demonstrate a reasonable expectation of privacy in marijuana plots located more than one hundred yards from his cabin, where he placed no signs declaring the property to be private property or declaring the land to be off-limits to

trespassers and did not erect any substantial fences around the plots. State v. Sutton, 112 N.M. 449, 816 P.2d 518 (Ct. App. 1991).

Search of unoccupied property. — Where heroin was found in the lot next to defendant's home and was on unoccupied property, the defendant had no reasonable expectation of privacy as to this location, and thus the constitutional prohibition against unreasonable searches and seizures did not apply. State v. Aragon, 89 N.M. 91, 547 P.2d 574 (Ct. App.), cert. denied, 89 N.M. 206, 549 P.2d 284 (1976), overruled on other grounds State v. Rickerson, 95 N.M. 666, 625 P.2d 1183.

Inevitable discovery exception. — The inevitable discovery doctrine applies where evidence may have been seized illegally, but where an alternative legal means of discovery such as a routine police inventory search would inevitably have led to the same result. State v. Wagoner, 2001-NMCA-014, 130 N.M. 274, 24 P.3d 306, cert. denied, 130 N.M. 213, 22 P.3d 681 (2001).

For the doctrine to apply, the alternate source of evidence must be pending, but not yet realized. If the alternate source has been realized, and the evidence seized or "reseized" according to this alternate source, the inevitable discovery doctrine is no longer applicable. Instead, the admissibility of the evidence must be evaluated under the independent source doctrine. State v. Wagoner, 2001-NMCA-014, 130 N.M. 274, 24 P.3d 306, cert. denied, 130 N.M. 213, 22 P.3d 681 (2001).

Independent source doctrine. — The independent source doctrine (an exception to the exclusionary rule where evidence is legally seized after an illegal search) is inapplicable to a search conducted pursuant to a warrant based partially on tainted information gathered during a prior illegal search. State v. Wagoner, 2001-NMCA-014, 130 N.M. 274, 24 P.3d 306, cert. denied, 130 N.M. 213, 22 P.3d 681 (2001).

The exigent circumstances exception means that if, prior to entry, a police officer in good faith believes that the person whose home is to be searched and/or the person inside to be arrested is fleeing or is attempting to destroy evidence, the police officer may enter without fulfilling the usual requirements. A good faith belief is meant reasonable belief, resting on a reasonable assessment of the facts available to the police officer prior to entry. State v. Sanchez, 88 N.M. 378, 540 P.2d 858 (Ct. App.), rev'd on other grounds, 88 N.M. 402, 540 P.2d 1291 (1975), overruled on other grounds, State v. Attaway, 117 N.M. 141, 870 P.2d 103 (1994).

The burden of showing the existence of exigent circumstances rests on the state. State v. Sanchez, 88 N.M. 378, 540 P.2d 858 (Ct. App.), rev'd on other grounds, 88 N.M. 402, 540 P.2d 1291 (1975), overruled on other grounds, State v. Attaway, 117 N.M. 141, 870 P.2d 103 (1994).

An exigent circumstance exists if, prior to entry, officers in good faith believe that the contraband, or other evidence, for which search is to be made is about to be destroyed,

and the question of exigent circumstances is one of fact. State v. Anaya, 89 N.M. 302, 551 P.2d 992 (Ct. App. 1976).

A search for weapons in the absence of probable cause to arrest must, like any other search, be strictly circumscribed by the exigencies which justify its initiation. Thus, it must be limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others nearby. State v. Washington, 82 N.M. 284, 480 P.2d 174 (Ct. App. 1971).

Where the officers received a report that the defendant had fired a firearm at others and some of the officers heard the shots, and the officers observed the defendant lying on a bed holding a firearm and were concerned about the safety of others in the area if the defendant were to begin shooting again, substantial evidence supported the trial court's finding of exigent circumstances justifying a warrantless seizure of the gun. State v. Calvillo, 110 N.M. 114, 792 P.2d 1157 (Ct. App. 1990).

Where police officers armed with a search warrant had probable cause to believe and in good faith did believe that defendant was selling heroin from his home and that there was heroin therein, they had received information from an informant who had assisted in the investigation leading to the issuance of the warrant, that defendant kept a weapon in the house and that the officers would have to move rapidly or defendant would flush the heroin down the toilet, the officers were all experienced and knew from their experience that normally there is an attempt to get rid of heroin before police officers get into a house, and after knocking on the door and announcing that they were police officers, they could see people moving and hear the sound of voices coming from inside the house, one of which was yelling or screaming as if someone was calling to another for the purpose of getting attention, the circumstances justified the officers in entering after knocking and announcing that they were police officers without waiting to be invited or denied entry. State v. Sanchez, 88 N.M. 402, 540 P.2d 1291 (1975), overruled on other grounds, State v. Attaway, 117 N.M. 141, 870 P.2d 103 (1994).

Exigent circumstances justifying a warrantless search did not exist where defendant's car was parked outside the sheriff's office and the defendant and the two other occupants were in the sheriff's office under arrest. State v. Coleman, 87 N.M. 153, 530 P.2d 947 (Ct. App. 1974).

An officer armed with a search warrant prior to forcible entry must give notice of authority and purpose, and be denied admittance; this is a general standard, and noncompliance with this standard is justified if exigent circumstances exist. An exigent circumstance exists if, prior to entry, officers in good faith believe that the contraband, or other evidence, for which the search is to be made is about to be destroyed. State v. Sanchez, 88 N.M. 402, 540 P.2d 1291 (1975), overruled on other grounds, State v. Attaway, 117 N.M. 141, 870 P.2d 103 (1994).

The exigency of the circumstances, as with the probable cause required to make a search reasonable under the circumstances, depends on practical considerations. The

circumstances must be evaluated from the point of view of a prudent, cautious and trained police officer. State v. Sanchez, 88 N.M. 402, 540 P.2d 1291 (1975), overruled on other grounds, State v. Attaway, 117 N.M. 141, 870 P.2d 103 (1994).

Where, after plainclothes officer stated he was a police officer and showed his badge and gun, defendant disappeared from the door, turned out the lights and was heard running, exigent circumstances justified a forcible entry by the officer, since the officer, in good faith prior to entry, believed that defendant was fleeing. State v. Kenard, 88 N.M. 107, 537 P.2d 1003 (Ct. App.), cert. denied, 88 N.M. 318, 540 P.2d 248 (1975), cert. denied, 423 U.S. 1024, 96 S. Ct. 468, 46 L. Ed. 2d 398 (1975).

Exigent circumstances do not exist where the only fact known to the police is the readily disposable nature of the contraband that is the object of the search. State v. Sanchez, 88 N.M. 378, 540 P.2d 858 (Ct. App.), rev'd on other grounds, 88 N.M. 402, 540 P.2d 1291 (1975), overruled on other grounds, State v. Attaway, 117 N.M. 141, 870 P.2d 103 (1994).

Absent a search warrant or valid consent to enter, intrusion into a private residence by law officers must be supported by a showing, by a preponderance of the evidence, that the entry was justified by exigent circumstances; and whether exigent circumstances exist is within the fact finding function of the trial court. State v. Burdex, 100 N.M. 197, 668 P.2d 313 (Ct. App.), cert. denied, 100 N.M. 192, 668 P.2d 308 (1983).

Where the presence of possibly hazardous chemicals provided the exigent circumstances necessary for a warrantless entry of defendant's residence, seizure of glassware and handguns was lawful because they were in plain view, and the exigencies of the situation permitted the opening of a briefcase without a warrant to search for other weapons or explosives. State v. Calloway, 111 N.M. 47, 801 P.2d 117 (Ct. App. 1990).

Exigent circumstances not found. — In determining whether exigent circumstances exist, the test is whether under the objective test exigent circumstances were shown to exist at the time of injury and that the particular defendant presents a danger, may flee, or is destroying evidence; there was no evidence of the existence of exigent circumstances where although numerous individuals were present on the premises, at the time of execution of the search warrant nothing indicated that anyone threatened the officers or that they were placed in fear by persons either inside or outside the residence. State v. Williams, 114 N.M. 485, 840 P.2d 1251 (Ct. App. 1992).

A warrantless search of an automobile and its contents requires a particularized showing of exigent circumstances, and a warrantless search is valid where the officer reasonably has determined that exigent circumstances exist. State v. Gomez, 1997-NMSC-006, 122 N.M. 777, 932 P.2d 1.

Under N.M. Const., art. II, § 10, there are no "automatic" exigent circumstances justifying the warrantless search of an automobile; rather, a warrantless search of an

automobile is valid only where the officer has reasonably determined that exigent circumstances exist. State v. Jones, 2002-NMCA-019, 131 N.M. 586, 40 P.3d 1030, cert. denied, 131 N.M. 619, 41 P.3d 345 (2002).

This section requires both probable cause and exigent circumstances for the warrantless search of an automobile. No exigent circumstances existed for a search of the trunk when the vehicle was in an impound lot, was to remain there for several days, and the lot had numerous security measures. State v. Warsaw, 1998-NMCA-044, 125 N.M. 8, 956 P.2d 139, cert. denied, 125 N.M. 147, 958 P.2d 105 (1998).

Before evidence seen in plain view inside an automobile may be seized, a warrant is required to enter the automobile unless the state can satisfy its burden to show that exigent circumstances existed justifying the warrantless entry or that another applicable exception to the warrant requirement applies. State v. Jones, 2002-NMCA-019, 131 N.M. 586, 40 P.3d 1030, cert. denied, 131 N.M. 619, 41 P.3d 345 (2002).

The State failed to prove the existence of exigent circumstances justifying a warrantless search of an automobile where border agents conducted the search at a checkpoint thirty miles away from the location of the nearest magistrate, the magistrate was available at the time of the stop, there was a telephone at the checkpoint and a fax machine at the main border patrol office, and there were three border patrol agents on duty at the checkpoint at the time of the stop. State v. Gallegos, 2003-NMCA-079, 133 N.M. 838, 70 P.3d 1277, cert. granted, 133 N.M. 771, 70 P.3d 761 (2003).

To justify a protective sweep of an automobile on officer safety grounds, the officer must be confronted with circumstances that support a reasonable suspicion that the subject is both armed and dangerous. State v. Garcia, 2004-NMCA-066, 135 N.M. 595, 92 P.3d 41, cert. granted, 2004-NMCERT-003, 135 N.M. 319, 88 P.3d 263.

Defendant's expectations of privacy, particularly to his vehicle parked outside the probation office, were necessarily reduced by his status and by the provisions in the probation order and intensive supervision program agreement regarding warrantless arrests and searches where he was under arrest and had undergone a patdown search that aroused suspicions and a key-lock match that caught him in a lie. Defendant's probation status, together with his prior convictions and the current probation violation for which he was arrested, the patdown discovery of a large sum of cash in small bills, and defendant's lie about how he arrived at the probation office were sufficient to give the officers a reasonable basis to search the vehicle for evidence of another violation of his probation conditions. State v. Ponce, 2004-NMCA-137, 136 N.M. 614, 103 P.3d 54, cert. granted, 2004-NMCERT-012, 136 N.M. 614, 103 P.3d 54.

Presence of firearm in automobile does not automatically support reasonable suspicion that the occupants will use the firearm to harm the police officer and therefore the seizure of the firearm was not justified. State v. Garcia, 2004-NMCA-066, 135 N.M. 595, 92 P.3d 41, cert. granted, 2004-NMCERT-003, 135 N.M. 319, 88 P.3d 263.

A protective search or sweep. — A protection search or sweep is only allowed incident to a lawful arrest; thus, since the officers entered and searched a bedroom before they arrested the defendant, the search and seizure could not be upheld as a protective sweep. State v. Wright, 119 N.M. 559, 893 P.2d 455 (Ct. App. 1994).

Administrative inspection of business premises. — A nonconsensual, warrantless administrative inspection of business premises can be made only when: the enterprise sought to be inspected is engaged in a business pervasively regulated by state or federal government; the inspection will pose only a minimal threat to justifiable expectations of privacy; the warrantless inspection is a crucial part of a regulatory scheme designed to further an urgent government interest; and the inspection is carefully limited as to time, place and scope. Here, a publishing company was not engaged in a pervasively-regulated business, and the state agency, in the absence of the consent, must obtain a search warrant based upon a preliminary finding of probable cause by a judicial officer. State ex rel. Environmental Imp. Agency v. Albuquerque Publishing Co., 91 N.M. 125, 571 P.2d 117 (1977), cert. denied, 435 U.S. 956, 98 S. Ct. 1590, 55 L. Ed. 2d 808 (1978).

Where officers follow building owner into defendant's room and observed narcotics paraphernalia, after owner knocks on door and is invited in, such entry is not constitutionally unreasonable even where defendant does not know of the presence of the officers when he gives the invitation to enter. State v. Chavez, 87 N.M. 180, 531 P.2d 603 (Ct. App. 1974), cert. denied, 87 N.M. 179, 531 P.2d 602, cert. denied, 422 U.S. 1011, 95 S. Ct. 2635, 45 L. Ed. 2d 675 (1975).

Where the affidavit for the search warrant established a good faith belief on the part of the officers that heroin was to be found on the premises; the officers knocked on the door, identified themselves as police officers, and announced their purpose, and while awaiting a response heard commotion within, the officers were justified in not delaying further. State v. Baca, 87 N.M. 12, 528 P.2d 656 (Ct. App.), cert. denied, 87 N.M. 5, 528 P.2d 649 (1974).

Search warrant does not abrogate knock and announce requirement and since officers, equipped with a valid warrant during the conduct of a drug raid, failed to give notice of their authority and purpose prior to entering a motel room with a pass key, evidence seized pursuant to this warrant was required to be suppressed. State v. Rogers, 116 N.M. 217, 861 P.2d 258 (Ct. App. 1993).

Ruse exception to the announcement rule. — For a ruse to be a reasonable and constitutional alternative to knocking and announcing, the state must demonstrate that, at the time of execution of the warrant, the police had a reasonable suspicion, based upon the particular circumstances of the case at hand, that exigent circumstances exist to believe that announcing would increase the risk of injury to the officers or increase the risk that evidence would be destroyed. State v. Reynaga, 2000-NMCA-053, 129 N.M. 257, 5 P.3d 579, cert. denied, 129 N.M. 208, 4 P.3d 36 (2000).

Procedure used prior to forcible entry. — In executing a search warrant or making an arrest on probable cause, an officer, prior to forcible entry, must give notice of authority and purpose and be denied admittance. Noncompliance with this standard is justified, however, if exigent circumstances exist, which may include good faith belief that the officers or someone within is in peril of bodily harm or that the person to be arrested is fleeing or attempting to destroy evidence. State v. Baca, 87 N.M. 12, 528 P.2d 656 (Ct. App.), cert. denied, 87 N.M. 5, 528 P.2d 649 (1974).

The general standard for executing a search is that prior to forcible entry, an officer must give notice of authority and purpose and be denied admittance, but noncompliance with the standard may be justified by exigent circumstances known to the officer beforehand, as, for example, when the officer, in good faith, believes that a person is attempting to destroy evidence. State v. Anaya, 89 N.M. 302, 551 P.2d 992 (Ct. App. 1976).

An officer, prior to forcible entry, must give notice of authority and purpose, and be denied admittance although noncompliance with this standard is justified if exigent circumstances exist, as, for example, when prior to entry officers in good faith believe that the person to be arrested is fleeing or attempting to destroy evidence. This rule allows the police to act fast and without warning under exigent circumstances when to do otherwise might allow a guilty person to escape conviction, but at the same time, prevents unwarranted intrusion into private dwellings by overzealous police officers eager to execute a search. State v. Sanchez, 88 N.M. 378, 540 P.2d 858 (Ct. App.), rev'd on other grounds, 88 N.M. 402, 540 P.2d 1291 (1975), overruled on other grounds, State v. Attaway, 117 N.M. 141, 870 P.2d 103 (1994).

There are no set rules as to the time an officer must wait before using force to enter a house; the answer will depend upon the circumstances of each case. However, simultaneous identification and entry is unreasonable and demands the suppression of evidence. State v. Sanchez, 88 N.M. 378, 540 P.2d 858 (Ct. App.), rev'd on other grounds, 88 N.M. 402, 540 P.2d 1291 (1975), overruled on other grounds, State v. Attaway, 117 N.M. 141, 870 P.2d 103 (1994).

Where a police officer knocked on defendant's door and announced his authority in an audible manner, but did not wait for anyone to come to the door, nor did he state his purpose for being present, or request permission to enter and serve the warrant, he did not properly give notice of his authority and purpose. State v. Sanchez, 88 N.M. 378, 540 P.2d 858 (Ct. App.), rev'd on other grounds, 88 N.M. 402, 540 P.2d 1291 (1975), overruled on other grounds, State v. Attaway, 117 N.M. 141, 870 P.2d 103 (1994).

"Forcible entry". — Forcible entry is not restricted to breaking down a door or window; entry through a closed but unlocked door, absent consent, is a forcible entry, as is entry through an open door, absent consent. In essence, forcible entry refers to an unannounced intrusion. State v. Sanchez, 88 N.M. 378, 540 P.2d 858 (Ct. App.), rev'd on other grounds, 88 N.M. 402, 540 P.2d 1291 (1975), overruled on other grounds, State v. Attaway, 117 N.M. 141, 870 P.2d 103 (1994).

The phrase "refused admittance" has been generally interpreted not to mean an affirmative refusal, and an officer may justifiably conclude that he has been refused entry where after announcement he either becomes aware of activity by the occupants which is inconsistent with action deemed reasonably necessary to open the door, or where a reasonable interval of time has elapsed without any response by the occupants, although an entry made too soon after announcement precludes any opportunity by the occupant to refuse the officer admittance. State v. Sanchez, 88 N.M. 378, 540 P.2d 858 (Ct. App.), rev'd on other grounds, 88 N.M. 402, 540 P.2d 1291 (1975), overruled on other grounds, State v. Attaway, 117 N.M. 141, 870 P.2d 103 (1994).

Where a police officer knocked loudly on the door, stated his identity as a police officer and that he had a search warrant, demanded entry and repeated this two or more times, waiting 30 to 60 seconds before breaking in, the officer could reasonably infer that he had been denied admittance. State v. Sanchez, 88 N.M. 378, 540 P.2d 858 (Ct. App.), rev'd on other grounds, 88 N.M. 402, 540 P.2d 1291 (1975), overruled on other grounds, State v. Attaway, 117 N.M. 141, 870 P.2d 103 (1994).

"Hot pursuit" doctrine. — Where shortly after an armed robbery an officer saw defendant who fit the description of one of the robbers enter a house and after about 10 minutes the officers actually entered the house, the doctrine of "hot pursuit" applied and the entry by the officers was a valid intrusion. State v. Hansen, 87 N.M. 16, 528 P.2d 660 (Ct. App. 1974).

Search by school officials. — Search of a 13-year-old boy who was seen by the school official smoking a pipe on school property against school regulations was based upon cause to believe that the search was necessary in the aid of maintaining school discipline, and the trial court was accordingly correct in admitting into evidence the fruits of that search. Doe v. State, 88 N.M. 347, 540 P.2d 827 (Ct. App.), cert. denied, 88 N.M. 318, 540 P.2d 248 (1975).

School officials may conduct a search of a student's person if they have a reasonable suspicion that a crime is being or has been committed or they have reasonable cause to believe that the search is necessary in the aid of maintaining school discipline; among the factors to be considered in determining the sufficiency to cause to search a student are the child's age, history and record in the school, the prevalence and seriousness of the problem in the school to which the search was directed, the exigency to make the search without delay and the probative value and reliability of the information used as a justification for the search. Doe v. State, 88 N.M. 347, 540 P.2d 827 (Ct. App.), cert. denied, 88 N.M. 318, 540 P.2d 248 (1975).

Something less than the strict standards to which police officers are held is appropriate given the facts and circumstances of school searches, since crime in the schools is reaching epidemic proportions, ordinary school discipline is essential if the educational function is to be performed, events calling for discipline are frequent and sometimes require immediate action, and the normal exceptions to the warrant requirement would

have little application in the school situation. Doe v. State, 88 N.M. 347, 540 P.2d 827 (Ct. App.), cert. denied, 88 N.M. 318, 540 P.2d 248 (1975).

A student's voluntary, direct statement to a person in authority, indicating personal knowledge of facts which establish that another student is engaging in illegal conduct, may provide school authorities reasonable grounds to search the second student's locker. However, a student's mere relaying of rumors or suspicions about another student is not sufficient to provide reasonable grounds. State v. Michael G., 106 N.M. 644, 748 P.2d 17 (Ct. App. 1987).

Informer's use of electronic device. — Where informer making purchases of heroin from defendants had an electronic device concealed on his person that transmitted sounds to a receiver in a police car and the sounds were recorded on tape, defendants' contention that the tapes were erroneously admitted as evidence, that they were victims of an illegal search and seizure, and that their privilege against self-incrimination was violated was without merit. The informer having testified as to the conversations, the tapes were admissible to corroborate the informer's testimony. State v. Maes, 81 N.M. 550, 469 P.2d 529 (Ct. App.), cert. denied, 81 N.M. 588, 470 P.2d 309 (1970).

Search of a moving object. — The courts have long recognized another exception to the requirement that searches and seizures be undertaken by officers only after obtaining a warrant, that is, the search of a moving object, particularly an automobile, where it is not practicable to secure a warrant, because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought. State v. Aull, 78 N.M. 607, 435 P.2d 437 (1967), cert. denied, 391 U.S. 927, 88 S. Ct. 1829, 20 L. Ed. 2d 668 (1968).

Following a valid investigatory stop, an officer was justified, on the basis of a reasonable suspicion that defendant had recently used a handgun to commit an aggravated assault, in conducting a protective search of the floor and adjacent area of defendant's vehicle; however, a search of a small hole in the dashboard exceeded the scope of the search. State v. Arredondo, 1997-NMCA-081, 123 N.M. 628, 944 P.2d 276.

Vehicle trunk is protected place. — Entry into the trunk of a vehicle, even an open trunk, is an intrusion governed by the Fourth and Fourteenth Amendments because, at least in New Mexico, persons have a reasonable expectation of freedom from intrusion in that area. State v. Ramzy, 116 N.M. 748, 867 P.2d 418 (Ct. App. 1993).

Request to empty pockets. — After stopping a vehicle based on violations of the seat-belt law and before making an arrest, an officer violated the constitutionally permissible bounds of a pat-down search when he did not feel the outside of defendant's pocket but asked him to empty his pockets at a time when the defendant was not free to leave and in a manner that the officer admitted was directive. State v. Ingram, 1998-NMCA-177, 126 N.M. 426, 970 P.2d 1151, cert. denied, 126 N.M. 533, 972 P.2d 352 (1998).

Officer entitled to look into parked vehicle once investigatory stop completed. — Once the purpose of an investigatory stop is completed, an officer still has the right to look into a vehicle parked on a public road, and may then seize contraband which is in plain view. State v. Powell, 99 N.M. 381, 658 P.2d 456 (Ct. App. 1983).

An inventory search of an automobile in lawful custody of the police can be made and items in the trunk can be inventoried. State v. Vigil, 86 N.M. 388, 524 P.2d 1004 (Ct. App.), cert. denied, 86 N.M. 372, 524 P.2d 988 (1974), cert. denied, 420 U.S. 955, 95 S. Ct. 1339, 43 L. Ed. 2d 432 (1975).

An inventory search of an automobile does not violate U.S. Const., amend. IV, when that automobile is in the lawful custody of the police in a reasonable exercise of its caretaking function. State v. Clark, 89 N.M. 695, 556 P.2d 851 (Ct. App. 1976).

Where the initial intrusion into a vehicle which is lawfully in police custody is justified, an inventory of the contents of closed containers is also justified. State v. Vigil, 86 N.M. 388, 524 P.2d 1004 (Ct. App.), cert. denied, 86 N.M. 372, 524 P.2d 988 (1974), cert. denied, 420 U.S. 955, 95 S. Ct. 1339, 43 L. Ed. 2d 432 (1975).

An inventory search is not constitutionally permissible absent a search warrant after police have relinquished possession, custody and control to a third party who has the legal right to possession, custody and control, and the trial court should have granted defendant's motion to suppress. State v. Clark, 89 N.M. 695, 556 P.2d 851 (Ct. App. 1976).

Forcibly abandoned property. — Where defendant's abandonment of property was a direct result of an actual illegal police search, defendant did not act voluntarily in abandoning property, and the evidence must be suppressed. State v. Ingram, 1998-NMCA-177, 126 N.M. 426, 970 P.2d 1151, cert. denied, 126 N.M. 533, 972 P.2d 352 (1998).

Actions of officers. — Where, following an accident, defendant sought to preserve the contents of the trunk of his car as private, actions of officers in encouraging a narcotics dog to jump into the trunk and bending their heads into the trunk to view the object of the dog's alert, constituted an illegal search. State v. Warsaw, 1998-NMCA-044, 125 N.M. 8, 956 P.2d 139, cert. denied, 125 N.M. 147, 958 P.2d 105 (1998).

Drug sniffing dog not inventory search. — Because the officers were not following a routine procedure established by police regulations, the use of drug sniffing dog cannot be justified under the inventory-search exception. State v. Ramzy, 116 N.M. 748, 867 P.2d 418 (Ct. App. 1993).

General license and registration check. — Where defendant's car was stopped during a general license and registration check, and after a police request defendant opened the trunk, at which point the officer smelled marijuana, and subsequently the defendant opened a suitcase (also at the officer's request), it was held that the seizure

of the marijuana residue found in the suitcase was not unlawfully accomplished. State v. Bloom, 90 N.M. 192, 561 P.2d 465 (1977).

In conducting general license and registration checks under former 64-13-49, 1953 Comp. (similar to 66-5-16 NMSA 1978) and 66-3-13 NMSA 1978, the actions of the police must be in conformity with the constitutional requirements of the U.S. Const., amend. 4; and when the detention permitted by the statute becomes a mere subterfuge or excuse for some other purpose which would not be lawful, the actions then become unreasonable and fail to meet the constitutional requirement. State v. Bloom, 90 N.M. 226, 561 P.2d 925 (Ct. App. 1976), rev'd on other grounds, 90 N.M. 192, 561 P.2d 465 (1977).

Further questioning not permissible. — Where an officer stopped defendant's vehicle because of the lack of a license plate, the officer could lawfully ask for driver documentation, but an additional question, whether defendant had any weapons in the car, and the officer's subsequent detention and search were not permissible. City of Albuquerque v. Haywood, 1998-NMCA-029, 124 N.M. 661, 954 P.2d 93, cert. denied, 124 N.M. 589, 953 P.2d 1087 (1998).

Leaving car unattended before search. — Where the officer went by a grocery store before returning to the car that was to be searched, and the officer's trip by the grocery store before returning to the car was part of a continuing series of events, the fact that the car was unattended for 10 minutes did not make the search unreasonable, but the fact that the car had been unattended might raise questions in connecting defendant with items found in the search. State v. Everitt, 80 N.M. 41, 450 P.2d 927 (Ct. App. 1969).

Warrant cannot validate prior illegal search. — If a search which discovers evidence is unreasonable, then the subsequent seizure is the fruit of that illegal search and a search warrant cannot validate a prior illegal search. State v. Everitt, 80 N.M. 41, 450 P.2d 927 (Ct. App. 1969).

"Visual search" by the officer of car of defendant to search for weapons, wherein he saw a shaving kit, a pair of shoes and a prybar, was not unreasonable. State v. Everitt, 80 N.M. 41, 450 P.2d 927 (Ct. App. 1969).

Blood alcohol tests. — The doctrine of search and seizure is not applicable to a blood test made at the sole request of the surgeon, a private individual. State v. Richerson, 87 N.M. 437, 535 P.2d 644 (Ct. App.), cert. denied, 87 N.M. 450, 535 P.2d 657 (1975).

Absent a valid warrant or consent by the defendant, an arrest prior to the taking of a blood alcohol test is an essential element in order to constitute a reasonable search and seizure. Admission into evidence of the results of a blood test which does not meet this standard is reversible error. State v. Richerson, 87 N.M. 437, 535 P.2d 644 (Ct. App.), cert. denied, 87 N.M. 450, 535 P.2d 657 (1975).

Entry under defendant's trailer and severing of a sewer pipe before executing a search warrant for narcotics did not amount to an unconstitutional search under the circumstances since testimony indicated that heroin is often disposed of by flushing and that upon a prior arrest of one defendant she attempted to dispose of heroin in this fashion. State v. Anaya, 89 N.M. 302, 551 P.2d 992 (Ct. App. 1976).

Aerial surveillance. — Where defendant's property lies within two or three miles of a municipal airport, and crop dusters fly in the area at will, the defendant had no reasonable expectation of privacy in his field to the extent of visibility from the air, and the aerial surveillance of the property did not violate defendant's fourth amendment rights. State v. Bigler, 100 N.M. 515, 673 P.2d 140 (Ct. App. 1983).

Visibility from the air. — A defendant does not have a justifiable expectation of privacy with respect to marijuana plants protruding through holes in his greenhouse roof, to the extent of their visibility from the air. State v. Rogers, 100 N.M. 517, 673 P.2d 142 (Ct. App. 1983).

Suppression of marijuana evidence observed in shielded garden. — See State v. Chort, 91 N.M. 584, 577 P.2d 892 (Ct. App. 1978).

Dog sniff of defendant's closed luggage in the common baggage compartment of a common carrier did not violate a reasonable expectation of privacy on the part of the defendant, and did not constitute a search within the meaning of this section. State v. Villanueva, 110 N.M. 359, 796 P.2d 252 (Ct. App. 1990).

Nighttime searches. — Where defendant challenged the denial of his motion to suppress evidence from a nighttime search, since the search was conducted on people who were seen to be active in nighttime, and probable cause was developed in the nighttime, the search was constitutional. State v. Garcia, 2002-NMCA-050, 132 N.M. 180, 45 P.3d 900, cert. denied, 132 N.M. 193, 46 P.3d 100 (2002).

Statute requiring any person killing bovine to preserve its hide unmutilated for 30 days did not violate constitutional immunities from self-incrimination and unreasonable searches and seizures. State v. Walker, 34 N.M. 405, 281 P. 481 (1929).

Strip searches of prison visitors can be justified on basis of reasonable suspicion, but only if such searches are conducted as part of a prison procedure that informs visitors before being searched that they have the right to refuse to be searched, in which case they will be escorted off the prison grounds. State v. Garcia, 116 N.M. 87, 860 P.2d 217 (Ct. App. 1993).

Standing to challenge search and seizure. — Constitutional provisions prohibiting unreasonable searches and seizures are personal rights, and they may be enforced by exclusion of evidence only at the instance of one whose own protection was infringed by the search and seizure. To have standing one must be the victim of the search in the

sense that one's right of privacy was invaded. State v. Torres, 81 N.M. 521, 469 P.2d 166 (Ct. App.), cert. denied, 81 N.M. 506, 469 P.2d 151 (1970).

Defendant has no standing to exclude evidence on grounds of unreasonable search where the evidence seized was not an essential element of any of the offenses with which defendant was charged, and where defendant never claimed a connection with any of the seized evidence - either at the suppression hearing or at trial. State v. Ellis, 88 N.M. 90, 537 P.2d 698 (Ct. App. 1975), overruled on other grounds State v. Espinosa, 107 N.M. 293, 756 P.2d 573 (1988).

Where a U-Haul dealer stated that he was holding a van leased by defendant until paid what was owing and if defendant did not pay he was going to keep the contents of the van, and he was waiting for the money owing at the time of the inventory search, this recognition of defendant's right to the vehicle by the U-Haul representative was sufficient to give defendant standing to object to an inventory search and seizure. State v. Clark, 89 N.M. 695, 556 P.2d 851 (Ct. App. 1976).

All that is necessary to give a defendant standing to challenge search and seizure is "possession" of the seized evidence which is itself an essential element of the offense with which the defendant is charged. State v. Nemrod, 85 N.M. 118, 509 P.2d 885 (Ct. App. 1973), overruled on other grounds, State v. Vigil, 86 N.M. 388, 524 P.2d 1004 (1974).

Where a car that was searched and from which evidence was seized did not belong to defendant nor did the record show that he claimed any possessory interest in the car, the fact that the car was parked on defendant's property when it was searched did not give defendant standing to challenge the search and seizure. State v. Torres, 81 N.M. 521, 469 P.2d 166 (Ct. App.), cert. denied, 81 N.M. 506, 469 P.2d 151 (1970).

Argument that since defendant did not own but only rented a car that was searched, he did not have standing to question the validity of the application for the search warrant, where there was no question that defendant was one against whom the search was directed, was without merit. State v. Lewis, 80 N.M. 274, 454 P.2d 360 (Ct. App. 1969), overruled on other grounds, State v. Nemrod, 85 N.M. 118, 509 P.2d 885 (Ct. App. 1973).

Arrestee's spouse, co-owner of home, present at time of husband's invalid arrest, had a reasonable expectation of privacy in the couple's home and was entitled to summary judgment on a claim under this section. Montes v. Gallegos, 812 F. Supp. 1165 (D.N.M. 1992).

Since the defendant, by permission of the owner, was in the bedroom of a residence with the door closed, she had a reasonable expectation of privacy. State v. Wright, 119 N.M. 559, 893 P.2d 455 (Ct. App. 1994).

To establish his standing to challenge a search and seizure, a visitor must show subjectively, by his conduct, that he had an expectation of privacy, and objectively that his expectation was reasonable; defendant did not make any specific showing concerning his expectation of privacy where he was among a group of people in the living room in the presence of marijuana. State v. Fairres, 2003-NMCA-152, 134 N.M. 668, 81 P.3d 611, cert. denied, 2003-NMCERT-003, 135 N.M. 51, 84 P.3d 668.

Even though the defendant did not own the vehicle and was not an occupant at the time of the search, she had standing to challenge a search by virtue of her status as a permissive user who had an ongoing relationship with the owner through which she exerted control over both the vehicle and its contents. State v. Leyba, 1997-NMCA-023, 123 N.M. 159, 935 P.2d 1171.

B. IN CASES OF ARREST.

A search without a warrant is lawful when the search is incident to a lawful arrest. State v. Deltenre, 77 N.M. 497, 424 P.2d 782 (1966), cert. denied, 386 U.S. 976, 87 S. Ct. 1171, 18 L. Ed. 2d 136 (1967).

The right to search incident to a lawful arrest is deeply rooted in the law. State v. Ramirez, 79 N.M. 475, 444 P.2d 986 (1968).

Right is exception to warrant requirement. — In the case of a lawful custodial arrest, a full search of the person is an exception to the warrant requirement. State v. Vigil, 86 N.M. 388, 524 P.2d 1004 (Ct. App.), cert. denied, 86 N.M. 372, 524 P.2d 988 (1974), cert. denied, 420 U.S. 955, 95 S. Ct. 1339, 43 L. Ed. 2d 432 (1975).

Reason for right to search. — A police officer must have power to conduct an immediate search following an arrest in order to remove weapons and to prevent the suspect from destroying evidence. State v. Ramirez, 79 N.M. 475, 444 P.2d 986 (1968).

Search incident to arrest is "reasonable". — In the case of a lawful custodial arrest, a full search of the person is a "reasonable" search. State v. Vigil, 86 N.M. 388, 524 P.2d 1004 (Ct. App.), cert. denied, 86 N.M. 372, 524 P.2d 988 (1974), cert. denied, 420 U.S. 955, 95 S. Ct. 1339, 43 L. Ed. 2d 432 (1975).

An arrest will not be validated by what it turns up. State v. Deltenre, 77 N.M. 497, 424 P.2d 782 (1966), cert. denied, 386 U.S. 976, 87 S. Ct. 1171, 18 L. Ed. 2d 136 (1967).

Where evidence is not fruit of the arrest. — When it is clear that the trial court had jurisdiction of the defendant and of the cause, it makes no difference if defendant's presence was obtained through illegal arrest, when the evidence utilized at the trial was not a fruit of the arrest. State v. Garcia, 76 N.M. 171, 413 P.2d 210 (1966).

Seizure of items incidental to unrelated offense. — Officers who search incidental to a lawful arrest may seize things incidental to another and wholly unrelated offense which may be uncovered by such a search. State v. Adams, 80 N.M. 426, 457 P.2d 223 (Ct. App. 1969); State v. Slicker, 79 N.M. 677, 448 P.2d 478 (Ct. App. 1968); State v. Ramirez, 79 N.M. 475, 444 P.2d 986 (1968).

Although the checks seized from defendant were unrelated to the assault and battery charge, their seizure was not an unreasonable seizure violative of the constitutional prohibition because taken as an incident to the arrest on the assault and battery charge. State v. Adams, 80 N.M. 426, 457 P.2d 223 (Ct. App. 1969).

Although certain evidentiary items were unrelated to car registration offense, with which defendant was charged, their seizure was not an unreasonable seizure violative of the constitutional prohibition where they were taken as an incident to the arrest for that offense. State v. Slicker, 79 N.M. 677, 448 P.2d 478 (Ct. App. 1968).

Warrantless seizure of weapon. — Based on a police officer's reasonable safety concern, a warrantless seizure of a weapon within the area of immediate control of a person who is present during a custodial arrest does not violate the rights of the arrestee under the New Mexico Constitution. State v. Gutierrez, 2004-NMCA-081, 136 N.M. 18, 94 P.3d 18, cert. denied, 2004-NMCERT-004, ___N.M.____, ____P.3d_____.

Detention of visitor for investigation. – A visitor may be detained where there is a reasonable basis to believe that the visitor is connected to the premises or to criminal activity based on the totality of the circumstances; defendant's proximity to marijuana and drug paraphernalia in the living room gave officers a reasonable basis to believe that he had a connection to the presence of the marijuana and drug paraphernalia so as to reasonably detain him as part of the investigation. State v. Fairres, 2003-NMCA-152, 134 N.M. 668, 81 P.3d 611, cert. denied, 2003-NMCERT-003, 135 N.M. 51, 84 P.3d 668.

Although the investigation did not originally involve drugs, officers could reasonably expand the scope of the investigation based on the reasonable suspicion of criminal activity. State v. Fairres, 2003-NMCA-152, 134 N.M. 668, 81 P.3d 611, cert. denied, 2003-NMCERT-003, 135 N.M. 51, 84 P.3d 668.

Search of premises not prohibited. — A search and seizure is permissible when made contemporaneous with the arrest, and the constitution does not prohibit a search of the arrested person's premises for evidence related to the crime, under appropriate circumstances. State v. Sedillo, 79 N.M. 289, 442 P.2d 601 (Ct. App. 1968).

Search delayed after arrest. — Where there was probable cause for the arrest and detention of the vehicle, and officers looked in the car approximately one-half hour after the defendants were taken into custody and the presence of one of the television sets was noted, the search was reasonably incident to the arrest. State v. Warner, 83 N.M. 642, 495 P.2d 1089 (Ct. App.), cert. denied, 83 N.M. 631, 495 P.2d 1078 (1972).

A search that occurred around two hours after the arrest when the evidence is sufficient to show that the police officers had reasonable or probable cause to search the automobile at the place of arrest was valid, as this right continued to a search at the police station shortly thereafter. The search was not remote; therefore, the evidence seized from the car was properly admitted. State v. Courtright, 83 N.M. 474, 493 P.2d 959 (Ct. App. 1972).

Examination of contents of briefcase. — Where taking into custody of briefcase and the examination of its contents constituted a seizure and search, and this seizure and search were incident to the lawful arrest of the defendant, they were also lawful. State v. Barton, 79 N.M. 70, 439 P.2d 719 (1968).

Nothing stated in Mapp v. Ohio, 367 U.S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081 (1961), compels, or even strongly suggests, that the taking of a briefcase and its contents, incident to a lawful arrest, constituted an unreasonable search and seizure contrary to the guarantees of U.S. Const., amend. IV and XIV, and of this section. State v. Barton, 79 N.M. 70, 439 P.2d 719 (1968).

Search incident to arrest shown. — Where probable cause existed for child's arrest after examination of a cigarette containing marijuana lawfully taken from shirt pocket, the subsequent emptying of his pockets and the formal arrest were substantially contemporaneous events, the child having been deprived of his freedom of movement prior to those two events, and the seizure of the lid of marijuana was thus incident to a lawful arrest. In re John Doe, 89 N.M. 83, 547 P.2d 566 (Ct. App.), cert. denied, 89 N.M. 206, 549 P.2d 284 (1976).

Police officers were not required to obtain a search warrant prior to searching defendant's car for a gun in situation where police arrived on scene minutes after being called and told that a shooting was in progress, were directed by friends of alleged victim to defendant's car, arrested defendant and advised him of his rights, whereupon defendant stated that he didn't mean to shoot anyone and then told officers that the gun was under the front seat of the car. State v. Gurule, 84 N.M. 142, 500 P.2d 427 (Ct. App. 1972).

Search incident to arrest not shown. — Where the warrantless search of the car and seizure of marijuana seeds and marijuana was unlawful because consent was not given and the search was not pursuant to an arrest, there was no probable cause to warrant a search. State v. Brubaker, 85 N.M. 773, 517 P.2d 908 (Ct. App. 1973).

Where there was no arrest for any charge at the time of the search of defendant's car for beer, and defendant was not taken into custody for his driving violation, the search could not be justified by the search incident to arrest theory; the scope of a warrantless search must be commensurate with the rationale that excepts the search from the warrant requirement. State v. Ledbetter, 88 N.M. 344, 540 P.2d 824 (Ct. App. 1975).

Where defendants placed their belongings on the table, and it was thus evident that they were not armed, search was at an end, and since defendants were not under arrest, a search and seizure incident to arrest was not involved, and, therefore, where the officers continued search, discovery of marijuana constituted an illegal search and seizure. State v. Washington, 82 N.M. 284, 480 P.2d 174 (Ct. App. 1971).

Bondsman arresting third party. — Neither the common-law nor statutory authority of a bondsman to make a warrantless arrest of his principal absolves a bondsman of criminal responsibility ensuing from the armed, unauthorized, and forcible entry into the residence of a third party. State v. Lopez, 105 N.M. 538, 734 P.2d 778 (Ct. App. 1986), cert. denied, 479 U.S. 1092, 107 S. Ct. 1305, 94 L. Ed. 2d 160 (1987), 493 U.S. 996, 110 S. Ct. 549, 107 L. Ed. 2d 546 (1989).

III. WARRANT REQUIREMENTS.

Search illegal if probable cause not in affidavit for warrant. — Search of premises illegal where there was no probable cause to search premises for evidence of murder since there was no evidence presented on affidavit from which a magistrate could properly infer that the place to be searched was defendant's residence. State v. Herrera, 102 N.M. 254, 694 P.2d 510, cert. denied, 471 U.S. 1103, 105 S. Ct. 2332, 85 L. Ed. 2d 848 (1985).

Where the only allegations of criminality in an affidavit for a search warrant were hearsay from persons who were not law-enforcement officers, the affidavit did not establish probable cause because it did not establish either (1) that the informants were truthful persons, (2) that the informants had particular motives to be truthful about their specific allegations, or (3) that the allegations of criminality had been sufficiently corroborated. State v. Therrien, 110 N.M. 261, 794 P.2d 735 (Ct. App. 1990), overruled in part on other grounds, State v. Barker, 114 N.M. 589, 844 P.2d 839 (Ct. App. 1992).

The standards for the sufficiency of search warrants are: (1) only a probability of criminal conduct need be shown; (2) there need be less vigorous proof than the rules of evidence require to determine guilt of an offense; (3) common sense should control; (4) great deference should be shown by courts to a magistrate's determination of probable cause. State v. Bowers, 87 N.M. 74, 529 P.2d 300 (Ct. App. 1974).

Application failing to state basis for statement. — Where application for search warrant gave no clue as to the basis for the statement that a packet of marijuana had been found in the car, it did not state probable cause and was constitutionally inadequate. State v. Lewis, 80 N.M. 274, 454 P.2d 360 (Ct. App. 1969), overruled on other grounds, State v. Nemrod, 85 N.M. 118, 509 P.2d 885 (Ct. App. 1973).

Exigent circumstances. — For a finding of exigent circumstances, so as to justify a warrantless search, the following criteria must be met: (1) there must be a real possibility that evidence will be destroyed if law enforcement officers cannot enter the premises before they obtain a search warrant; (2) the exigency must not be one

improperly created by law enforcement officers; and (3) any intrusion by law enforcement officers should minimize the imposition on privacy and possessory interests protected by the Fourth Amendment and this section. State v. Wagoner, 1998-NMCA-124, 126 N.M. 9, 966 P.2d 176, cert. denied, 125 N.M. 654, 964 P.2d 818 (1998), overruled on other grounds, State v. Wagoner, 2001-NMCA-014, 130 N.M. 274, 24 P.3d 306, cert. denied, 130 N.M. 213, 22 P.3d 681 (2001).

Truck at border checkpoint presented exigent circumstance. — Border-patrol agents at checkpoint had an objectively reasonable basis for believing that exigent circumstances justified an immediate warrantless search of defendant's truck, and, therefore, marijuana seized pursuant to such search was not subject to the exclusionary rule. State v. Snyder, 1998-NMCA-166, 126 N.M. 168, 967 P.2d 843, cert. denied, 126 N.M. 533, 972 P.2d 352 (1998).

Exceptions to the warrant requirement. — In the absence of a search warrant, a search must find its justification in one of the exceptions to the warrant requirement, namely plain view, probable cause plus exigent circumstances, search incident to arrest, consent, inventory and hot pursuit. State v. Ledbetter, 88 N.M. 344, 540 P.2d 824 (Ct. App. 1975).

"Good faith" exception invalid. — Evidence obtained by virtue of an invalid search warrant is not admissible under the exclusionary rule's "good faith" exception as articulated by the United States Supreme Court in *United States v. Leon,* since the good-faith exception is incompatible with the guarantees of the New Mexico constitution that prohibit unreasonable searches and seizures and that mandate the issuance of search warrants only upon probable cause. State v. Gutierrez, 116 N.M. 431, 863 P.2d 1052 (1993).

Curfews. — Where a child was taken into custody for a curfew violation but not arrested, the fact that the ordinance mandated that the officer take the child into custody supplied the necessary justification for a pat-down search of his person; however, there were no grounds for an expanded protective search of his pockets. State v. Paul T., 1999-NMSC-037, 128 N.M. 360, 993 P.2d 74;.

A blank or alias warrant is void. If name in warrant is not given, the warrant must contain the best description possible, sufficient to indicate clearly the person to be arrested. It should state his occupation, personal appearance, place of residence or other means of identifying him. 1959-60 Op. Att'y Gen. No. 60-145.

Description of items to be seized. — Where a search warrant specified the seizure of controlled substances kept there contrary to law the items to be searched for and seized were as precisely identified as the situation permitted considering the wide variety of drugs used by addicts, the words used in the warrant having a definite meaning in that they refer to certain and definite lists of drugs and their derivatives. Nothing was left to the discretion of the officers. Heroin is one of the drugs listed, and it was heroin that they seized. State v. Quintana, 87 N.M. 414, 534 P.2d 1126 (Ct. App.), cert. denied, 88

N.M. 29, 536 P.2d 1084, cert. denied, 423 U.S. 832, 96 S. Ct. 54, 46 L. Ed. 2d 50 (1975).

A description in a search warrant is sufficient if the officer can, with reasonable effort, ascertain and identify the place intended to be searched; the description, however, must be such that the officer is enabled to locate the place to be searched with certainty. It should identify the premises in such manner as to leave the officer no doubt and no discretion as to the premises to be searched. State v. Aragon, 89 N.M. 91, 547 P.2d 574 (Ct. App.), cert. denied, 89 N.M. 206, 549 P.2d 284 (1976), overruled on other grounds State v. Rickerson, 95 N.M. 666, 625 P.2d 1183.

The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant. State v. Paul, 80 N.M. 521, 458 P.2d 596 (Ct. App.), cert. denied, 80 N.M. 746, 461 P.2d 228 (1969), cert. denied, 397 U.S. 1044, 90 S. Ct. 1354, 25 L. Ed. 2d 654 (1970).

Where warrant contained two errors, in that the color of the residence was wrong, and the street number of the residence was wrong, but the warrant properly described the roof of the residence, located the house with specificity and stated that the residence was the only one in the immediate area which had a chicken coop containing pigeons (plainly visible from the road), the requirements of a sufficient description were met. State v. Aragon, 89 N.M. 91, 547 P.2d 574 (Ct. App.), cert. denied, 89 N.M. 206, 549 P.2d 284 (1976), overruled on other grounds State v. Rickerson, 95 N.M. 666, 625 P.2d 1183.

A search warrant was not overly broad where the items described therein to be searched and seized were described with sufficient particularity to be specifically related to the counterfeiting activity believed to be occurring at defendant's residence. State v. Steinzig, 1999-NMCA-107, 127 N.M. 752, 987 P.2d 409.

Oral representations to the judge who issues the search warrant are insufficient, because this section requires a written showing of probable cause. State v. Lewis, 80 N.M. 274, 454 P.2d 360 (Ct. App. 1969), overruled on other grounds, State v. Nemrod, 85 N.M. 118, 509 P.2d 885 (Ct. App. 1973).

Information in affidavit not stale. — Trial court erred in granting motion to suppress evidence seized in search pursuant to a warrant on the basis that the information in the affidavit for the warrant was stale where affidavit recited informant's month-old purchase of heroin, his past observations of heroin on the premises and his observations of sales from the premises during the month prior to issuance of the search warrant, and also gave statements of three reliable informants that defendant was a daily heroin user. State v. Garcia, 90 N.M. 577, 566 P.2d 426 (Ct. App.), cert. denied, 90 N.M. 636, 567 P.2d 485 (1977).

Affidavit held insufficient. — Affidavit did not establish a substantial basis for believing an informant's report was based on reliable information, where, although the informant reportedly stated that defendant had brought heroin into town and was selling it at the house in question, the affidavit was devoid of any indication of how the informant gathered this information. State v. Cordova, 109 N.M. 211, 784 P.2d 30 (1989).

Unsigned warrant invalid. — Since the bench warrant upon which the defendant was arrested was not properly signed by the court, the warrant was invalid and evidence seized thereunder was suppressed. State v. Gurrola, 121 N.M. 34, 908 P.2d 264 (Ct. App. 1995).

Liability for wrongful issuance and service of warrant. — Police officers and assistant district attorney were immune from liability for alleged wrongful issuance and service of a search warrant which was valid on its face in which court ordered police officers to search for child, take him into custody, keep him safely and make a return of the proceedings on the warrant. Torres v. Glasgow, 80 N.M. 412, 456 P.2d 886 (Ct. App. 1969).

Where warrantless arrest based upon communication from superiors. — When an officer has no warrant and arrests are based upon a communication from superiors, the officer or his superior must later be prepared to meet the twofold test of requiring that the source of the communication be credible, and the underlying circumstances which formed the basis of the communication be shown. State v. Gorsuch, 87 N.M. 135, 529 P.2d 1256 (Ct. App. 1974).

Warrantless search not justified. — The circumstances did not justify a warrantless search of defendant's home, where the deputies had no reason to believe someone else was in the home or that the evidence was likely to be destroyed before a deputy could return with a warrant. State v. Wagoner, 1998-NMCA-124, 126 N.M. 9, 966 P.2d 176, cert. denied, 125 N.M. 654, 964 P.2d 818 (1998), overruled on other grounds, State v. Wagoner, 2001-NMCA-014, 130 N.M. 274, 24 P.3d 306, cert. denied, 130 N.M. 213, 22 P.3d 681 (2001).

Magistrate to be interposed between arresting force and citizen. — Before a warrant for arrest may be issued, the judicial officer issuing it must be supplied with sufficient information to support an independent judgment that probable cause exists for the warrant, so as to allow a relatively independent magistrate to be interposed between the arresting force, and the citizen, whose right not to be arrested without cause is guaranteed by U.S. Const., amend. IV. State v. Gorsuch, 87 N.M. 135, 529 P.2d 1256 (Ct. App. 1974).

Where physical possession of warrant not essential. — Physical possession of the arrest warrant is not essential to a lawful arrest when the validity of the warrant is not involved. State v. Grijalva, 85 N.M. 127, 509 P.2d 894 (Ct. App. 1973).

Federal and state standards must be met. — Having found the arrest to be valid under the federal standards, the arrest without a warrant must still be tested by New Mexico standards. State v. Deltenre, 77 N.M. 497, 424 P.2d 782 (1966), cert. denied, 386 U.S. 976, 87 S. Ct. 1171, 18 L. Ed. 2d 136 (1967).

Probability for issuance of warrant shown. — Where the affidavits presented to the magistrate indicated that the affiants personally inspected two cars rented previously by the defendants and found significant traces of marijuana, that the defendants lived together, spent large amounts of cash for purchases, had no visible means of support, rented numerous automobiles for trips and flew on airplanes during the period of surveillance, the magistrate could assure himself that the affidavits were not based on rumors or merely on the defendants' reputation; there was sufficient information for him to be satisfied that the circumstances by which the affiants came by their information demonstrated probability for the issuance of a search warrant. State v. Bowers, 87 N.M. 74, 529 P.2d 300 (Ct. App. 1974).

Where the application for search warrant clearly showed how the officer concluded that the specific item for which they were looking might be in a certain car and where it affirmatively showed that two sources of information spoke with personal knowledge, the application was sufficient, and the district judge who found that the affidavit showed probable cause and who issued the search warrant did not err in so doing. State v. Torres, 81 N.M. 521, 469 P.2d 166 (Ct. App.), cert. denied, 81 N.M. 506, 469 P.2d 151 (1970).

Statements in the affidavit that the informant saw the defendant in possession of heroin and that the affiant knows the informant to be reliable because he has provided him with reliable information concerning narcotics violations in the past were sufficient to support the issuance of the search warrant. State v. Ramirez, 95 N.M. 202, 619 P.2d 1246 (Ct. App. 1980).

Conviction not void for illegal arrest. — Where defendant was properly before the court under the information filed against him and his plea thereto, and there is no contention made that he did not receive a fair trial, or that the verdict of guilty upon which his conviction was entered was not supported by the evidence, his conviction was not thereby rendered void even where the warrant was unlawfully issued and his arrest illegal. State v. Halsell, 81 N.M. 239, 465 P.2d 518 (Ct. App. 1970).

Requirements for investigative demands under Antitrust Act. — Constitutional restrictions on government searches and seizures do not impose a requirement that civil investigative demands (CID) issue only upon a reasonable cause to believe that the Antitrust Act, Chapter 57, Article 1 NMSA 1978, has been or is being violated. The federal Constitution requires only that for the issuance of an administrative subpoena the inquiry must be within the authority of the agency, the demand must not be too indefinite, and the information must be reasonably relevant to the purposes of the investigation; also, N.M. Const., art. II, § 10 does not require a "probability" showing that the federal constitution does not. Moreover, probable cause does not have the same

meaning in the context of administrative searches as it does in the context for searches for evidence of crimes. Wilson Corp. v. State ex rel. Udall, 1996-NMCA-049, 121 N.M. 677, 916 P.2d 1344, cert. denied, 121 N.M. 644, 916 P.2d 844, cert. denied, 519 U.S. 964, 117 S. Ct. 388, 136 L. Ed. 2d 304 (1996).

IV. PROBABLE CAUSE.

Pat down not justified. — Where the sole rationale offered for the search was police officer's testimony that he considers any person with whom he comes into contact to be an unknown threat, although this may be a prudent assumption, this assumption alone cannot justify a patdown. State v. Boblick, 2004-NMCA-078, 135 N.M. 754, 93 P.3d 775, cert. denied, 2004-NMCERT-006, 135 N.M. 789, 93 P.3d 1292.

There is no reason to equate reasonable cause with probable cause. State v. Baca, 2004-NMCA-049, 135 N.M. 490, 90 P.3d 509.

Warrantless patdown was reasonable and lawful as incident to the lawful arrest of defendant for a violation of a condition of the probation order and a condition of his intensive supervision program agreement. State v. Ponce, 2004-NMCA-137, 136 N.M. 614, 103 P.3d 54, cert. granted, 2004-NMCERT-012, 136 N.M. 614, 103 P.3d 54.

The question of probable cause is one of law to be determined by the trial court by way of voir dire examination. State v. Deltenre, 77 N.M. 497, 424 P.2d 782 (1966), cert. denied, 386 U.S. 976, 87 S. Ct. 1171, 18 L. Ed. 2d 136 (1967).

It is for a neutral and detached judge to determine from the affidavit whether probable cause exists. A police officer is not vested with that authority. State v. Baca, 97 N.M. 379, 640 P.2d 485 (1982).

Hearsay can establish probable cause. — That information was hearsay does not destroy its role in establishing probable cause. State v. Deltenre, 77 N.M. 497, 424 P.2d 782 (1966), cert. denied, 386 U.S. 976, 87 S. Ct. 1171, 18 L. Ed. 2d 136 (1967).

Reasonable belief that offense committed. — Probable cause for a warrantless search means a reasonable ground for belief of guilt and exists where the facts and circumstances within the officers' knowledge, and of which they had reasonably trustworthy information, are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed. State v. Ledbetter, 88 N.M. 344, 540 P.2d 824 (Ct. App. 1975).

The substance of all the definitions of probable cause is a reasonable ground for belief of guilt. State v. Bidegain, 88 N.M. 384, 540 P.2d 864 (Ct. App.), rev'd on other grounds, 88 N.M. 466, 541 P.2d 971 (1975).

The legality of an arrest without a warrant depends upon whether the arrest was based upon probable cause. State v. Deltenre, 77 N.M. 497, 424 P.2d 782 (1966), cert. denied, 386 U.S. 976, 87 S. Ct. 1171, 18 L. Ed. 2d 136 (1967).

Probable cause exists where the facts and circumstances within the officers' knowledge and of which they had reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed. State v. Deltenre, 77 N.M. 497, 424 P.2d 782 (1966), cert. denied, 386 U.S. 976, 87 S. Ct. 1171, 18 L. Ed. 2d 136 (1967); State v. Ramirez, 95 N.M. 202, 619 P.2d 1246 (Ct. App. 1980).

A police officer may arrest without a warrant if the circumstances would warrant a reasonable person in believing that an offense had been committed by the person whom he then arrests. State v. Trujillo, 85 N.M. 208, 510 P.2d 1079 (Ct. App. 1973).

An officer may legally arrest one whom he reasonably believes is committing a criminal offense in his presence. State v. Ramirez, 79 N.M. 475, 444 P.2d 986 (1968).

Officer arresting without warrant need not have actual knowledge that an offense is being committed in his presence; a bona fide belief on the part of the officer is sufficient. State v. Gibby, 78 N.M. 414, 432 P.2d 258 (1967).

In determining whether search and seizure was unreasonable, the absence of probable cause for arrest is not determinative. The inquiry is the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security. In justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion. The facts must be judged against an objective standard: Would the facts available to the officer at the moment of the seizure or the search "warrant a man of reasonable caution in the belief" that the action taken was appropriate? State v. Slicker, 79 N.M. 677, 448 P.2d 478 (Ct. App. 1968).

Where defendant had a strong smell of liquor on his breath immediately after accident, had a "half gone" bottle of wine in the car, and had been driving the car, circumstances warranted the arresting officer, as a reasonable person, to believe that defendant had been driving while intoxicated and provided a probable cause for defendant's arrest without a warrant. State v. Trujillo, 85 N.M. 208, 510 P.2d 1079 (Ct. App. 1973).

Where police officer testified that he knew that the appellant "was on revocation" and that he stopped the appellant "to check his driving privileges," and where appellant did not testify, arresting officer was justified in making the arrest without a warrant for 64-13-68, 1953 Comp., a misdemeanor committed in his presence. State v. Gutierrez, 76 N.M. 429, 415 P.2d 552 (1966).

Where the officer makes an arrest without any knowledge of the commission of a crime except from an informer whom he does not know to be reliable, the courts have

consistently held there is no reasonable grounds for the arrest. State v. Deltenre, 77 N.M. 497, 424 P.2d 782 (1966), cert. denied, 386 U.S. 976, 87 S. Ct. 1171, 18 L. Ed. 2d 136 (1967).

Investigatory stop made by police who were called to assist motel owner in evicting the defendant was unlawful since failure of defendant to pay rent did not constitute a criminal offense. Since there was no justified official intrusion upon the constitutionally protected interest of defendant, her resistance did not provide probable cause for the arrest, and even though she fled from the officer, evidence recovered as a result thereof was tainted and properly suppressed. State v. Frazier, 88 N.M. 103, 537 P.2d 711 (Ct. App. 1975).

Probable cause cannot be established or justified by what is revealed by the search. State v. Baca, 97 N.M. 379, 640 P.2d 485 (1982).

Defective information cannot provide probable cause. — An aggregate of discrete bits of information, each defective, cannot add up to probable cause. State v. Baca, 97 N.M. 379, 640 P.2d 485 (1982).

Statements of undisclosed informants. — Affidavit in support of search warrant, which was based primarily upon information provided by undisclosed informants but which failed to set out sufficient facts to determine the reliability of such informants, was insufficient to establish probable cause, and thus a search predicated on such warrant violated this section and the Fourth Amendment to the United States Constitution. In re Shon Daniel K., 1998-NMCA-069, 125 N.M. 219, 959 P.2d 553, cert. denied, 125 N.M. 147, 958 P.2d 105 (1998).

Trial court's decision as to reasonableness of arrest will not be disturbed if facts found to make the arrest constitutionally reasonable are supported by substantial evidence. State v. Deltenre, 77 N.M. 497, 424 P.2d 782 (1966), cert. denied, 386 U.S. 976, 87 S. Ct. 1171, 18 L. Ed. 2d 136 (1967).

Same standard for arrest with or without warrant. — The probable cause standard for an arrest must be at least as stringently applied in the case of warrantless arrests as in the instance of an arrest with a warrant. State v. Gorsuch, 87 N.M. 135, 529 P.2d 1256 (Ct. App. 1974).

Reasonable suspicion or exigent circumstances must exist. — In the absence of reasonable suspicion or exigent circumstances, even if some other reasonable ground may exist, an officer may not restrain a person in order to question him. State v. Burciaga, 116 N.M. 733, 866 P.2d 1200 (Ct. App. 1993).

Test for whether officer had reasonable suspicion to stop motor vehicle is objective; it is the evidence known to the officer that is important, not his view of the governing law. State v. Munoz, 1998-NMCA-140, 125 N.M. 765, 965 P.2d 349.

Attempt to flee. — Where defendant was suspected of a murder, and his attempt to move toward back of mobile home indicated an attempt to flee, officers' warrantless arrest on grounds of exigent circumstances was justified. State v. Duffy, 1998-NMSC-014, 126 N.M. 132, 967 P.2d 807.

Reasonable suspicion based on report by citizen informant. — Where an officer had reasonable suspicion, based on a concerned citizen's report, that juveniles might have a gun or guns, and he reasonably subjected them to a limited search to protect his own safety, there was no violation of either the New Mexico or the United States Constitution. State v. Jimmy R., 1997-NMCA-107, 124 N.M. 45, 946 P.2d 648.

Reliability of citizen informant. – In New Mexico, a citizen-informant is regarded as more reliable than a police informant or a crime-stoppers informant, because citizens presumably have nothing to gain by fabrication. State v. Contreras, 2003-NMCA-129, 134 N.M. 503, 79 P.3d 1111, cert. denied, 2003-NMCERT-002, 134 N.M. 723, 82 P.3d 533.

Warrantless arrests in public. — Statutory provisions regarding warrants must be considered in para materia with this section. Section 30-31-30B NMSA 1978 cannot establish conclusively that an arrest based on such authority comports with the constitutional protection afforded by this section. Warrantless arrests made under the authority of the statute may be presumed reasonable but that presumption may be rebutted under an interpretation of what is constitutional. Campos v. State, 117 N.M. 155, 870 P.2d 117 (1994).

For a warrantless arrest to be reasonable the arresting officer must show that the officer had probable cause to believe that the person arrested had committed or was about to commit a felony and some exigency existed that precluded the officer from securing a warrant. If an officer observes the person arrested committing a felony, exigency will be presumed. Campos v. State, 117 N.M. 155, 870 P.2d 117 (1994).

Vehicle in unsafe condition may be stopped. — A motor vehicle with a cracked windshield, if in an unsafe condition, may be constitutionally stopped, because 66-3-801 NMSA 1978 makes it a crime to drive a vehicle that in an unsafe condition. State v. Munoz, 1998-NMCA-140, 125 N.M. 765, 965 P.2d 349.

Warrantless stop for safety concern. — Since the officer testified that the reason he stopped the truck was a concern for the safety of the passengers on the back tailgate, even though when asked if the truck was violating any state, municipal, or federal law, the officer said that it was not. Under these facts, the detention of the truck and the request for the license of the driver, registration, and proof of insurance did not violate the Fourth Amendment requirement of reasonableness. State v. Reynolds, 119 N.M. 383, 890 P.2d 1315 (1995).

Investigatory stop as invalid arrest. — Under the totality of the circumstances, the detention of the defendant in the locked patrol car over 45 minutes and probably longer

prior to being arrested presented a significant intrusion and resulted in a de facto arrest with no probable cause. State v. Werner, 117 N.M. 315, 871 P.2d 971 (1994).

Standards for testing affidavits of probable cause. — Affidavits of probable cause are tested by much less rigorous standards than those governing the admissibility of evidence at trial. State v. Torres, 81 N.M. 521, 469 P.2d 166 (Ct. App.), cert. denied, 81 N.M. 506, 469 P.2d 151 (1970).

Case-by-case examination of probable cause. — The existence of "probable cause," whether for issuance of a search warrant or warrant of arrest, or for arrest without a warrant, or for search and seizure without a warrant, involves a case-by-case examination of the facts, and no two cases are precisely alike. State v. Aull, 78 N.M. 607, 435 P.2d 437 (1967), cert. denied, 391 U.S. 927, 88 S. Ct. 1829, 20 L. Ed. 2d 668 (1968).

Probable cause for arrest not necessary for investigation. — In appropriate circumstances and in an appropriate manner, a police officer may approach a person to investigate possibly criminal behavior even though the officer may not have probable cause for an arrest. To justify such an invasion of a citizen's personal security, the police officer must be able to specify facts which, together with rational inferences therefrom, reasonably warrant the intrusion. These facts are to be judged by an objective standard - would the facts available to the officer warrant a person of reasonable caution to believe the action taken was appropriate? State v. Bidegain, 88 N.M. 384, 540 P.2d 864 (Ct. App.), rev'd on other grounds, 88 N.M. 466, 541 P.2d 971 (1975); State v. Lewis, 80 N.M. 274, 454 P.2d 360 (Ct. App. 1969), overruled on other grounds, State v. Nemrod, 85 N.M. 118, 509 P.2d 885 (Ct. App. 1973).

A police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possible criminal behavior even though there is no probable cause to make an arrest. State v. Slicker, 79 N.M. 677, 448 P.2d 478 (Ct. App. 1968).

A police officer making a lawful stop of a motorist is not precluded from making reasonable inquiries concerning the purpose or purposes for the stop, nor is an inquiry by an officer automatically violative of the right of security of a motorist, because the officer lacks probable cause to secure a warrant, or even because he lacks reasonable grounds for suspecting the motorist to be guilty of a crime. There is nothing wrong with an officer asking for information or asking for permission to make a search. State v. Bidegain, 88 N.M. 466, 541 P.2d 971 (1975).

Public safety may be factor in investigatory stop of vehicle. – The exigency of the possible threat to public safety that a drunk driver poses, New Mexico's grave concern about the dangers of drunk drivers, and the minimal intrusion of a brief investigatory stop may tip the balance in favor of the stop. State v. Contreras, 2003-NMCA-129, 134 N.M. 503, 79 P.3d 1111, cert. denied, 2003-NMCERT-002, 134 N.M. 723, 82 P.3d 533.

Although the investigation did not originally involve drugs, officers could reasonably expand the scope of the investigation based on the reasonable suspicion of criminal activity. State v. Fairres, 2003-NMCA-152, 134 N.M. 668, 81 P.3d 611, cert. denied, 2003-NMCERT-003, 135 N.M. 51, 84 P.3d 668.

Valid investigatory stop. — Even in the absence of probable cause, an informant's tip combined with the officers' investigation and independent knowledge gave rise to a reasonable suspicion to stop the defendant's vehicle, and the defendant's actions in response to the officers' lawful attempt to execute a protective search provided both the probable cause and exigent circumstances to justify a warrantless search. State v. Eskridge, 1997-NMCA-106, 124 N.M. 227, 947 P.2d 502.

Valid investigatory stop. — Where driver did not have a valid registration for his car and the license plate did not match with his vehicle, it was reasonable for a police officer to open the driver's door of defendant's car to attempt to verify the primary vehicle identification number (VIN); thus, the officer's act of opening the door to look for a secondary VIN did not constitute an unreasonable search of the car without probable cause. State v. Romero, 2002-NMCA-064, 132 N.M. 364, 48 P.3d 102, cert. denied, 132 N.M. 397, 49 P.3d 76 (2002).

Under the totality of circumstances, an investigatory stop of a vehicle was reasonable where the facts allowed the inference that the anonymous caller was a reliable concerned motorist, the information given was detailed enough for the deputies to find the vehicle in question and confirm the description, and the caller was an apparent eyewitness to the defendant's erratic driving. State v. Contreras, 2003-NMCA-129, 134 N.M. 503, 79 P.3d 1111, cert. denied, 2003-NMCERT-002, 134 N.M. 723, 82 P.3d 533 (2003).

The burden is on the state to show the requisite probable cause to justify a warrantless arrest. State v. Gorsuch, 87 N.M. 135, 529 P.2d 1256 (Ct. App. 1974).

Probable cause not shown. — Where two officers who had stopped defendant's car for carelessly leaving the curb saw alcoholic beverages therein (not a crime in and of itself) and neither officer ever explained why either of them believed any of the three occupants (all of whom had reached their majority) were under 21 (so as to make possession of the alcohol illegal), the officers had no probable cause to search the car, since to justify such an invasion of a citizen's personal security, the police officer must be able to specify facts which, together with rational inferences therefrom, reasonably warrant the intrusion, and defendant's motion to suppress should have been granted as being conducted without a warrant and not pursuant to any exception to the warrant requirement. State v. Ledbetter, 88 N.M. 344, 540 P.2d 824 (Ct. App. 1975).

Officers lacked sufficient detail to properly detain and search a vehicle based on the race and number of its occupants and the color of the car, since the car stopped included a six-year-old girl, was not travelling from the area of the disturbance, and nothing about the appearance or operation of the vehicle aroused the officer's

suspicions or contributed to the justification for the stop. United States v. Jones, 998 F.2d 883 (10th Cir. 1993).

Probable cause shown. — Officer's observation of tobacco and marijuana seeds at a location where child had been and of a commercial cigarette which had been twisted at the end in child's pocket provided probable cause for seizure of the cigarette. In re John Doe, 89 N.M. 83, 547 P.2d 566 (Ct. App.), cert. denied, 89 N.M. 206, 549 P.2d 284 (1976).

Information regarding the sale by defendant of "dexedrine pills" from a suitcase at a truck stop, detailed information concerning the description of defendant, the fact that he would be armed, the fact that a lady would be traveling with him and recitation of the make and color of the tractor and the color of the trailer, considered together with the testimony concerning informant's reliability, furnished adequate basis for the trial court's finding of probable cause, and such finding, combined with exigent circumstances which existed due to fact that drugs were kept in a vehicle provided the required foundation for the warrantless search of defendant's tractor and trailer. State v. One 1967 Peterbilt Tractor, 84 N.M. 652, 506 P.2d 1199 (1973).

Detectives were discharging a legitimate investigative function when they identified themselves to defendant and asked him about items he attempted to pawn, and under circumstances where they had reports that similar items had been stolen, where defendant's answers were vague, and where in identifying himself he had an extra social security card bearing a name other than defendant's, detectives' questioning, request for identification and request that defendant go to the police station to check the items attempted to be pawned did not amount to an unreasonable seizure of defendant. Therefore, the detention of defendant from the initial question until he entered the police car did not bar the admission of the evidentiary items. State v. Slicker, 79 N.M. 677, 448 P.2d 478 (Ct. App. 1968).

Where arresting officer testified that he was contacted by car radio by a second officer and, after getting together with him, learned of the shooting, who the suspect was, that defendant was identified as the suspect by several persons present at the shooting, and that the suspect was on foot when he left the house where the shooting occurred, whereupon the officer drove up and down the streets checking for defendant, and, having no success, staked out the apartment of defendant, subsequent arrest and frisk search at defendant's apartment was based on probable cause. State v. Riggsbee, 85 N.M. 668, 515 P.2d 964 (1973).

Where appellant was arrested by drugstore owner who apprehended appellant outside his store in early morning, appellant was properly arrested without warrant on probable cause, and appellant was properly before the justice of the peace regardless of validity of final complaint of the store owner. State v. Hudson, 78 N.M. 228, 430 P.2d 386 (1967).

Police had probable cause to arrest and search defendant where police observed defendant engage in what appeared to be a drug transaction just prior to his arrest, police clocked the vehicle driven by defendant going approximately 50 miles an hour in a 35 mile per hour zone, and defendant, when asked for his driver's license, stated that he had none. State v. Rondeau, 89 N.M. 408, 553 P.2d 688 (1976).

Information supplied by an informer, verified by police, was sufficient to constitute probable cause for issuance of a search warrant. State v. Mireles, 84 N.M. 146, 500 P.2d 431 (Ct. App. 1972).

A police officer who testified he had been working in narcotics for approximately four years, had made numerous arrests in the area, for the year prior to defendant's arrest had spent almost every day in the area, and was acquainted with many addicts and had discussed methods of carrying and hiding small quantities of narcotics, had reasonable grounds for belief that defendant, based on the officer's observance of his conduct, was in possession of heroin and therefore had probable cause for the detention, and search and seizure which disclosed the heroin. State v. Blea, 88 N.M. 538, 543 P.2d 831 (Ct. App.), cert. denied, 89 N.M. 5, 546 P.2d 70 (1975).

Where affidavit for search warrant stated that informant had signed statement from person willing to testify in court which stated that that person had personal knowledge that heroin was kept inside a certain house and that he had received heroin from that place on approximately 10 different occasions, such was sufficient for judge to whom affidavit was presented to find probable cause for issuance of a search warrant. State v. Archuleta, 85 N.M. 146, 509 P.2d 1341 (Ct. App.), cert. denied, 85 N.M. 145, 509 P.2d 1340, 414 U.S. 876, 94 S. Ct. 85, 38 L. Ed. 2d 121 (1973) (But see *State v. Barker* , 114 N.M. 589, 844 P.2d 839 (Ct. App. 1992), overruling this case by holding that a statement against penal interest by itself is not sufficient indicia of credibility).

While the underlying facts, if any, known by the officer regarding defendant's reputation as a safeman were not brought out, the officer had knowledge that a "peeled" safe had been found nearby after a neighbor thrice had complained of loud hammering noises, that defendant's car contained tools well suited to such work (which tools he could see through the car window), and that defendant's car was the only one moving in the area at 3:00 a.m. and these facts supplied probable cause for searching the car, without regard to defendant's reputation as a safeman. State v. Aull, 78 N.M. 607, 435 P.2d 437 (1967), cert. denied, 391 U.S. 927, 88 S. Ct. 1829, 20 L. Ed. 2d 668 (1968).

The Philadelphia police were entitled to act on the Phoenix police department's telephone request and to assume that Phoenix had probable cause for making it, and since defendant did not contend that the Phoenix police lacked probable cause to arrest him for crimes committed in Arizona, defendant's arrest by the Philadelphia police was lawful, and the confession thereafter obtained from him was admissible. State v. Carter, 88 N.M. 435, 540 P.2d 1324 (Ct. App. 1975).

When the arresting officer saw a pistol in defendant's pocket, he thereby had all the probable cause needed to make an arrest, regardless of whether the weapon later was found to be unloaded. Ramirez v. Rodriguez, 467 F.2d 822 (10th Cir. 1972), cert. denied, 410 U.S. 987, 93 S. Ct. 1518, 36 L. Ed. 2d 185 (1973).

Where an investigating officer's affidavit, when read as a whole, clearly indicated that the reports of informants were based on seeing stolen items at the locations indicated and on overhearing a conversation referring to a burglary, the information in the affidavit was sufficient to support the magistrate's issuance of the search warrant and necessarily his determination as to the informant's credibility. State v. Wisdom, 110 N.M. 772, 800 P.2d 206 (Ct. App. 1990) (But see *State v. Barker* , 114 N.M. 589, 844 P.2d 839 (Ct. App. 1992), overruling this case by holding that a statement against penal interest by itself is not sufficient indicia of credibility).

An officer's observation of a car operating on a public street without lights provided a sufficient basis for him to stop it, whether or not he thought it might be the car he was looking for in connection with a drive-by shooting. State v. Vargas, 120 N.M. 416, 902 P.2d 571 (Ct. App. 1995).

Police officer's experience of vials as drug paraphernalia and knowledge of defendant's prior involvement with drugs established probable cause to seize vial in plain view in defendant's pants pocket as he was patting down defendant. State v. Ochoa, 2004-NMSC-023, 135 N.M. 781, 93 P.3d 1286.

V. CONSENT TO SEARCH.

The scope of a consent search is limited and determined by the actual consent given. State v. Alderete, 88 N.M. 619, 544 P.2d 1184 (Ct. App. 1976).

The search did not exceed defendant's consent where the defendant affirmatively volunteered to be searched and did not express any restriction to the search or protest the search of his pockets or his wallet. State v. Fairres, 2003-NMCA-152, 134 N.M. 668, 81 P.3d 611, cert. denied, 2003-NMCERT-003, 135 N.M. 51, 84 P.3d 668.

The question of the voluntariness of a consent is one of fact to be determined by the trial court from all the evidence adduced upon this issue; that court must weigh the evidence, determine its credibility or plausibility, determine the credibility of the witnesses, and decide whether the evidence was sufficient to clearly and positively, or clearly and convincingly, establish that the consent was voluntarily given. State v. Bloom, 90 N.M. 192, 561 P.2d 465 (1977); State v. Bidegain, 88 N.M. 466, 541 P.2d 971 (1975).

The question of whether consent to a search has been given is a question of fact subject to the limitations of judicial review. State v. Carlton, 83 N.M. 644, 495 P.2d 1091 (Ct. App.), cert. denied, 83 N.M. 631, 495 P.2d 1078 (1972).

The question of consent to search is to be determined by the court and is not an issue to be submitted to the jury. State v. Carlton, 83 N.M. 644, 495 P.2d 1091 (Ct. App.), cert. denied, 83 N.M. 631, 495 P.2d 1078 (1972).

Consent to the search must be freely and intelligently given, must be voluntary and not the product of duress or coercion, actual or implied. State v. Carlton, 83 N.M. 644, 495 P.2d 1091 (Ct. App.), cert. denied, 83 N.M. 631, 495 P.2d 1078 (1972); State v. Harrison, 81 N.M. 324, 466 P.2d 890 (Ct. App. 1970); State v. Aull, 78 N.M. 607, 435 P.2d 437 (1967), cert. denied, 391 U.S. 927, 88 S. Ct. 1829, 20 L. Ed. 2d 668 (1968); State v. Sneed, 76 N.M. 349, 414 P.2d 858 (1966).

Where without force or threat, an officer stated that he intended to seek a search warrant and may have offered the opportunity to consent to a search before the warrant was obtained, and the defendant stated that he wished to be searched so that he could leave the premises, his consent was not obtained by duress where a warrant was ultimately issued. State v. Fairres, 2003-NMCA-152, 134 N.M. 668, 81 P.3d 611, cert. denied, 2003-NMCERT-003, 135 N.M. 51, 84 P.3d 668.

Acquiescence is not consent. — Where officer who applied for the search warrant for seized automobile interviewed defendant a short time prior to making the application, where officer testified that defendant had no objection to a search of the car because officer had told him that he was going to get a search warrant for it anyway, and where defendant then affirmatively consented to a search of the car, this consent did not justify the search since it was no more than acquiescence to a claim of lawful authority. State v. Lewis, 80 N.M. 274, 454 P.2d 360 (Ct. App. 1969), overruled on other grounds, State v. Nemrod, 85 N.M. 118, 509 P.2d 885 (Ct. App. 1973).

Propriety of search eliminated by consent. — A consent freely and intelligently given by the proper person may operate to eliminate any question otherwise existing as to the propriety of a search. State v. Carlton, 83 N.M. 644, 495 P.2d 1091 (Ct. App.), cert. denied, 83 N.M. 631, 495 P.2d 1078 (1972).

Miranda warnings need not necessarily be given before there can be a valid consent to search. State v. Carlton, 83 N.M. 644, 495 P.2d 1091 (Ct. App.), cert. denied, 83 N.M. 631, 495 P.2d 1078 (1972).

Permission need not be initially volunteered to constitute consent. State v. Bidegain, 88 N.M. 466, 541 P.2d 971 (1975).

There is nothing wrong with an officer asking for information or asking for permission to make a search, and permission need not be initially volunteered to constitute consent. State v. Bloom, 90 N.M. 192, 561 P.2d 465 (1977).

Consent is exception to requirements of warrant and probable cause. — The probable cause required to secure a warrant or to justify a warrantless search is not a

prerequisite to a consent search or to a request for consent to search. State v. Bidegain, 88 N.M. 466, 541 P.2d 971 (1975).

A search authorized by consent is an exception to the requirements of both a warrant and probable cause and is wholly valid. State v. Bloom, 90 N.M. 192, 561 P.2d 465 (1977); State v. Bidegain, 88 N.M. 466, 541 P.2d 971 (1975).

Consent must be proven by clear and positive evidence. — See State v. Bidegain, 88 N.M. 384, 540 P.2d 864 (Ct. App.), rev'd on other grounds, 88 N.M. 466, 541 P.2d 971 (1975); State v. Carlton, 83 N.M. 644, 495 P.2d 1091 (Ct. App.), cert. denied, 83 N.M. 631, 495 P.2d 1078 (1972); State v. Harrison, 81 N.M. 324, 466 P.2d 890 (Ct. App. 1970); State v. Aull, 78 N.M. 607, 435 P.2d 437 (1967), cert. denied, 391 U.S. 927, 88 S. Ct. 1829, 20 L. Ed. 2d 668 (1968); State v. Sneed, 76 N.M. 349, 414 P.2d 858 (1966).

The burden of proving consent is on the state. — See State v. Bidegain, 88 N.M. 384, 540 P.2d 864 (Ct. App.), rev'd on other grounds, 88 N.M. 466, 541 P.2d 971 (1975); State v. Carlton, 83 N.M. 644, 495 P.2d 1091 (Ct. App.), cert. denied, 83 N.M. 631, 495 P.2d 1078 (1972); State v. Harrison, 81 N.M. 324, 466 P.2d 890 (Ct. App. 1970); State v. Kennedy, 80 N.M. 152, 452 P.2d 486 (Ct. App. 1969); State v. Aull, 78 N.M. 607, 435 P.2d 437 (1967), cert. denied, 391 U.S. 927, 88 S. Ct. 1829, 20 L. Ed. 2d 668 (1968); State v. Sneed, 76 N.M. 349, 414 P.2d 858 (1966).

When third party can consent. — A third party cannot consent to a search of a part of the premises within defendant's exclusive use and control. State v. Johnson, 85 N.M. 465, 513 P.2d 399 (Ct. App. 1973).

While the original entry was with the permission of defendant's relative and homeowner, he could not validly consent to a search of the defendant's personal effects which were not exposed to open view. State v. Johnson, 85 N.M. 465, 513 P.2d 399 (Ct. App. 1973).

A defendant may object to a search consented to by another where the defendant has exclusive control over a part of the premises searched or over an effect on the premises which is itself capable of being searched. Enclosed spaces over which a nonconsenting party has a right to exclude others, whether rooms or effects, are protected. State v. Johnson, 85 N.M. 465, 513 P.2d 399 (Ct. App. 1973).

Where there is no showing that defendant's personal effects were taken from an area reserved to defendant's exclusive use, and the wife, as a joint possessor of the premises, consents to the taking of the personal effects, the consent is valid. State v. Kennedy, 80 N.M. 152, 452 P.2d 486 (Ct. App. 1969).

Where there is no claim that the wife's consent to search resulted from fraud, coercion or threat by the police, the wife's consent under the facts was sufficient. State v. Kennedy, 80 N.M. 152, 452 P.2d 486 (Ct. App. 1969).

The wife, as a joint possessor, may consent to a search in her own right and the items taken by her consent can be used in evidence against the other joint possessor. State v. Kennedy, 80 N.M. 152, 452 P.2d 486 (Ct. App. 1969).

When a spouse, who has common authority over premises and other community property within it, finds incriminating evidence and voluntarily delivers it to the police and consents to an examination of that evidence, neither the Fourth Amendment nor this section of the New Mexico Constitution prohibits the admission of the evidence at trial. State v. Cline, 1998-NMCA-154, 126 N.M. 77, 966 P.2d 785, cert. denied, 126 N.M. 532, 972 P.2d 351 (1998), cert. denied, 526 U.S. 1041, 119 S. Ct. 1338, 143 L. Ed. 2d 502 (1999).

Where trial court specifically found and properly ruled that permission to search house was voluntarily given by defendant's mother, and where defendants were single and living with their parents in their parents' home, it follows that the defendants' boots were seized as a result of a lawful search and were properly received in evidence, and mere irregularity as might appear on the consent form used by the officers was not deemed controlling. State v. Williamson, 78 N.M. 751, 438 P.2d 161, cert. denied, 393 U.S. 891, 89 S. Ct. 212, 21 L. Ed. 2d 170 (1968).

A search after permission is given by one who has authority, such as the owner of a house, is valid. State v. Mosier, 83 N.M. 213, 490 P.2d 471 (Ct. App. 1971).

Even assuming defendant was living in mobile home, a fact that was in dispute, the home's owners and co-inhabitants could lawfully consent to search of the home. State v. Duffy, 1998-NMSC-014, 126 N.M. 132, 967 P.2d 807.

State must show control. — To establish a third party's common authority to consent to a search, the state is required to show more than ownership of the house. The evidence had to demonstrate that the third party had "joint access or control for most purposes" over an area of "mutual use." State v. Diaz, 1996-NMCA-104, 122 N.M. 384, 925 P.2d 4.

Parent cannot consent for adult child. — Under the facts and circumstances of this case, a third party's status as a parent did not, without more, empower him to consent to a search of his 29-year-old son's room. State v. Diaz, 1996-NMCA-104, 122 N.M. 384, 925 P.2d 4.

No "apparent authority" exception. — When the state relies upon consent to justify a warrantless search of a residence, there is no "apparent authority" exception under the New Mexico Constitution. State v. Wright, 119 N.M. 559, 893 P.2d 455 (Ct. App. 1994).

The state is required to show actual authority of the third party for his consent to be valid; apparent authority is not sufficient. State v. Diaz, 1996-NMCA-104, 122 N.M. 384, 925 P.2d 4.

Consent shown. — Defendant's statement that he was going to open the trunk of his car when asked by the officer, even before the officer indicated that he would secure a search warrant, together with the evidence of the officer concerning his request to look into the trunk of the vehicle, could properly be construed as consent on this defendant's part to look into and make a search of the trunk. State v. Bloom, 90 N.M. 192, 561 P.2d 465 (1977).

Evidence that during a routine check of driver's licenses and vehicle registrations, defendant was routinely stopped and that after defendant, who resided in Arizona, had produced an Arizona's driver's license issued to him and a Connecticut certificate of registration showing the vehicle to be registered in the name of another person, the officers unsuccessfully attempted a computer check to determine if the car was stolen, and then asked what was in the trunk of the vehicle, and if defendant minded if they looked in the trunk, to which defendant replied that he did not mind, got out of the vehicle and personally unlocked and opened the trunk, supported the trial court's finding that defendant voluntarily consented to the opening of the trunk. State v. Bidegain, 88 N.M. 466, 541 P.2d 971 (1975).

Comparable provisions. — Idaho Const., art. I, § 17.

Iowa Const., art. I, § 8.

Montana Const., art. II, § 11.

Utah Const., art. I, § 14.

Wyoming Const., art. I, § 4.

Law reviews. — For note, "The Investigatory Stop of Motor Vehicles in New Mexico," see 8 N.M.L. Rev. 223 (1978).

For note, "Search and Seizure: The Automobile Exception to the Fourth Amendment Warrant Requirement - A Further Exception to the Fourth: State v. Capps," see 14 N.M.L. Rev. 239 (1984).

For note, "Criminal Procedure - Search and Seizure - Expectations of Privacy in the Open Fields and an Evolving Fourth Amendment Standard of Legitimacy: Oliver v. United States," 16 N.M.L. Rev. 129 (1986).

For note, "Criminal Procedure - Search and Seizure of Person and Property: *State v. Lovato,* " see 23 N.M.L. Rev. 323 (1993).

For note, "New Mexico Requires Exigent Circumstances for Warrantless Public Arrests: *Campos v. State*," see 25 N.M.L. Rev. 315 (1995).

For article, "State Constitutional Interpretation and Methodology," see 28 N.M.L. Rev. 199 (1998).

For note, "Constitutional Law - The Effect of State Constitutional Interpretation on New Mexico's Civil and Criminal Procedure - *State v. Gomez*," see 28 N.M.L. Rev. 355 (1998).

For article, "New Mexico State Constitutional Law Comes of Age," see 28 N.M.L. Rev. 379 (1998).

For article, "*State v. Gomez* and the Continuing Conversation over New Mexico's State Constitutional Rights Jurisprudence," see 28 N.M.L. Rev. 387 (1998).

For note, "Police Searches on Public School Campuses in New Mexico," see 30 N.M.L. Rev. 141 (2000).

For article, "New Developments in Fourth, Fifth and Sixth Amendment Law," see 31 N.M.L. Rev. 175 (2001).

For note, "Criminal Procedure - Supreme Court Update on Reasonable Suspicion Analysis: A Review on the Supreme Court Decisions in Illinois v. Wardlow and Florida v. J.L.," see 31 N.M.L. Rev. 421 (2001).

For note, "Constitutional Law: State v. Nemeth - The Community Caretaker Exception to the Fourth Amendment," see 32 N.M.L. Rev. 291 (2002).

For note, "Search and Seizure Law: State v. Cardenas-Alvarez: The Jurisdictional Reach of State Constitutions - Applying State Search and Seizure Standards to Federal Agents," see 32 N.M.L. Rev. 531 (2002).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 68 Am. Jur. 2d Searches and Seizures §§ 2 to 6.

Arrest without warrant, statute authorizing as violating guaranty against unreasonable seizure, 1 A.L.R. 586.

Venereal disease, compulsory examination for, 2 A.L.R. 1332, 22 A.L.R. 1189.

Intoxicating liquor, constitutional guaranty as applicable to search for and seizure of, 3 A.L.R. 1514, 13 A.L.R. 1316, 27 A.L.R. 709, 39 A.L.R. 811, 41 A.L.R. 1559, 74 A.L.R. 1418.

Unreasonable search and seizure, intoxicating liquor, 3 A.L.R. 1514, 13 A.L.R. 1316, 27 A.L.R. 709, 39 A.L.R. 811, 74 A.L.R. 1418.

Entry and search without search warrant to make arrest, 5 A.L.R. 263.

Trains, warrants for search of, 7 A.L.R. 121.

Contagious disease, seizing property to prevent spread, 8 A.L.R. 840.

Legislative power in examination of conduct of private persons, corporations or institutions, 9 A.L.R. 1341.

United States constitution as limiting powers of states with respect to search and seizure, 19 A.L.R. 644.

Illegal search, admissibility of evidence, 24 A.L.R. 1408, 32 A.L.R. 408, 41 A.L.R. 1145, 52 A.L.R. 477, 88 A.L.R. 348, 134 A.L.R. 819, 150 A.L.R. 566, 50 A.L.R.2d 531.

Lawful arrest, articles or property that may be seized on making, 32 A.L.R. 686, 51 A.L.R. 424, 74 A.L.R. 1387, 82 A.L.R. 782.

Liability for improper issuance of search warrant or improper proceedings thereunder, 45 A.L.R. 605.

Inspection of books and records, permissible scope of order directing or authorizing, 58 A.L.R. 1263.

Automobiles, search without warrant in reliance on description of persons suspected of crime, 60 A.L.R. 299.

Liability of peace officer on his bond for unlawful search, 62 A.L.R. 855.

Quashing search warrant and ordering return of property, jurisdiction in liquor cases under former federal statutes, 65 A.L.R. 1246.

Employee's right to challenge admissibility of evidence wrongfully obtained, 86 A.L.R. 346.

Weapons, search for and seizure of without warrant on suspicion of information as to lawful possession, 92 A.L.R. 490.

National Industrial Recovery Act regulations as violating guaranty against searches and seizures, 92 A.L.R. 1467, 95 A.L.R. 1391.

Vaccination, requiring as condition to school attendance as violation of guaranty against unreasonable search, 93 A.L.R. 1431.

Constitutionality of statutory provisions for examination of records, books or documents for taxation purpose, 103 A.L.R. 522.

Illustrations of distinction, as regards search and seizure, between papers or other articles which merely furnish evidence of crime, and the actual instrumentalities of crime, 129 A.L.R. 1296.

Search incident to one offense as justifying seizure of instruments of or articles connected with another offense, 169 A.L.R. 1419.

Propriety and legality of issuing only one search warrant to search more than one place or premises occupied by the same person, 31 A.L.R.2d 864.

Authority to consent for another to search or seizure, 31 A.L.R.2d 1078.

Blood grouping tests, 46 A.L.R.2d 1000, 43 A.L.R.4th 579.

Sufficiency of description of automobile or other conveyance to be searched, 47 A.L.R.2d 1444.

Mail, opening, search and seizure of, 61 A.L.R.2d 1282.

Transiently occupied room in hotel, motel or roominghouse as within provision forbidding unreasonable searches and seizures, 86 A.L.R.2d 984.

Arrest: lawfulness of nonconsensual search and seizure without warrant, prior to arrest, 89 A.L.R.2d 715.

Admissibility, in civil case, of evidence obtained by unlawful search and seizure, 5 A.L.R.3d 670.

Lawfulness of seizure of property used in violation of law as prerequisite to forfeiture action or proceeding, 8 A.L.R.3d 473.

Validity of consent to search given by one in custody of officers, 9 A.L.R.3d 858.

Traffic violation: lawfulness of search of motor vehicle following arrest for traffic violation, 10 A.L.R.3d 314.

Propriety of considering hearsay or other incompetent evidence in establishing probable cause for issuance of search warrant, 10 A.L.R.3d 359.

Criminal liability for obstructing process as affected by invalidity or irregularity of the process, 10 A.L.R.3d 1146.

Sufficiency of description, in search warrant, of apartment or room to be searched in multiple-occupancy structure, 11 A.L.R.3d 1330.

Modern status of rule as to validity of nonconsensual search and seizure made without warrant after lawful arrest as affected by lapse of time between, or difference in places of, arrest and search, 19 A.L.R.3d 727.

Plea of guilty as waiver of claim of unlawful search and seizure, 20 A.L.R.3d 724.

Private individual: admissibility, in criminal case, of evidence obtained by search by private individual, 36 A.L.R.3d 553.

"Fruit of the poisonous tree" doctrine excluding evidence derived from information gained in illegal search, 43 A.L.R.3d 385.

"Furtive" movement or gesture as justifying police search, 45 A.L.R.3d 581.

Observation through binoculars as constituting unreasonable search, 48 A.L.R.3d 1178.

Censorship and evidentiary use of unconvicted prisoner's mail, 52 A.L.R.3d 548.

Admissibility, in criminal prosecution, of evidence obtained by electronic surveillance of prisoner, 57 A.L.R.3d 172.

Admissibility, in state probation revocation proceedings, of evidence obtained through illegal search and seizure, 77 A.L.R.3d 636.

Validity of requirement that, as a condition of probation, defendant submit to warrantless searches, 79 A.L.R.3d 1083.

Admissibility of evidence discovered in search of adult defendant's property or residence authorized by defendant's minor child - state cases, 99 A.L.R.3d 598.

Admissibility of evidence discovered in search of defendant's property or residence authorized by domestic employee or servant, 99 A.L.R.3d 1232.

Admissibility of evidence discovered in search of defendant's property or residence authorized by defendant's spouse (resident or nonresident) - state cases, 1 A.L.R.4th 673.

Admissibility of evidence discovered in warrantless search of rental property authorized by lessor of such property - state cases, 2 A.L.R.4th 1173.

Admissibility of evidence discovered in search of defendant's property or residence authorized by defendant's adult relative other than spouse - state cases, 4 A.L.R.4th 196.

Admissibility of evidence discovered in search of defendant's property or residence authorized by one, other than relative, who is cotenant or common resident with defendant - state cases, 4 A.L.R.4th 1050.

Odor of narcotics as providing probable cause for warrantless search, 5 A.L.R.4th 681.

Use of electronic sensing device to detect shoplifting as unconstitutional search and seizure, 10 A.L.R.4th 376.

Adequacy of defense counsel's representation of criminal client regarding search and seizure issues, 12 A.L.R.4th 318.

Admissibility in criminal case of blood-alcohol test where blood was taken despite defendant's objection or refusal to submit to test, 14 A.L.R.4th 690.

Use, in attorney or physician disciplinary proceeding, of evidence obtained by wrongful police action, 20 A.L.R.4th 546.

Permissible surveillance, under state communications interception statute, by person other than state or local law enforcement officer or one acting in concert with officer, 24 A.L.R.4th 1208.

Disputation of truth of matters stated in affidavit in support of search warrant - modern cases, 24 A.L.R.4th 1266.

Admissibility in criminal case of evidence that accused refused to take test of intoxication, 26 A.L.R.4th 1112.

Employment of photographic equipment to record presence and nature of items as constituting unreasonable search, 27 A.L.R.4th 532.

Search and seizure: suppression of evidence found in automobile during routine check of vehicle identification number (VIN), 27 A.L.R.4th 549.

Reasonable expectation of privacy in contents of garbage or trash receptacle, 28 A.L.R.4th 1219.

Validity of searches conducted as condition of entering public premises - state cases, 28 A.L.R.4th 1250.

Lawfulness of warrantless search of purse or wallet of person arrested or suspected of crime, 29 A.L.R.4th 771.

Admissibility, in criminal case, of evidence discovered by warrantless search in connection with fire investigation - post-Tyler cases, 31 A.L.R.4th 194.

Propriety in state prosecution of severance of partially valid search warrant and limitation of suppression to items seized under invalid portions of warrant, 32 A.L.R.4th 378.

Validity of routine roadblocks by state or local police for purpose of discovery of vehicular or driving violations, 37 A.L.R.4th 10.

Validity of, and admissibility of evidence discovered in, search authorized by judge over telephone, 38 A.L.R.4th 1145.

Liability for false arrest or imprisonment under warrant as affected by mistake as to identity of person arrested, 39 A.L.R.4th 705.

Search and seizure: What constitutes abandonment of personal property within rule that search and seizure of abandoned property is not unreasonable - modern cases, 40 A.L.R.4th 381.

Admissibility, in criminal case, of physical evidence obtained without consent by surgical removal from person's body, 41 A.L.R.4th 60.

Seizure of property as evidence in criminal prosecution or investigation as compensable taking, 44 A.L.R.4th 366.

Propriety of governmental eaves-dropping on communications between accused and his attorney, 44 A.L.R.4th 841.

Validity of arrest made in reliance upon uncorrected or outdated warrant list or similar police records, 45 A.L.R.4th 550.

Officer's ruse to gain entry as affecting admissibility of plain-view evidence - modern cases, 47 A.L.R.4th 425.

Search and seizure: necessity that police obtain warrant before taking possession of, examining, or testing evidence discovered in search by private person, 47 A.L.R.4th 501.

Eavesdropping on extension telephone as invasion of privacy, 49 A.L.R.4th 430.

Propriety of state or local government health officer's warrantless search - post-Camara cases, 53 A.L.R.4th 1168.

Seizure of books, documents, or other papers under search warrant not describing such items, 54 A.L.R.4th 391.

Search and seizure: reasonable expectation of privacy in public restroom, 74 A.L.R.4th 508.

Search and seizure of telephone company records pertaining to subscriber as violation of subscriber's constitutional rights, 76 A.L.R.4th 536.

Lawfulness of search of person or personal effects under medical emergency exception to warrant requirement, 11 A.L.R.5th 52.

Prisoner's rights as to search and seizure under state law or constitution - post-Hudson cases, 14 A.L.R.5th 913.

State constitutional requirements as to exclusion of evidence unlawfully seized - post-*Leon* cases, 19 A.L.R.5th 470.

Search and seizure: lawfulness of demand for driver's license, vehicle registration, or proof of insurance pursuant to police stop to assist motorist, 19 A.L.R.5th 884.

Admissibility, in motor vehicle license suspension proceedings, of evidence obtained by unlawful search and seizure, 23 A.L.R.5th 108.

Search conducted by school official or teacher as violation of fourth amendment or equivalent state constitutional provision, 31 A.L.R.5th 229.

Search and seizure of bank records pertaining to customer as violation of customer's rights under state law, 33 A.L.R.5th 453.

Propriety of stop and search by law enforcement officers based solely on drug profile, 37 A.L.R.5th 1.

Propriety of execution of search warrant at nighttime, 41 A.L.R.5th 171.

Sufficiency of description in warrant of person to be searched, 43 A.L.R.5th 1.

Application of "plain-feel" exception to warrant requirements-state cases, 50 A.L.R.5th 581.

Propriety of search of nonoccupant visitor's belongings pursuant to warrant issued for another's premises, 51 A.L.R.5th 375.

Admissibility of evidence discovered in search of adult defendant's property or residence authorized by defendant's minor child-state cases, 51 A.L.R.5th 425.

Admissibility of evidence discovered in search of defendant's property or residence authorized by defendant's adult relative other than spouse-state cases, 55 A.L.R. 5th 125.

Observation through binoculars as constituting unreasonable search, 59 A.L.R.5th 615.

Search and seizure: reasonable expectation of privacy in driveways, 60 A.L.R.5th 1.

Admissibility of evidence discovered in warrantless search of rental property authorized by lessor of such property - state cases, 61 A.L.R.5th 1.

Searches and seizures: Reasonable expectation of privacy in contents of garbage or trash receptacle, 62 A.L.R.5th 1.

Belief that burglary is in progress or has recently been committed as exigent circumstance justifying warrantless search of premises, 64 A.L.R.5th 637.

Admissibility of evidence discovered in search of defendant's property or residence authorized by defendant's spouse (resident or nonresident) - state cases, 65 A.L.R.5th 407.

Search and seizure: reasonable expectation of privacy in tent or campsite, 66 A.L.R.5th 373.

Validity of anticipatory search warrants - state cases, 67 A.L.R.5th 361.

Admissibility of evidence discovered in search of defendant's property or residence authorized by one, other than relative, who is cotenant or common resident with defendant - state cases, 68 A.L.R.5th 343.

Civilian participation in execution of search warrant as affecting legality of search, 68 A.L.R.5th 549.

Effect of retroactive consent on legality of otherwise unlawful search and seizure, 76 A.L.R.5th 563.

Permissibility and sufficiency of warrantless use of thermal imager or Forward Looking Infra-Red Radar (F.L.I.R.), 78 A.L.R.5th 309.

Validity of police roadblocks or checkpoints for purpose of discovery of illegal narcotics violations, 82 A.L.R.5th 103.

Validity of search or seizure of computer, computer disk, or computer peripheral equipment, 84 A.L.R.5th 1.

What constitutes compliance with knock-and-announce rule in search of private premises - state cases, 85 A.L.R.5th 1.

Federal and state constitutions as protecting prison visitor against unreasonable searches and seizures, 85 A.L.R.5th 261.

Constitutionality of secret video surveillance, 91 A.L.R.5th 585.

Expectation of privacy in internet communications, 92 A.L.R.5th 15.

Error, in either search warrant or application for warrant, as to address of place to be searched as rendering warrant invalid, 103 A.L.R.5th 463.

Validity of requirement that, as condition of probation, defendant submit to warrantless searches, 99 A.L.R.5th 557.

When are facts offered in support of search warrant for evidence of sale or possession of cocaine so untimely as to be stale – state cases, 109 A.L.R.5th 99.

When are facts offered in support of search warrant for evidence of sexual offense so untimely as to be stale – state cases, 111 A.L.R.5th 239.

When are facts relating to marijuana, provided by one other than police or other law enforcement officer, so untimely as to be stale when offered in support of search warrant for evidence of sale or possession of a controlled substance – state cases, 112 A.L.R.5th 429.

Narcotics and drugs: use of trained dogs to detect narcotics or drugs as unreasonable search in violation of fourth amendment, 31 A.L.R. Fed. 931.

Fourth amendment as protecting prisoner against unreasonable searches or seizures, 32 A.L.R. Fed. 601.

Construction and application of "national security" exception to fourth amendment search warrant requirement, 39 A.L.R. Fed. 646.

Authority of United States officials to conduct inspection or search of American registered vessel located outside territorial waters of United States, 40 A.L.R. Fed. 402.

Admissibility of evidence discovered in search of defendant's property or residence authorized by defendant's relative, 48 A.L.R. Fed. 131.

Admissibility of evidence discovered in warrantless search of property or premises authorized by one having ownership interest in property or premises other than relative, 49 A.L.R. Fed. 511.

Sufficiency of description of business records under fourth amendment requirement of particularity in federal warrant authorizing search and seizure, 53 A.L.R. Fed. 679.

Validity, under federal constitution, of search conducted as condition of entering public building, 53 A.L.R. Fed. 888.

Aerial observation or surveillance as violative of fourth amendment guaranty against unreasonable search and seizure, 56 A.L.R. Fed. 772.

Defense of good faith in action for damages against law enforcement official under 42 USC § 1983, providing for liability of person who, under color of law, subjects another to deprivation of rights, 61 A.L.R. Fed. 7

Propriety, under § 287(a)(1) of Immigration and Nationality Act (8 USCS § 1357(a)(1)), of warrantless interrogation of alien, or person believed to be alien, as to alien's right to be or to remain in United States, 63 A.L.R. Fed. 180.

Propriety of search involving removal of natural substance or foreign object from body by actual or threatened force, 66 A.L.R. Fed. 119.

Admissibility of evidence obtained by unconstitutional search in proceedings under Occupational Safety and Health Act (29 USCS § 651 et seq.), 67 A.L.R. Fed. 724.

When do facts shown as probable cause for wiretap authorization under 18 USC § 2518(3) become "stale," 68 A.L.R. Fed. 953.

Propriety in federal prosecution of severance of partially valid search warrant and limitation of suppression to items seized under invalid portions of warrant, 69 A.L.R. Fed. 522.

Use of electronic tracking device (beeper) to monitor location of object or substance other than vehicle or aircraft as constituting search violating Fourth Amendment, 70 A.L.R. Fed. 747.

Fourth amendment as prohibiting strip searches of arrestees or pretrial detainees, 78 A.L.R. Fed. 201.

Validity of warrantless search under extended border doctrine, 102 A.L.R. Fed. 269.

Warrantless detention of mail for investigative purposes as violative of fourth amendment, 115 A.L.R. Fed. 439.

Permissibility under Fourth Amendment of detention of motorist by police, following lawful stop for traffic offense, to investigate matters not related to offense, 118 A.L.R. Fed. 567.

When is consent voluntarily given so as to justify search conducted on basis of that consent - Supreme Court cases, 148 A.L.R. Fed. 271.

Use of trained dog to detect narcotics or drugs as unreasonable search in violation of Fourth Amendment, 150 A.L.R. Fed. 399.

Admissibility of evidence discovered in search of adult defendant's property or residence authorized by defendant's minor relative, 152 A.L.R. Fed. 475.

Admissibility of evidence discovered in search of defendant's property or residence authorized by defendant's adult relative other than spouse, 160 A.L.R. Fed. 165.

Sufficiency of information provided by anonymous informant to provide probable cause for federal search warrant - cases decided after *Illinois v. Gates*, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983), 178 A.L.R. Fed. 487.

79 C.J.S. Searches and Seizures § 3 et seq.

Sec. 11. [Freedom of religion.]

Every man shall be free to worship God according to the dictates of his own conscience, and no person shall ever be molested or denied any civil or political right or privilege on account of his religious opinion or mode of religious worship. No person shall be required to attend any place of worship or support any religious sect or denomination; nor shall any preference be given by law to any religious denomination or mode of worship.

ANNOTATIONS

Cross references. — For religious rights preserved under Treaty of Guadalupe Hidalgo, see N.M. Const., art. II, § 5.

As to provision that religious belief not to abridge right of citizens to vote, hold office or sit upon juries, see N.M. Const., art. VII, § 3.

For prohibition against religious tests for admission to school and prohibition against requiring attendance at religious services, see N.M. Const., art. XII, § 9.

For provision relating to use of sacramental wines, see N.M. Const., art. XX, § 13.

For provisions requiring religious toleration and prohibiting polygamy, see N.M. Const., art. XXI, § 1.

See Kearny Bill of Rights, cl. 3 in Pamphlet 3.

As to excusing student from school to participate in religious instruction, see 22-12-3 NMSA 1978.

For statutory provision prohibiting teaching of sectarian doctrine in public school, see 22-13-15 NMSA 1978.

Sign ordinance held not to violate provision. — Where a sign ordinance does not limit what a religious organization may maintain on its signs, the ordinance does not abridge the free exercise of religious beliefs in violation of this provision. Temple Baptist Church, Inc. v. City of Albuquerque, 98 N.M. 138, 646 P.2d 565 (1982).

Baccalaureate and commencement exercises. — The New Mexico constitutional provisions, statutes and decisions do not prohibit holding baccalaureate services and commencement exercises in a church building, where it is the only building in the community which could comfortably accommodate those present. Miller v. Cooper, 56 N.M. 355, 244 P.2d 520 (1952).

Special use permit for parochial school not unreasonable restriction. — A municipal zoning ordinance requiring the issuance of a special use permit as a prerequisite to the operation of a parochial school does not impose an unreasonable restriction upon a church's free exercise of religion. City of Las Cruces v. Huerta, 102 N.M. 182, 692 P.2d 1331 (Ct. App. 1984).

School credit for bible study courses. — The legislature may not enact laws permitting the public schools in New Mexico to grant credit to pupils for bible study or other religious courses taught in a church Sunday school by nonaccredited ministers or other Sunday school teachers. 1967 Op. Att'y Gen. No. 67-48.

Vouchers for private school education. — Tuition assistance in the form of vouchers for private education may constitute a violation of the state Establishment Clause, if the schools involved are primarily sectarian. 1999 Op. Att'y Gen. No. 99-01.

Statute authorizing school board to implement daily moment of silence unconstitutional. — Former section 22-5-4.1 NMSA 1978, which authorized local school boards to implement a daily moment of silence, and its implementation in a public school system, violated this section, in that it gave a preference by law to a particular mode of worship. Duffy ex rel. Duffy v. Las Cruces Pub. Sch., 557 F. Supp. 1013 (D.N.M. 1983).

Local prohibition on Sunday sale of alcohol. — Section 60-7A-1 NMSA 1978, regulating the sale of alcoholic beverages and allowing local option districts to prohibit Sunday sales, is a proper exercise of legislative power and does not violate equal protection of the laws under U.S. Const., amend. XIV, § 1 and N.M. Const., art. II, § 18, nor the prohibitions of the furtherance and establishment of religion clause of U.S. Const., amend. I and this section. Pruey v. Department of ABC, 104 N.M. 10, 715 P.2d 458 (1986).

Wrongful decision to perform autopsy. — In an action for damages on the basis of a wrongful decision to perform an autopsy on decedent, causing emotional distress to family members because the body was not handled according to traditional Navajo religious beliefs, a count alleging interference with plaintiffs' free exercise of religion was dismissed since the state had given no consent to be sued and there was no express waiver for the state medical examiner under the Tort Claims Act. Begay v. State, 104 N.M. 483, 723 P.2d 252 (Ct. App. 1985).

Nuns teaching in public schools. — This section and N.M. Const., art. XII, § 9, prevent there being anything in the law to prohibit the payment of Sisters who are qualified and employed to teach in our public schools. 1939-40 Op. Att'y Gen. 35.

Taxation of fraternal benefit societies. — Fact that fraternal benefit societies meeting certain qualifications were exempted from former 2% privilege tax did not render the tax invalid as contravening the guarantees in respect to religious worship where members of any religious faith or order could organize an exempt society. Sovereign Camp, W.O.W. v. Casados, 21 F. Supp. 989 (D.N.M.), aff'd, 305 U.S. 558, 59 S. Ct. 79, 83 L. Ed. 352 (1938).

Oaths by witnesses and jurors. — Defendant's contention that by requiring an oath by witnesses and jurors, the state "openly fostered religion," when made without any showing that the defendant was affected thereby, was at best a species of harmless error. State v. Deats, 82 N.M. 711, 487 P.2d 139 (Ct. App. 1971).

Employment of chaplains at state penal institutions. — There is nothing unconstitutional in the employment of chaplains at a state penal institution for counseling purposes. There would be nothing unconstitutional in the chaplains being hired to render general counseling services to any inmate who should desire to avail himself of the same. 1957-58 Op. Att'y Gen. No. 57-103.

Comparable provisions. — Idaho Const., art. I, § 4.

Iowa Const., art. I, §§ 3, 4.

Montana Const., art. II, § 5.

Utah Const., art. I, § 4.

Wyoming Const., art. I, § 18.

Law reviews. — For comment, "Compulsory School Attendance - Who Directs the Education of a Child? State v. Edgington," see 14 N.M.L. Rev. 453 (1984).

For annual survey of New Mexico property law, see 16 N.M.L. Rev. 59 (1986).

For article, "The Free Exercise Rights of Native Americans and the Prospects for a Conservative Jurisprudence Protecting the Rights of Minorities," see 23 N.M.L. Rev. 187 (1993).

For note, "Constitutional Law - New Mexico Federal Court Rejects Government's Attempt to Determine Membership Eligibility in a Religion: United States v. Boyll," see 23 N.M.L. Rev. 211 (1993).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 16A Am. Jur. 2d Constitutional Law §§ 409, 464 to 495.

Bigamy, religious belief as defense, 24 A.L.R. 1237.

Jury list excluding members of religious sect, 52 A.L.R. 922.

Appeal to religious prejudice as ground for new trial or reversal, 78 A.L.R. 1438.

Requirement of vaccination of school children as invasion of right to religious liberty, 93 A.L.R. 1431.

Sectarianism in school, 141 A.L.R. 1144.

Releasing public school students from attendance for purpose of receiving religious instruction, 2 A.L.R.2d 1371.

Deed discriminating or imposing restrictions against persons on account of religion, 3 A.L.R.2d 466.

Restrictive covenants, conditions or agreements in respect of real property discriminating against persons on account of race, color or religion, 3 A.L.R.2d 466.

Compulsory education law: religious beliefs of parents as defense to prosecution for failure to comply with, 3 A.L.R.2d 1401.

Loud speakers: public regulation and prohibition of broadcasts in streets and other public places as infringement of religious freedom, 10 A.L.R.2d 627.

Chemical treatment of public water supply, statute, ordinance or other measure involving, as interference with religious freedom, 43 A.L.R.2d 453.

Wearing of religious garb by public school teachers, 60 A.L.R.2d 300.

Zoning regulations as affecting churches, 74 A.L.R.2d 377, 62 A.L.R.3d 197.

Use of public school premises for religious purposes during nonschool time, 79 A.L.R.2d 1148.

Public payment of tuition, scholarship or the like, to sectarian school, 81 A.L.R.2d 1309.

Constitutionality of furnishing free textbooks to sectarian school or student therein, 93 A.L.R.2d 986.

Jury service, religious belief as ground for exemption or excuse from, 2 A.L.R.3d 1392.

Compulsory medical care for adult, power of courts or other public agencies, in the absence of statutory authority, to order, 9 A.L.R.3d 1391.

Prisoners, provision of religious facilities for, 12 A.L.R.3d 1276.

Drugs: free exercise of religion as defense to prosecution for narcotic or psychedelic drug offense, 35 A.L.R.3d 939.

Public property: erection, maintenance or display of religious structures or symbols on as violation of religious freedom, 36 A.L.R.3d 1256.

Adoption: religion as factor in adoption proceedings, 48 A.L.R.3d 383.

What constitutes "church," "religious use" or the like within zoning ordinance, 62 A.L.R.3d 197.

Validity, under establishment of religion clause of federal or state constitution, of making day of religious observance a legal holiday, 90 A.L.R.3d 728.

Regulation of astrology, clairvoyancy, fortune-telling, and the like, 91 A.L.R.3d 766.

Power of court or other public agency to order medical treatment for child over parental objections not based on religious grounds, 97 A.L.R.3d 421.

Validity, under federal and state establishment of religion provisions, of prohibition of sale of intoxicating liquors on specific religious holidays, 27 A.L.R.4th 1155.

Judicial review of termination of pastor's employment by local church or temple, 31 A.L.R.4th 851.

Validity, under state constitutions, of private shopping center's prohibition or regulation of political, social, or religious expression or activity, 38 A.L.R.4th 1219.

Liability of religious association for damages for intentionally tortious conduct in recruitment, indoctrination, or related activity, 40 A.L.R.4th 1062.

Validity of local or state denial of public school courses or activities to private or parochial school students, 43 A.L.R.4th 776.

Invasion of privacy by a clergyman, church, or religious group, 67 A.L.R.4th 1086.

Cause of action for clergy malpractice, 75 A.L.R.4th 750.

Liability of church or religious society for sexual misconduct of clergy, 5 A.L.R.5th 530.

Power of court or other public agency to order medical treatment over parental religious objections for child whose life is not immediately endangered, 21 A.L.R.5th 248.

Free exercise of religion as applied to individual's objection to obtaining or disclosing social security number, 93 A.L.R.5th 1.

First Amendment challenges to the display of religious symbols on public property, 107 A.L.R.5th 1.

Effect of First Amendment on jurisdiction of National Labor Relations Board over labor disputes involving employer operated by religious entity, 63 A.L.R. Fed. 831.

Validity, construction, and application of provisions of § 702 of Civil Rights Act of 1964 (42 USCS § 2000e-1) exempting activities of religious organizations from operation of Title VII Equal Employment Opportunity provisions, 67 A.L.R. Fed. 874.

Constitutionality of teaching or suppressing teaching of Biblical creationism or Darwinian evolution theory in public schools, 102 A.L.R. Fed. 537.

Constitutionality of teaching or otherwise promoting secular humanism in public schools, 103 A.L.R. Fed. 538.

Constitutionality of regulation or policy governing prayer, meditation, or "moment of silence" in public schools, 110 A.L.R. Fed. 211.

Bible distribution or use in public schools - modern cases, 111 A.L.R. Fed. 121.

What constitutes "hybrid rights" claim under *Employment Div., Dep't of Human Resources v. Smith*, 494 U.S. 872, 110 S. Ct. 1595, 108 L. Ed. 2d 876, 163 A.L.R. Fed. 493.

16A C.J.S. Constitutional Law §§ 513 to 538.

Sec. 12. [Trial by jury; less than unanimous verdicts in civil cases.]

The right of trial by jury as it has heretofore existed shall be secured to all and remain inviolate. In all cases triable in courts inferior to the district court the jury may consist of six. The legislature may provide that verdicts in civil cases may be rendered by less than a unanimous vote of the jury.

ANNOTATIONS

Cross references. — As to right to impartial jury, see N.M. Const., art. II, § 14.

For provisions relating to grand jury, see N.M. Const., art. II, § 14.

As to number of jurors in cases in probate court, see N.M. Const., art. VI, § 23.

See Kearny Bill of Rights, cl. 5 in Pamphlet 3.

For waiver of right to jury in metropolitan courts, see 34-8A-5 NMSA 1978.

Phrase "as it has heretofore existed" refers to the right to jury trial as it existed in the territory of New Mexico immediately preceding adoption of the constitution. Bliss v. Greenwood, 63 N.M. 156, 315 P.2d 223 (1957); Guiterrez v. Gober, 43 N.M. 146, 87 P.2d 437 (1939); Young v. Vail, 29 N.M. 324, 222 P. 912 (1924); State v. Holloway, 19 N.M. 528, 146 P. 1066, 1915F L.R.A. 922 (1914).

It was the purpose of the constitution framers to retain the right of trial by jury, as it theretofore existed in the territory of New Mexico, except in special proceedings, for which express provision was made in the same instrument. Seward v. Denver & R.G.R.R., 17 N.M. 557, 131 P. 980, 46 L.R.A. (n.s.) 242 (1913).

This section is to be applicable only to those cases to which this right was secure at the time of the enactment of the constitution. State v. Sweat, 78 N.M. 512, 433 P.2d 229 (Ct. App. 1967).

The law applicable at the adoption of the constitution in reference to right to trial by jury in prosecution by information was preserved by the language of the constitution. State v. Jackson, 78 N.M. 29, 427 P.2d 46 (Ct. App. 1967).

Those misdemeanors triable in district court do not provide for a trial by jury unless such crime was of the type which enjoyed and permitted trial by jury at the time of the adoption of this section. 1963-64 Op. Att'y Gen. No. 64-37.

This section does not grant any right of trial by jury, but merely continues that which existed in the territory preceding adoption of the constitution. Guiterrez v. Gober, 43 N.M. 146, 87 P.2d 437 (1939).

Trial by jury in the various state courts is not guaranteed by the federal constitution. United States Const., art. III and amend. VI concern defendants before federal courts only. Nor is this right extended by U.S. Const. amend. XIV, which is limited to the general requirement of due process, more particularly concerning the procedural and substantive requirements of notice and an opportunity to be heard. Within this the states may establish any system of criminal courts deemed desirable. The constitution of New Mexico granted no new rights so far as the question of a right to a jury trial is concerned. This section provides: "The right of trial by jury as it has heretofore existed shall be secured to all and remain inviolate." 1957-58 Op. Att'y Gen. No. 58-36.

This constitutional provision has been interpreted by the New Mexico supreme court to continue the right to jury trial in that class of cases where the right to a trial by jury existed prior to the constitution of New Mexico. 1963-64 Op. Att'y Gen. No. 64-37.

By this section, the right to trial by jury was guaranteed only to the extent that it existed prior to the adoption of the constitution. 1957-58 Op. Att'y Gen. No. 58-36.

The right to trial by jury which is guaranteed by the constitution refers to the right as it had existed and was enforced in the territory of New Mexico at the time of the adoption of the constitution and does not guarantee such right in all cases of alleged violations of criminal statutes. Hamilton v. Walker, 65 N.M. 470, 340 P.2d 407 (1959).

The constitution continues the right to jury trial in that class of cases in which it existed either at common law or by statute at the time of adoption of the constitution. State v. Chavez, 88 N.M. 451, 541 P.2d 631 (Ct. App. 1975).

The constitution continues the right to jury trial in that class of cases in which it existed either at common law or by statute at the time of the adoption of the constitution and in that class of cases where the right to a trial by jury existed prior to the constitution, it cannot be denied by the legislature. State ex rel. Bliss v. Greenwood, 63 N.M. 156, 315 P.2d 223 (1957).

Eminent domain proceedings. — It was the purpose of the constitution framers to retain the right to trial by jury as it heretofore existed in the territory of New Mexico except in "special proceedings" unless express provision for jury trial was included therein. Eminent domain proceedings are "special proceedings." El Paso Elec. v. Real Estate Mart, Inc., 98 N.M. 490, 650 P.2d 12 (Ct. App. 1982).

Multiple crimes arising from single incident. — In determining the constitutional right to jury trial of a defendant charged with more than one petty crime arising from a single incident, a court should consider the objective measure of the combined, maximum statutory penalties rather than the subjective measure of the actual penalty threatened at the commencement of trial. State v. Sanchez, 109 N.M. 428, 786 P.2d 42 (1990).

This section requires a unanimous verdict in a criminal case. 1972 Op. Att'y Gen. No. 72-31.

Criminal contempt is not triable by jury. State v. Magee Publishing Co., 29 N.M. 455, 224 P. 1028, 38 A.L.R. 142 (1924).

So long as the fine for criminal contempt which is, or may be, imposed is not more than $1000, there is no federal constitutional right to jury trial as the crime is a petty offense. Seven Rivers Farm, Inc. v. Reynolds, 84 N.M. 789, 508 P.2d 1276 (1973).

This section and art. II, § 14 compared. — The difference in the purposes of this section and art. II, § 14 is that this section guarantees a trial by jury and § 14 provides, among other things, that the trial shall be by an "impartial" jury. State v. Sweat, 78 N.M. 512, 433 P.2d 229 (Ct. App. 1967).

This section guarantees a trial by jury and art. II, § 14 provides, among other things, that the trial shall be by an "impartial" jury. By impartial jury is meant a jury where each and every one of the 12 members constituting the jury is totally free from any partiality whatsoever. "Impartial" is defined in Webster's New International Dictionary (2nd Ed.), as "not partial; not favoring one more than another; treating all alike; unbiased; equitable; fair; just." Accordingly, the jury which one charged with crime is guaranteed is one that does not favor one side more than another, treats all alike, is unbiased, equitable, fair and just. If any juror does not have these qualities, the jury upon which he serves is thereby deprived of its quality of impartiality. State v. Pace, 80 N.M. 364, 456 P.2d 197 (1969).

Members of jury panel array under 21 years of age. — In a burglary trial, where the jury panel array may have included three jurors under the age of 21, but the members of the petit jury, none of whom were under 21, were selected and qualified according to statute, and defendant did not show that he suffered any prejudice, his motion to quash for lack of a fair and impartial jury was without merit. State v. Chavez, 86 N.M. 625, 526 P.2d 219 (Ct. App. 1974).

Procedure to be followed in securing right to jury. — The right to trial by jury as guaranteed by the constitution is to be distinguished from the procedure to be followed in securing the right. Reasonable regulatory provisions, although different in form and substance from those in effect at the adoption of the constitution, do not abridge, limit or modify the right which is to remain inviolate. Carlile v. Continental Oil Co., 81 N.M. 484, 468 P.2d 885 (Ct. App. 1970).

The supreme court has power to regulate pleading, practice and procedure, and this power may be applied to regulate the procedure to be followed in securing the right to a jury trial, but it may not be used to prohibit entirely the right to jury trial which, under the constitution, is to remain inviolate. State v. Chavez, 88 N.M. 451, 541 P.2d 631 (Ct. App. 1975).

Rule 38(d), N.M.R. Civ. P. (see now Rule 1-038D NMRA), does not contravene this section and is a reasonable procedural regulation. Carlile v. Continental Oil Co., 81 N.M. 484, 468 P.2d 885 (Ct. App. 1970).

A constitutional guaranty of the right of trial by jury does not preclude the adoption of reasonable rules of court providing that a litigant shall not be entitled to a jury trial unless he makes demand within the time and in the manner specified by the rule. Carlile v. Continental Oil Co., 81 N.M. 484, 468 P.2d 885 (Ct. App. 1970).

Although right to trial by jury is guaranteed, one relying thereon must assert it in appropriate form. Knabel v. Escudero, 32 N.M. 311, 255 P. 633 (1927).

Once jury trial ordered, court not to withdraw. — Under Rule 1-039B NMRA once the parties consent to try an issue before a jury and the court orders a jury trial pursuant to the stipulation, the trial court cannot withdraw the legal issues from the jury on the

ground that there are also equitable issues involved. Peay v. Ortega, 101 N.M. 564, 686 P.2d 254 (1984).

Shareholder's derivative suits. — If a shareholder's derivative suit raises legal claims or issues as to which the corporation is entitled to a jury trial, those claims or issues should be tried by a jury on demand. Scott v. Woods, 105 N.M. 177, 730 P.2d 480 (Ct. App. 1986).

Action by dissenting shareholder. — There is no statutory or constitutional right to a jury in a proceeding brought by a dissenting shareholder based on the right to an appraisal of the value of a dissenting shareholder's stock for stock valuation created by the legislature. Smith v. First Alamogordo Bancorp., Inc., 114 N.M. 340, 838 P.2d 494 (Ct. App. 1992).

Excusing prospective juror. — It is within the trial court's discretion as to whether a prospective juror should be excused, and the trial court's decision will not be disturbed unless there is a manifest error or a clear abuse of discretion. State v. Cutnose, 87 N.M. 300, 532 P.2d 889 (Ct. App. 1975), overruled on other grounds State v. McCormack, 100 N.M. 657, 674 P.2d 1117 (1984).

Trial in federal courthouse. — Where the trial was before a jury of the county where crime was committed, and was presided over by the judge of the district in which the county is located, appellant was denied none of the rights guaranteed her by this section and N.M. Const., art. II, § 14, notwithstanding the trial was in a federal courthouse. Smith v. State, 79 N.M. 450, 444 P.2d 961 (1968).

Determination of competency to stand trial. — Where defendant moved for a jury trial on the question of his competency, the trial court should have determined, after an evidentiary hearing, whether there was reasonable doubt as to defendant's competency, and if the trial court ruled there was reasonable doubt, the issue was for the jury to decide. State v. Chavez, 88 N.M. 451, 541 P.2d 631 (Ct. App. 1975).

In that class of cases where the right to a trial by jury existed prior to the constitution, it cannot be denied by the legislature to the extent that 31-9-1 NMSA 1978 eliminates the right to a jury determination on the question of mental capacity to stand trial, it violates this section and is void. State v. Chavez, 88 N.M. 451, 541 P.2d 631 (Ct. App. 1975).

Rule (see now Rule 5-602 B NMRA) does more than regulate the procedure for securing a jury trial; and to the extent that it eliminates the right to a jury determination on the question of mental capacity to stand trial, it violates this section and is void. State v. Chavez, 88 N.M. 451, 541 P.2d 631 (Ct. App. 1975).

Juror's inability to understand English. — It is a violation of this section and art. II, § 14, to allow one unqualified juror to serve in a criminal cause for the reason that any verdict rendered in such a situation would be less than unanimous; and a juror who does not possess a working knowledge of English is unable to serve, in the absence of

an interpreter, because he cannot possibly understand the issues or evaluate the evidence to arrive at an independent judgment as to the guilt or innocence of the accused. When the court learns in the midst of the jury's deliberations that one juror does not understand English very well, it should conduct a summary hearing to determine for itself the ability of the juror in question to understand English. State v. Gallegos, 88 N.M. 487, 542 P.2d 832 (Ct. App.), cert. denied, 89 N.M. 6, 546 P.2d 71 (1975).

A case was remanded for the trial court to certify the record as to the details of any communications between the court and jury as to a jury member not understanding English, and to conduct an evidentiary hearing into whether the state could overcome a presumption of prejudice from the defendant's absence during these communications, and to determine whether the defendant was accorded his right to a jury of 12. Irrespective of the proper preservation of error by the defendant, it was the duty of the trial court to make a record and rule upon any possible miscarriage of justice that could have constituted fundamental error. State v. Escamilla, 107 N.M. 510, 760 P.2d 1276 (1988).

Right of juvenile to jury trial. — At the time of the adoption of the state constitution, a juvenile could not have been imprisoned without a trial by jury. This being true, no change in terminology or procedure may be invoked whereby incarceration could be accomplished in a manner which involved denial of the right to jury trial. Peyton v. Nord, 78 N.M. 717, 437 P.2d 716 (1968).

Prior to the adoption of the state's first juvenile law in 1917, a minor charged with having committed a criminal offense was handled no differently than an adult. Under the provisions of this section, which reads in part, "the right of trial by jury as it has heretofore existed shall be secured to all and remain inviolate," he would have been entitled to have his guilt determined by a jury before he could have been imprisoned. Peyton v. Nord, 78 N.M. 717, 437 P.2d 716 (1968).

This section does not entitle a delinquent child to a jury trial in all instances. State v. John Doe, 90 N.M. 776, 568 P.2d 612 (Ct. App.), cert. denied, 91 N.M. 3, 569 P.2d 413 (1977).

No right to jury trial in paternity proceedings. — In a paternity proceeding the putative father is not entitled to a jury trial because such right did not exist at common law or by statute at the time the New Mexico Constitution was adopted. State ex rel. Human Servs. Dep't v. Aguirre, 110 N.M. 528, 797 P.2d 317 (Ct. App. 1990).

No right to jury trial in parental-rights terminations. — There is no right to a trial by jury in parental rights termination proceedings. State ex rel. Children, Youth & Families Dep't v. T.J., 1997-NMCA-021, 123 N.M. 99, 934 P.2d 293.

Waiver of right to jury. — Accused in felony case may waive right to trial by jury. State v. Hernandez, 46 N.M. 134, 123 P.2d 387 (1942).

Although person accused of felony may consent to trial without jury, case may not be tried without jury over state's objection. State ex rel. Gutierrez v. First Judicial Dist. Court, 52 N.M. 28, 191 P.2d 334 (1948).

Waiver of jury trial in criminal case requires consent of the state. 1953-54 Op. Att'y Gen. No. 5686.

The right to a jury trial is a privilege which may be waived, and if a right to jury trial existed in a case where appellant was charged with giving alcoholic beverages to minors, appellant, by proceeding without demand or objection to trial before the court without a jury, waived the privilege granted by the constitution. State v. Marrujo, 79 N.M. 363, 443 P.2d 856 (1968).

In order to effect waiver of a jury in felony cases the consent of government counsel and the sanction of the court must be had, in addition to the express and intelligent consent of the defendant. State v. Marrujo, 79 N.M. 363, 443 P.2d 856 (1968).

By pleading guilty the defendant admits the acts well pleaded in the charge, waives all defenses other than that the indictment or information charges no offense, and waives the right to trial and the incidents thereof, and the constitutional guarantees with respect to the conduct of criminal prosecutions, including right to jury trial, right to counsel subsequent to guilty plea and right to remain silent. State v. Daniels, 78 N.M. 768, 438 P.2d 512 (1968).

The safeguards required for waiver of a jury in felony cases has never been extended to misdemeanors. State v. Marrujo, 79 N.M. 363, 443 P.2d 856 (1968).

A defendant charged with a petty offense or a misdemeanor, represented by counsel, who proceeds without objection to trial before the court without a jury, thereby waives the privilege of a jury trial if one is granted in the particular petty offense by the constitution. State v. Marrujo, 79 N.M. 363, 443 P.2d 856 (1968).

The jury may be waived but, insofar as a juvenile is concerned, this should be permitted only when advised by counsel and it is amply clear that an understanding and intelligent decision has been made. If a juvenile, after considering all the advantages and disadvantages attendant thereon, and having been advised by counsel, waives a trial by jury, then the benefits generally felt to attach through trial to the court would be his. Peyton v. Nord, 78 N.M. 717, 437 P.2d 716 (1968).

Remand was required for an evidentiary hearing concerning whether defendant voluntarily, knowingly, and intelligently waived his right to a jury trial at the time of denial of his counsel's request for a continuance because of illness. State v. Aragon, 1997-NMCA-087, 123 N.M. 803, 945 P.2d 1021.

Trial court's conclusion that defendant waived his right to a jury trial was supported by defendant's testimony that he understood his decision to proceed at a bench trial, that

he made the decision after discussing his options with counsel, that he understood the choice before him, that he suffered no mental defect which would render his decision suspect, and that his counsel did not apply pressure or otherwise induce him into waiving his right. State v. Aragon, 1999-NMCA-060, 127 N.M. 393, 981 P.2d 1211.

Child's right to waive jury trial. — A child may waive his or her right to a jury trial without the state's concurrence. In re Christopher K., 1999-NMCA-157, 128 N.M. 406, 993 P.2d 120.

Violation of city ordinances. — Violation of ordinance prohibiting use of vile and abusive language is a petty offense tried at common law summarily without a jury, and may be prosecuted before a police judge without a jury. Guiterrez v. Gober, 43 N.M. 146, 87 P.2d 437 (1939).

No right of trial by jury exists in municipal court in "petty" or "minor" cases arising from the violation of city ordinances. 1963-64 Op. Att'y Gen. No. 64-37.

The case of City of Tucumcari v. Briscoe, 58 N.M. 721, 275 P.2d 958 (1954), specifically holds that the offense of driving while intoxicated is within the class denominated "petty" and as such is triable without a jury if the violation is that of a municipal ordinance. However, it should be pointed out that this case appears to be limited to municipal ordinances and is not concerned with the acts of the state legislature. 1957-58 Op. Att'y Gen. No. 58-38.

The fact that the jury chooses not to believe defendant does not amount to a denial of a jury trial. State v. Crouch, 77 N.M. 657, 427 P.2d 19 (1967).

Prior convictions. — Defendant is not entitled to have a jury find the facts of his prior convictions beyond a reasonable doubt under this section. State v. Sandoval, 2004-NMCA-046, 135 N.M. 420, 89 P.3d 92, cert. denied, 2004-NMCERT-006, 135 N.M. 789, 93 P.3d 1292.

Directed verdicts. — The all important consideration in determining whether to direct a verdict in a civil action is that a party has the constitutional right to have controverted questions of fact settled by the jury. Sanchez v. Gomez, 57 N.M. 383, 259 P.2d 346 (1953).

Where the evidence is controverted, even though, to the presiding judge, the possibility of a recovery by the plaintiff may appear remote and even though the court may be motivated in its action in directing the verdict by a sincere desire to spare the plaintiff from the further and additional expense which more prolonged proceedings may entail, the party aggrieved may not in such manner be deprived of a jury determination. Sanchez v. Gomez, 57 N.M. 383, 259 P.2d 346 (1953).

Order compelling arbitration was not unconstitutional on the ground that it deprived defendants of their right to a jury trial without a knowing or intentional waiver. The order

was final, and defendants were required to file an appeal to pressure their right to a jury trial. Lyman v. Kern, 2000-NMCA-013, 128 N.M. 582, 995 P.2d 504, cert. denied, 128 N.M. 688, 997 P.2d 820 (2000).

Compulsory arbitration is constitutional. — The procedures used in judicial tribunals need not be used in compulsory arbitration, so long as the arbitration procedures are sufficient to guarantee a fair proceeding. Therefore, the provisions of 22-10-17.1 NMSA 1978 mandating compulsory arbitration of the grievances of discharged school employees do not violate an employee's right of access to the courts, or right to jury trial; nor do these provisions unconstitutionally delegate power to a nonjudicial tribunal. Board of Educ. v. Harrell, 118 N.M. 470, 882 P.2d 511 (1994).

In suit to deprive one of the possession of real estate, this section of the constitution grants a right to a jury trial to the one in possession. This right, however, can be waived by the defendant in possession affirmatively seeking to quiet title in himself. Griego v. Roybal, 79 N.M. 273, 442 P.2d 585 (1968).

Forcible entry and detainer action. — No right to trial by jury exists in forcible entry and detainer actions in absence of express statutory authority since action is a special statutory proceeding, summary in character. Reece v. Montano, 48 N.M. 1, 144 P.2d 461 (1943).

Injunctive actions. — In suit to enjoin defendant from practicing medicine as a public nuisance, he was not entitled to trial by jury. State ex rel. Marron v. Compere, 44 N.M. 414, 103 P.2d 273 (1940).

Mortgage foreclosure. — Parties in mortgage foreclosure suit cannot have jury trial upon issue of indebtedness. Young v. Vail, 29 N.M. 324, 222 P. 912, 34 A.L.R. 980 (1924).

Probate court appeals. — No party to a proceeding brought in probate court and appealed or removed to district court under statute is entitled to jury trial as a matter of right. In re Sheley's Estate, 35 N.M. 358, 298 P. 942 (1931).

Quiet title action. — In suit to quiet title, where complaint alleges that defendants are in possession of land in question, are cultivating it and have fenced it, and answer sets up title, possession and right to possession in defendants, defendants have a constitutional right to trial by jury, and court is without jurisdiction to try case as a suit in equity. Pankey v. Ortiz, 26 N.M. 575, 195 P. 906, 30 A.L.R. 92 (1921).

Where in a quiet title action neither possession nor any other issue at law is in anywise involved, and the action is essentially one in equity rather than one in the nature of ejectment, or otherwise at law, jury trial is properly denied. Harlan v. Sparks, 125 F.2d 502 (10th Cir. 1942).

Remittitur. — Remission by plaintiff of part of verdict at suggestion of trial court, followed by judgment for sum remaining, does not deprive defendant of his constitutional right to have question of damages tried by jury. Henderson v. Dreyfus, 26 N.M. 541, 191 P. 442 (1919).

Rescission. — Purchaser of real estate did not have the right to trial by jury on a claim for equitable rescission under the federal Interstate Land Sales Full Disclosure Act or under the state constitution. Las Campanas Ltd. Partnership v. Pribble, 1997-NMCA-055, 123 N.M. 520, 943 P.2d 554.

Trial de novo. — There is no right to jury trial on appeal to district court from justice court conviction of unlawful liquor sales. City of Clovis v. Dendy, 35 N.M. 347, 297 P. 141 (1931).

On appeal from justice of peace, trial de novo in district court does not of itself contemplate that there be a jury trial, and district court is not bound by procedure and rules of justice court. Reece v. Montano, 48 N.M. 1, 144 P.2d 461 (1943).

One charged with a misdemeanor not of the class triable to a justice of the peace is entitled to a jury trial. State v. Jackson, 78 N.M. 29, 427 P.2d 46 (Ct. App. 1967).

Driving under influence of intoxicating liquor. — Denial of jury trial on charge of driving under the influence of intoxicating liquor as prohibited by state law is not unconstitutional, since maximum penalty of 90 days in jail and $200 fine was not so severe as to remove it from the petty offense class. Hamilton v. Walker, 65 N.M. 470, 340 P.2d 407 (1959).

The fact that a conviction under a municipal ordinance for drunken driving automatically sets in motion a proper exercise of the state police power has no connection with or relevance to the appellant's right to a jury trial. City of Tucumcari v. Briscoe, 58 N.M. 721, 275 P.2d 958 (1954).

In a first offense case of driving while intoxicated, defendant is not entitled as a right to a jury trial in the district court for the reason that such an offense is deemed a "petty" offense in New Mexico pursuant to Gutierrez v. Gober, 43 N.M. 146, 87 P.2d 437 (1939) and City of Tucumcari v. Briscoe, 58 N.M. 721, 275 P.2d 958 (1954). 1957-58 Op. Att'y Gen. No. 58-36.

Driving while intoxicated violations of state statutes in district courts tested by the "petty" or "grave" standard do not give rise to the right of trial by jury. 1957-58 Op. Att'y Gen. No. 58-36.

Mandatory revocation of the driving license of any person convicted under former 64-13-59, 1953 Comp. (similar to 66-5-29 NMSA 1978) for a period of one year does not deny the right to trial by a jury in district court on appeal, in violation of this

constitutional section or N.M. Const., art. II, § 14. City of Tucumcari v. Briscoe, 58 N.M. 721, 275 P.2d 958 (1954).

Selling liquor without a license. — At the time of the adoption of the constitution and immediately prior thereto a person charged with selling alcoholic liquor without a license had the right to a trial by jury. State v. Jackson, 78 N.M. 29, 427 P.2d 46 (Ct. App. 1967).

Six-man juries. — In criminal cases over which a justice of the peace has jurisdiction, a defendant is entitled to a jury trial by a six-man jury, if demand is timely made (opinion rendered under former 36-12-3, 1953 Comp.). 1963-64 Op. Att'y Gen. No. 64-37.

Change of venue. — "Right to trial by jury" is in no respect impaired by statute authorizing change of venue, upon state's application, when fair trial cannot be had in county of original venue. State v. Holloway, 19 N.M. 528, 146 P. 1066 (1914).

Trial by jury. — Insureds' claim that a state's imposition of a mandatory arbitration clause in all title insurance policies was a violation of their state constitutional and Seventh Amendment right to a trial by jury was upheld. Lisanti v. Alamo Title Ins. of Tex., 2001-NMCA-100, 131 N.M. 334, 35 P.3d 989, aff'd, 2002-NMSC-032, 132 N.M. 750, 55 P.3d 962 (2002).

Comparable provisions. — Idaho Const., art. I, § 7.

Iowa Const., art. I, § 9.

Montana Const., art. II, § 26.

Utah Const., art. I, § 10.

Wyoming Const., art. I, § 9.

Law reviews. — For comment, "Juries - New Trial - Discovery of Juror's Disqualification or False Answer on Voir Dire as Ground for New Trial," see 7 Nat. Resources J. 415 (1967).

For article, "Survey of New Mexico Law, 1979-80: Criminal Law and Procedure," see 11 N.M.L. Rev. 85 (1981).

For article, "Separation of Powers and the Judicial Rule-Making Power in New Mexico: The Need for Prudential Restraints," see 15 N.M.L. Rev. 407 (1985).

For annual survey of New Mexico Criminal Procedure, see 20 N.M.L. Rev. 285 (1990).

For note, "Civil Procedure and Constitutional Law: Changing New Mexico Remittitur Procedure to Protect the Appropriate Balance of Power Between Judge and Jury -

Allsup's Convenience Stores, Inc. v. North River Insurance Co.," see 32 N.M.L. Rev. 277 (2002).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 47 Am. Jur. 2d Jury § 3 et seq.

Removal of public officer, right to jury trial in proceedings for, 3 A.L.R. 232, 8 A.L.R. 1476.

Seizure of property alleged to be illegally used, right to jury trial, 17 A.L.R. 568, 50 A.L.R. 97.

Validity of statute allowing for separation of jury, 34 A.L.R. 1128, 79 A.L.R. 821, 21 A.L.R.2d 1088.

Right to consent to trial of criminal case before 12 jurors, 70 A.L.R. 279, 105 A.L.R. 1114.

Declaratory judgment action as infringement of right to jury trial, 87 A.L.R. 1209.

Right to jury trial in disbarment proceedings, 107 A.L.R. 692.

Appearance to demand jury trial as submission to jurisdiction, 111 A.L.R. 925.

Deficiency judgment, right to jury trial of issues as to, 112 A.L.R. 1492.

Right to jury trial in suit to remove cloud, quiet title or determine adverse claims, 117 A.L.R. 9

Interlocutory ruling of one judge on right to jury trial as binding on another judge in same case, 132 A.L.R. 68.

Right to jury trial as to fact essential to action or defense but not involving merits thereof, 170 A.L.R. 383.

Right to jury trial in action under Fair Labor Standards Act, 174 A.L.R. 421.

Insanity: constitutional right to jury trial in proceeding for adjudication of incompetency or insanity or for restoration, 33 A.L.R.2d 1145.

Mandamus or prohibition as remedy to enforce right to jury trial, 41 A.L.R.2d 780.

Arbitration statute as denial of jury trial, 55 A.L.R.2d 432.

Consolidated trial upon several indictments or informations against same accused, over his objection, 59 A.L.R.2d 841.

Substitution of judge: right to jury trial as violated by substitution in criminal case, 83 A.L.R.2d 1032.

Indoctrination by court of persons summoned for jury service, 89 A.L.R.2d 197.

Rule or statute requiring opposing party's consent to withdrawal of demand for jury trial, 90 A.L.R.2d 1162.

Juvenile court delinquency proceedings, right to jury trial in, 100 A.L.R.2d 1241.

Eminent domain: how to obtain jury trial in eminent domain: waiver, 12 A.L.R.3d 7.

Intoxication: motor vehicles: right to trial by jury in criminal prosecution for driving while intoxicated or similar offense, 16 A.L.R.3d 1373.

Right in equity suit to jury trial of counterclaim involving legal issue, 17 A.L.R.3d 1321.

Garnishment: issues in garnishment as triable to court or to jury, 19 A.L.R.3d 1393.

Statute reducing number of jurors as violative of right to trial by jury, 47 A.L.R.3d 895.

Former law enforcement officers as qualified jurors in criminal cases, 72 A.L.R.3d 958.

Right to jury trial on vacation of judgment, 75 A.L.R.3d 894.

Validity and efficacy of accused's waiver of unanimous verdict, 97 A.L.R.3d 1253.

Propriety of sentencing justice's consideration of defendant's failure or refusal to accept plea bargain, 100 A.L.R.3d 834.

Waiver, after not guilty plea, of jury trial in felony case, 9 A.L.R.4th 695.

Validity of agreement, by stipulation or waiver in state civil case, to accept verdict by number or proportion of jurors less than that constitutionally permitted, 15 A.L.R.4th 213.

Right to jury trial in stockholder's derivative action, 32 A.L.R.4th 1111.

Right of accused, in state criminal trial, to insist, over prosecutor's or court's objection, on trial by court without jury, 37 A.L.R.4th 304.

Admissibility, at criminal prosecution, of expert testimony on reliability of eyewitness testimony, 46 A.L.R.4th 1047.

Automobiles: validity and construction of legislation authorizing revocation or suspension of operator's license for "habitual," "persistent," or "frequent" violations of traffic regulations, 48 A.L.R.4th 367.

Paternity proceedings: right to jury trial, 51 A.L.R.4th 565.

Right to jury trial in action for retaliatory discharge from employment, 52 A.L.R.4th 1141.

Right to jury trial in state court divorce proceedings, 56 A.L.R.4th 955.

Validity of law or rule requiring state court party who requests jury trial in civil case to pay costs associated with jury, 68 A.L.R.4th 343.

Small claims: jury trial rights in, and on appeal from, small claims court proceeding, 70 A.L.R.4th 1119.

Validity, construction, and effect of statute limiting amount recoverable in dram shop action, 78 A.L.R.4th 542.

Right to jury trial in action under state civil rights law, 12 A.L.R.5th 508.

Use of peremptory challenges to exclude ethnic and racial groups, other than Black Americans, from criminal jury - post- *Batson* state cases, 20 A.L.R.5th 398.

Validity, construction, and application of state statutory provisions limiting amount of recovery in medical malpractice claims, 26 A.L.R.5th 245.

Substitution of judge in state criminal trial, 45 A.L.R.5th 591.

Constitutional right to jury trial in cause of action under state unfair or deceptive trade practices law, 54 A.L.R.5th 631.

Right to jury trial in child neglect, child abuse, or termination of parental rights proceedings, 102 A.L.R.5th 227.

Complexity of civil action as affecting seventh amendment right to trial by jury, 54 A.L.R. Fed. 733.

Right to jury trial on issue of damages in copyright infringement actions under 17 U.S.C.A. § 504, 163 A.L.R. Fed. 467.

Sec. 13. [Bail; excessive fines; cruel and unusual punishment.]

All persons shall, before conviction be bailable by sufficient sureties, except for capital offenses when the proof is evident or the presumption great and in situations in

which bail is specifically prohibited by this section. Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

Bail may be denied by the district court for a period of sixty days after the incarceration of the defendant by an order entered within seven days after the incarceration, in the following instances:

A. the defendant is accused of a felony and has previously been convicted of two or more felonies, within the state, which felonies did not arise from the same transaction or a common transaction with the case at bar;

B. the defendant is accused of a felony involving the use of a deadly weapon and has a prior felony conviction, within the state. The period for incarceration without bail may be extended by any period of time by which trial is delayed by a motion for a continuance made by or on behalf of the defendant. An appeal from an order denying bail shall be given preference over all other matters. (As amended November 4, 1980 and November 8, 1988.)

ANNOTATIONS

Cross references. — See Kearny Bill of Rights, cls. 9 and 10 in Pamphlet 3.

For provisions relating to bail generally, see 31-3-1 NMSA 1978 et seq.

For provisions relating to bail, see Rules 5-401 to 5-407.

Withdrawal of individual prison inmate's visitation privileges without affording that inmate certain procedural safeguards would violate due process. Cordova v. LeMaster, 2004-NMSC-026, 136 N.M. 217, 96 P.3d 778.

Intent of section. — This provision is based upon the idea that a person accused of crime shall be admitted to bail until adjudged guilty by the court of last resort to him. However, this right is not absolute under all circumstances. Tijerina v. Baker, 78 N.M. 770, 438 P.2d 514 (1968).

This section does not apply to fugitives held for rendition to a sister state. 1974 Op. Att'y Gen. No. 74-38.

Sentence to term. — Sentence of not less than 40 nor more than 90 years is not one of "imprisonment for life" within meaning of bail statute. Welch v. McDonald, 36 N.M. 23, 7 P.2d 292 (1931).

Presumption that "proof is evident or presumption great". — The charge of a capital offense raises a rebuttable presumption that the proof is evident and the presumption great that the defendant so charged committed the capital offense, and

one so accused is not entitled to bail until that presumption is overcome. Tijerina v. Baker, 78 N.M. 770, 438 P.2d 514 (1968).

In habeas corpus to be admitted to bail, if proof of capital crime is plain and presumption great, the court will not weigh it as against other facts and circumstances apparently contradictory. Ex parte Wright, 34 N.M. 422, 283 P. 53 (1929).

The supreme court weighs the evidence in habeas corpus proceedings only to determine whether it would sustain a verdict of guilty. Proof of deliberation in killing must be evident or the presumption great to warrant denial of bail to one charged with murder in the first degree. Ex parte Simpson, 37 N.M. 453, 24 P.2d 291 (1933).

Proportionality review ofcriminal sentence in a noncapital case is permissible, although reversal of a sentence on such grounds should be exceedingly rare. State v. Rueda, 1999-NMCA-033, 126 N.M. 738, 975 P.2d 351, cert. denied, 127 N.M. 391, 981 P.2d 1209 (1999).

Sentence to imprisonment for life precludes bail pending appeal. Welch v. McDonald, 36 N.M. 23, 7 P.2d 292 (1931).

Right of parolee to bail. — Looking at the basic purposes of bail, it is seen that the reasons therefor do not apply where a conviction has been had and that conviction is final. This, of course, is the situation of a parolee. There is no danger that an innocent person may suffer punishment. Guilt has been established. 1957-58 Op. Att'y Gen. No. 57-33.

A parolee who is being held in jail for investigation of parole violation is not entitled to make bond. 1957-58 Op. Att'y Gen. No. 57-33.

An out-of-state parolee who is under the parole board's supervision under the terms of the interstate compact is not eligible to make bond when held in jail for investigation of parole violation or after he has been arrested and placed in jail pending clearance with the sending state. 1957-58 Op. Att'y Gen. No. 57-33.

Right of probationer to bail. — A probationer, arrested in a county other than the county which granted him probation, has a right to be admitted to bail in the county in which he is arrested. 1964 Op. Att'y Gen. No. 64-106.

Power to revoke bail. — Since the court had inherent power to revoke bail of a defendant during trial and pending final disposition of the criminal case in order to prevent interference with witnesses or the proper administration of justice, it also had the right to do so before trial. Tijerina v. Baker, 78 N.M. 770, 438 P.2d 514 (1968).

The constitution gives to one accused of crime the right to personal liberty pending trial, except under certain circumstances. The supreme court has said that a suspended sentence gives a defendant his right of personal liberty and that due process requires a

notice and hearing before such suspension can be revoked. Therefore, due process also requires notice and an opportunity to be heard before bond can be revoked and a defendant remanded to custody. Tijerina v. Baker, 78 N.M. 770, 438 P.2d 514 (1968).

Post-conviction relief. — Conclusory claims that defendant was held under excessive bail are too vague to provide a basis for post-conviction relief. State v. Jacoby, 82 N.M. 447, 483 P.2d 502 (Ct. App. 1971).

After conviction, but pending a review of conviction, the right to bail depends upon whether or not a statute creates that right. 1957-58 Op. Att'y Gen. No. 57-33 (rendered prior to 1988 amendment, inserting "before conviction" in the first sentence).

Abuse of discretion by court in determining bail. — Where defendant is entitled to bond pending final determination of his conviction, the determination of what bail is proper to grant is particularly within the trial court's discretion but a demand for a corporate surety with a predetermined exclusion of all other collateral as surety is an abuse of discretion. State v. Lucero, 81 N.M. 578, 469 P.2d 727 (Ct. App. 1970).

An abuse of discretion occurs when the court exceeds the bounds of reason when setting bond with all the circumstances before it being considered. State v. Cebada, 84 N.M. 306, 502 P.2d 409 (Ct. App. 1972).

Cruel and unusual punishment generally. — Although habitual criminality is a status rather than an offense, where defendant was not convicted of being an habitual criminal but of the commission of a criminal act, he was appropriately punished for the commission of that crime by a substituted enhanced sentence as prescribed by statute and his punishment was not cruel and unusual punishment. State v. Gonzales, 84 N.M. 275, 502 P.2d 300 (Ct. App.), cert. denied, 84 N.M. 271, 502 P.2d 296 (1972).

Ordinarily the term "cruel and unusual punishment" implies something inhuman and barbarous. State v. Peters, 78 N.M. 224, 430 P.2d 382 (1967).

The word "usual" does not appear to either enlarge or restrict the word "cruel," and refers to the nature of the punishment under consideration rather than to the infrequency of its imposition. State ex rel. Serna v. Hodges, 89 N.M. 351, 552 P.2d 787, overruled on other grounds, State v. Rondeau, 89 N.M. 408, 553 P.2d 688 (1976).

The fixing of penalties is a legislative function and what constitutes an adequate punishment is a matter for legislative judgment. The question of whether the punishment for a given crime is too severe and disproportionate to the offense is for the legislature to determine. McCutcheon v. Cox, 71 N.M. 274, 377 P.2d 683 (1962).

Some personal discomfort, occasioned by being jailed for a few hours awaiting preliminary examination, does not constitute a denial of due process or equal protection, nor can it be said to constitute cruel and unusual punishment. Christie v. Ninth Judicial Dist., 78 N.M. 469, 432 P.2d 825 (1967).

Cruel and unusual punishment implies a limitation upon the form and character of the punishment and is not a limitation upon the duration. State v. Matthews, 79 N.M. 767, 449 P.2d 783 (1969); State v. Peters, 78 N.M. 224, 430 P.2d 382 (1967).

Although excessively long sentences, as well as those that are inherently cruel, are objectionable under this section and U.S. Const., amend. VIII, consecutive sentences of life imprisonment for murder, life imprisonment for act of carnal knowledge, and not more than 20 years imprisonment for kidnapping, were not excessive under facts of case where defendant inflicted these crimes upon five-year-old child. State v. Padilla, 85 N.M. 140, 509 P.2d 1335 (1973).

Defendant's indeterminate sentence of not less than 10 nor more than 50 years was not cruel and unusual punishment. State v. Deats, 83 N.M. 154, 489 P.2d 662 (Ct. App. 1971).

The objects and purposes of the Indeterminate Sentence Act, which form the basis for fixing the maximum penalty of life imprisonment, in the court's opinion, clearly preclude a determination that cruel and unusual punishment results from the sentence. Washington v. Rodriguez, 82 N.M. 428, 483 P.2d 309 (Ct. App. 1971).

Defendant's argument that the application of 30-22-9 NMSA 1978 to escapees from the prison honor farm constituted cruel and unusual punishment because of the difference in facilities at the farm compared with the state penitentiary was without merit, since the prison honor farm was an integral part and parcel of the state penitentiary, and escape therefrom was an escape from the state penitentiary. State v. Budau, 86 N.M. 21, 518 P.2d 1225 (Ct. App. 1973), cert. denied, 86 N.M. 5, 518 P.2d 1209 (1974).

Confinement for eight months in county jail, at which time defendant pleaded guilty and for which time defendant has been given full credit against his properly imposed sentence, does not constitute cruel and unusual punishment. State v. Gonzales, 80 N.M. 168, 452 P.2d 696 (Ct. App. 1969).

Detention of child awaiting residential treatment is not cruel or unusual. State v. Wacey C., 2004-NMCA-029, 135 N.M. 186, 86 P.3d 611.

New Mexico's Capital Felony Sentencing Act is constitutional. State v. Cheadle, 101 N.M. 282, 681 P.2d 708 (1983), cert. denied, 466 U.S. 945, 104 S. Ct. 1930, 80 L. Ed. 2d 475 (1984).

Life sentence for guilty but mentally ill murderer. — Imposition of a life sentence upon a murder defendant who was found guilty but mentally ill did not constitute cruel and inhuman punishment. State v. Neely, 112 N.M. 702, 819 P.2d 249 (1991).

Cruel and unusual punishment provision inapplicable where defendant burned with acid. — The court committed error in relying upon the cruel and unusual punishment provision of this section to dismiss the information, where the defendant,

while in the county jail prior to trial, had been doused with some type of acid and severely burned. State v. Smallwood, 94 N.M. 225, 608 P.2d 537 (Ct. App. 1980).

Habitual offender sentence of five-time shoplifting felon proper. — A sentence of eight years' imprisonment, imposed under the habitual offender statute against a defendant convicted for the fifth time on felony shoplifting charges, was not so disproportionate as to require reversal as cruel and unusual punishment under the New Mexico Constitution, notwithstanding facts that three of the convictions were over 15 years old, and the latest charge was only $3 over the minimum threshold for felony shoplifting. State v. Rueda, 1999-NMCA-033, 126 N.M. 738, 975 P.2d 351, cert. denied, 127 N.M. 391, 981 P.2d 1209 (1999).

Failure to provide medical care. — Although failure to provide needed medical care may constitute punishment that is inherently cruel, a prisoner is not entitled to every medical procedure of his or her private physician's choice. A sentence which does not exhibit a deliberate indifference to a defendant's medical needs is not inherently cruel. State v. Augustus, 97 N.M. 100, 637 P.2d 50 (Ct. App. 1981).

Incarceration of defendant with severe asthma was not cruel and unusual punishment since the prison provided custodial treatment, including arrangements for emergency medical care. State v. Arrington, 120 N.M. 54, 897 P.2d 241 (Ct. App. 1995).

Death penalty as cruel and unusual punishment. — The death penalty in and of itself does not amount to cruel and unusual punishment within the prohibition of U.S. Const., amend. VIII or this section, but former 40A-29-2, 1953 Comp., which did not permit the exercise of controlled discretion, but mandated a death sentence upon the conviction of a capital felony, was constitutionally defective. State v. Rondeau, 89 N.M. 408, 553 P.2d 688 (1976).

The death penalty is not cruel and unusual punishment per se within the prohibition of the eighth and fourteenth amendments of United States constitution or this section. State v. Garcia, 99 N.M. 771, 664 P.2d 969, cert. denied, 462 U.S. 1112, 103 S. Ct. 2464, 77 L. Ed. 2d 1341 (1983); State v. Clark, 1999-NMSC-035, 128 N.M. 119, 990 P.2d 793; State v. Jacobs, 2000-NMSC-026, 129 N.M. 448, 10 P.3d 127.

Issue of cruel and unusual punishment not raised. — Defendant's claim that he was returned to New Mexico from Texas without extradition proceedings and without a waiver of extradition and that in being so returned he suffered cruel and unjust treatment is not a claim of cruelty in his punishment and does not raise an issue under this section of the constitution or U.S. Const., amend. VIII. State v. Mosley, 79 N.M. 514, 445 P.2d 391 (Ct. App. 1968).

Comparable provisions. — Idaho Const., art. I, § 6.

Iowa Const., art. I, §§ 12, 17.

Montana Const., art. II, §§ 21, 22.

Oregon Const., art. I, §§ 14, 16.

Utah Const., art. I, §§ 8, 9.

Wyoming Const., art. I, § 14.

Law reviews. — For comment, "Criminal Procedure - Preventive Detention in New Mexico," see 4 N.M. L. Rev. 247 (1974).

For article, "Constitutionality of the New Mexico Capital Punishment Statute," see 11 N.M.L. Rev. 269 (1981).

For article, "The Constitutionality of Pretrial Detention Without Bail in New Mexico," see 12 N.M.L. Rev. 685 (1982).

For comment, "The Constitution Is Constitutional - A Reply to The Constitutionality of Pretrial Detention Without Bail in New Mexico," see 13 N.M.L. Rev. 145 (1983).

For article, "Disability Advocacy and the Death Penalty: The Road from Penry to Atkins", see 33 N.M.L. Rev. 173 (2003).

For article, "Adolescence, Mental Retardation, and the Death Penalty: The Siren Call of Atkins v. Virginia," see 33 N.M.L. Rev. 183 (2003).

For article, "Atkins, Adolescence, and the Maturity Heuristic: Rationales for a Categorical Exemption for Juveniles from Capital Punishment", see 33 N.M.L. Rev. 207 (2003).

For article, "Atkins v. Virginia: A Psychiatric Can of Worms," see 33 N.M.L. Rev. 255 (2003).

For article, "What Atkins Could Mean for People with Mental Illness", see 33 N.M.L. Rev. 293 (2003).

For article, "'Life Is in Mirrors, Death Disappears': Giving Life to Atkins", see 33 N.M.L. Rev. 315 (2003).

For article, "Straight Is the Gate: Capital Clemency in the United States from Gregg to Atkins", see 33 N.M.L. Rev. 349 (2003).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 8 Am. Jur. 2d Bail and Recognizance §§ 23 to 41, 63, 73 to 81; 21 Am. Jur. 2d Criminal Law §§ 614, 615, 625 to 631.

Civil action or proceeding, right to give bail in, 15 A.L.R. 1079.

Right to recover back cash bail or securities taken without authority, 26 A.L.R. 211, 44 A.L.R. 1499, 48 A.L.R. 1430.

Manner of inflicting death sentence as cruel or unusual punishment, 30 A.L.R. 1452.

Constitutionality of statute disbarring attorney convicted of crime, 32 A.L.R. 1068.

Statutes relieving against forfeiture of bail or recognizance, 43 A.L.R. 1233.

Bail pending appeal from conviction, 45 A.L.R. 458.

Amount of bail required in criminal action, 53 A.L.R. 399.

Arresting one who is released on bail, 62 A.L.R. 462.

Habeas corpus, bail pending appeal in, 63 A.L.R. 1495, 143 A.L.R. 1354.

Banishment or deportation as cruel and unusual punishment, 70 A.L.R. 100.

Factors in fixing amount of bail in criminal cases, 72 A.L.R. 801.

Constitutionality of statute providing for penalty or forfeiture as affected by failure to fix maximum amount, 114 A.L.R. 1126.

Rape as bailable offense, 118 A.L.R. 1115.

Mandamus to compel judge or other officer to grant accused bail or to accept proffered sureties, 23 A.L.R.2d 803.

Statutes relating to sexual psychopaths, 24 A.L.R.2d 350.

Bail jumping after conviction or failure to surrender or appear for sentencing, and the like, as contempt, 34 A.L.R.2d 1100.

Court's power and duty, pending determination of habeas corpus proceeding on merits to admit petitioner to bail, 56 A.L.R.2d 668.

Appealability of order relating to forfeiture of bail, 78 A.L.R.2d 1180.

Upon whom rests burden of proof, where bail is sought before judgment but after indictment in capital case, as to whether proof is evident or the presumption great, 89 A.L.R.2d 355.

Right to apply cash bail to payment of fine, 42 A.L.R.5th 547.

Delay in taking before magistrate or denial of opportunity to give bail as supporting action for false imprisonment, 98 A.L.R.2d 966, 3 A.L.R.4th 1057.

Insanity of accused as affecting right to bail in criminal case, 11 A.L.R.3d 1385.

Length of sentence as violation of constitutional provisions prohibiting cruel and unusual punishment, 33 A.L.R.3d 335.

Prison conditions as amounting to cruel and unusual punishment, 51 A.L.R.3d 111.

Constitutional or statutory provisions regarding release on bail as applicable to children subject to Juvenile Delinquency Act, 53 A.L.R.3d 848.

Sterilization of criminals or mental defectives as cruel and unusual punishment, 53 A.L.R.3d 960.

Capital punishment: effect of abolition of capital punishment on procedural rules governing crimes punishable by death - post-Furman decisions, 71 A.L.R.3d 453.

Pretrial preventive detention by state court, 75 A.L.R.3d 956.

Sufficiency of access to legal research facilities afforded defendant confined in state prison or local jail, 23 A.L.R.4th 590.

Automobiles: validity and construction of legislation authorizing revocation or suspension of operator's license for "habitual," "persistent," or "frequent" violations of traffic regulations, 48 A.L.R.4th 367.

State statutes making default on bail a separate criminal offense, 63 A.L.R.4th 1064.

Propriety of imposing capital punishment on mentally retarded individuals, 20 A.L.R.5th 177.

Propriety of applying cash bail to payment of fine, 42 A.L.R.5th 547.

Imposition of enhanced sentence under recidivist statute as cruel and unusual punishment, 27 A.L.R. Fed. 110.

When does forfeiture of currency, bank account, or cash equivalent violate excessive fines clause of Eight Amendment, 164 A.L.R. Fed. 591.

When does forfeiture of motor vehicle pursuant to federal statute violate excessive fines clause of Eighth Amendment, 169 A.L.R. Fed. 615.

When does forfeiture of real property violate excessive fines clause of Eighth Amendment - post-Austin cases, 168 A.L.R. Fed. 375.

Excessive fines clause of Eighth Amendment - supreme court cases, 172 A.L.R. Fed. 389.

8 C.J.S. Bail §§ 14 to 29, 66 to 72; 24 C.J.S. Criminal Law §§ 1593 to 1609.

Sec. 14. [Indictment and information; grand juries; rights of accused.] (1993)

No person shall be held to answer for a capital, felonious or infamous crime unless on a presentment or indictment of a grand jury or information filed by a district attorney or attorney general or their deputies, except in cases arising in the militia when in actual service in time of war or public danger. No person shall be so held on information without having had a preliminary examination before an examining magistrate, or having waived such preliminary examination.

A grand jury shall be composed of such number, not less than twelve, as may be prescribed by law. Citizens only, residing in the county for which a grand jury may be convened and qualified as prescribed by law, may serve on a grand jury. Concurrence necessary for the finding of an indictment by a grand jury shall be prescribed by law; provided, such concurrence shall never be by less than a majority of those who compose a grand jury, and, provided, at least eight must concur in finding an indictment when a grand jury is composed of twelve in number. Until otherwise prescribed by law a grand jury shall be composed of twelve in number of which eight must concur in finding an indictment. A grand jury shall be convened upon order of a judge of a court empowered to try and determine cases of capital, felonious or infamous crimes at such times as to him shall be deemed necessary, or a grand jury shall be ordered to convene by such judge upon the filing of a petition therefor signed by not less than the greater of two hundred registered voters or two percent of the registered voters of the county, or a grand jury may be convened in any additional manner as may be prescribed by law.

In all criminal prosecutions, the accused shall have the right to appear and defend himself in person, and by counsel; to demand the nature and cause of the accusation; to be confronted with the witnesses against him; to have the charge and testimony interpreted to him in a language that he understands; to have compulsory process to compel the attendance of necessary witnesses in his behalf, and a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed. (As amended November 4, 1924, effective January 1, 1925, November 4, 1980, and November 8, 1994.)

ANNOTATIONS

I. GENERAL CONSIDERATION.

Courts have inherent authority to insure that defendants are afforded their constitutional rights in criminal proceedings. State v. Brown, 2004-NMCA-037, 135 N.M. 291, 87 P.3d 1073, cert. granted, 2004-NMCERT-003, 135 N.M. 321, 88 P.3d 261.

Review by writ of certiorari. — Where defendant alleged in his petition for a writ of certiorari that the state violated his rights as provided under the Fifth, Sixth, and Fourteenth Amendments to the United State Constitution, and Article II, Section 14 of the New Mexico Constitution, the State Supreme Court had jurisdiction to review defendant's case by writ of certiorari because it involves a significant question of law under the constitution of New Mexico or the United States. State v. Urban, 2004-NMSC-007, 135 N.M. 279, 87 P.3d 1061.

Cross references. — For right to jury trial, see N.M. Const., art. II, § 12.

For right to bail, see N.M. Const., art. II, § 13.

For prohibition against double jeopardy and self-incrimination, see N.M. Const., art. II, § 15.

As to waiver of indictment, see N.M. Const., art. XX, § 20.

See Kearny Bill of Rights, cl. 6 in Pamphlet 3.

As to duties of examining magistrate, see 31-3-1 to 31-3-9 NMSA 1978.

As to grand juries generally, see 31-6-1 to 31-6-13 NMSA 1978.

For indictments and informations generally, see Rule 5-204.

1924 amendment. — The amendment to this section was proposed by H.J.R. 14 (Laws 1923, p. 351) and was adopted by the people at the general election November 4, 1924, by a vote of 28,420 for to 21,166 against. The amendment inserted "or information filed by a district attorney or attorney general or their deputies" in the first sentence of the first paragraph; added the second sentence of that paragraph; added the entire second paragraph; and added a fourth paragraph, which has been omitted by the compiler as executed, which read: "After the submission and approval by the electors of the state, the provisions hereof shall take effect on January 1, 1925."

The 1980 amendment which was proposed by S.J.R. No. 10 (Laws 1979) and adopted at the general election held on November 4, 1980, by a vote of 124,996 for and 108,056 against, substituted "the lesser of two hundred registered voters or five percent of the registered voters" for "seventy-five resident taxpayers" in the last sentence of the second paragraph.

The 1994 amendment, proposed by S.J.R. No. 5 (Laws 1993) and adopted at the general election held on November 8, 1994, by a vote of 203,496 for and 192,549 against, substituted "greater of two hundred registered voters or two percent of the registered voters" for "lesser of two hundred registered voters or five percent of the registered voters" near the end of the second paragraph.

This section is self-executing and needs no further legislation to put it in force. State v. Rogers, 31 N.M. 485, 247 P. 828 (1926).

The term "criminal prosecution" as used in the constitution means the criminal "proceedings." Mascarenas v. State, 80 N.M. 537, 458 P.2d 789 (1969).

A criminal prosecution is commenced when a criminal complaint is filed with a magistrate and a warrant issued thereon. Mascarenas v. State, 80 N.M. 537, 458 P.2d 789 (1969).

Length of charging period. — Where, as often occurs in child sexual abuse cases, the indictment sets forth a lengthy charging period, the due process rights of the defendant are implicated and the court must consider multiple factors to determine the reasonableness of the state's efforts to narrow the time of the indictment and the potential prejudice to the defendant of the time frame chosen by the state. State v. Baldonado, 1998-NMCA-040, 124 N.M. 745, 955 P.2d 214.

Where indictment charged defendant with sexual abuse of a child, defendant was not prejudiced or denied due process by state's failure to reduce charging period from 16 months to a more definite 4 months because defendant could not have raised a viable alibi defense. State v. Ervin, 2002-NMCA-012, 131 N.M. 640, 41 P.3d 908, cert. denied, 131 N.M. 619, 41 P.3d 345 (2002).

Guilty but mentally ill verdicts constitutional. — New Mexico statutory provisions authorizing a verdict of guilty but mentally ill do not impinge upon a defendant's right to a fair trial and do not violate the equal protection clauses of the United States and New Mexico Constitutions. State v. Neely, 112 N.M. 702, 819 P.2d 249 (1991).

Constitutional rights of juveniles. — When a juvenile is transferred to district court for criminal proceedings, all of the rights and safeguards in such cases required by law and the constitution of the United States and the constitution of New Mexico must be accorded him. Williams v. Sanders, 80 N.M. 619, 459 P.2d 145 (1969).

Waiver of jury by juvenile. — The jury may be waived but, insofar as the juvenile is concerned, this should be permitted only when advised by counsel and it is amply clear that an understanding and intelligent decision has been made. If the juvenile, after considering all the advantages and disadvantages attendant thereon, and having been advised by counsel, waives a trial by jury, then the benefits generally felt to attach through trial to the court would be his. Peyton v. Nord, 78 N.M. 717, 437 P.2d 716 (1968).

Rights waived by plea of guilty. — A voluntary plea of guilty waives the right to preliminary hearing, right to counsel and the right to aid with defense, and defendant's claim that he was denied the use of a telephone is not ground for relief, absent some showing of prejudice. State v. Maimona, 80 N.M. 562, 458 P.2d 814 (Ct. App. 1969).

Prior procedural state court defects are waived by the voluntary entry of plea of guilty. Baez v. Rodriguez, 381 F.2d 35 (10th Cir. 1967).

Impartial judge. — It seems very unlikely that the New Mexico constitution makers displayed the solicitude for an impartial trial shown by this section, and at the same time intended to curtail power of legislature to provide means in furtherance of such end, by disqualification of judges believed by litigants to be partial. What would it avail accused to have trial by impartial jury, if proceedings were presided over by biased judge? State ex rel. Hannah v. Armijo, 38 N.M. 73, 28 P.2d 511 (1933).

Language that defendant understands. — Under this provision, defendant is entitled to have testimony interpreted to him in a language which he understands. While such right cannot be denied, it is incumbent upon defendant, in some appropriate manner, to call attention of trial court to fact that he does not understand the language in which testimony is given. State v. Cabodi, 18 N.M. 513, 138 P. 262 (1914).

The word "charge" used in clause "to have the charge and testimony interpreted to him in a language that he understands" refers to the indictment or information, and not to instructions. State v. Cabodi, 18 N.M. 513, 138 P. 262 (1914).

Where instructions were translated into Spanish by court interpreter, who had to be corrected several times, and defendant's attorney assisted in the translation without making objection, defendant was not denied his constitutional rights. State v. Garcia, 43 N.M. 242, 89 P.2d 619 (1939).

Habeas corpus relief did not lie on claim that guilty plea was not intelligently made where record showed that defendant answered both by himself and through an interpreter to questions put by the judge to be sure that defendant knew what he was doing when he pleaded guilty. Orosco v. Cox, 359 F.2d 764 (10th Cir. 1966).

The existence of a language barrier is a circumstance probing both the totality of understanding premising the entry of plea and the adequacy of representation by counsel. Orosco v. Cox, 359 F.2d 764 (10th Cir. 1966).

Imposing costs against state. — The rule in criminal cases is the same as that which is expressed for civil cases, in that a defendant's costs may be imposed against the state, its officers or agencies, only to the extent permitted by law. 1953-54 Op. Att'y Gen. No. 6035.

Mandatory revocation of driving license. — Mandatory revocation by state authorities of the driving license of any person convicted under former 64-13-59, 1953 Comp. (similar to 66-5-29 NMSA 1978) for a period of one year does not deny the right to trial by a jury in district court on appeal, in violation of this section or N.M. Const., art. II, § 12. City of Tucumcari v. Briscoe, 58 N.M. 721, 275 P.2d 958 (1954).

Probation revocation proceeding. — The right of personal liberty is one of the highest rights of citizenship and this right cannot be taken from a defendant in a probation revocation proceeding without notice and an opportunity to be heard without invading his constitutional rights. State v. Brusenhan, 78 N.M. 764, 438 P.2d 174 (Ct. App. 1968).

Cumulative irregularities. — Any conviction obtained in a proceeding in which the cumulative impact of irregularities is so prejudicial to a defendant that he is deprived of his fundamental right to a fair trial must be reversed. State v. Martin, 101 N.M. 595, 686 P.2d 937 (1984); State v. Wilson, 109 N.M. 541, 787 P.2d 821 (1990).

Capital, felonious or infamous crime. — Contempt of court is not a capital, felonious or infamous crime. State v. Pothier, 104 N.M. 363, 721 P.2d 1294 (1986).

Writ of prohibition. — Where trial court is without jurisdiction to enter any judgment, prohibition will issue as a matter of right, but an alternative writ of prohibition should be discharged as having been improvidently issued where relator has been denied no privilege or right to which he is entitled. State ex rel. Prince v. Coors, 52 N.M. 189, 194 P.2d 678 (1948).

Prosecutorial misconduct. — The supreme court had jurisdiction by writ of certiorari to review defendant's claim he was denied a fair trial because of prosecutorial misconduct. State v. Ashley, 1997-NMSC-049, 124 N.M. 1, 946 P.2d 205.

Combination of factors invading rights. — Failure to grant a continuance to allow defendant a reasonable time to prepare and present a defense, denial of his rights to subpoena witnesses and to have medical records produced, and granting the state's motion to suppress any evidence going to defendant's mental or physical condition, invaded defendant's constitutional rights to due process and a fair trial. March v. State, 105 N.M. 453, 734 P.2d 231 (1987).

Rights not violated by monitoring telephone calls. — The monitoring of the defendant's phone calls from jail did not violate his attorney-client privilege, his privilege against self-incrimination, protections against unreasonable searches and seizure, or his right of privacy. State v. Coyazo, 1997-NMCA-029, 123 N.M. 200, 936 P.2d 882.

Comparable provisions. — Iowa Const., art. I, §§ 10, 11.

Montana Const., art. II, § 24.

Utah Const., art. I, §§ 12, 13.

Wyoming Const., art. I, §§ 10, 13.

Law reviews. — For article, "Approaching Statutory Interpretation in New Mexico," see 8 Nat. Resources J. 689 (1968).

For comment, "McGuinness v. State: Limiting the Use of Depositions at Trial," see 10 N.M.L. Rev. 207 (1979-1980).

For comment, "The Use of an Information Following the Return of a Grand Jury No Bill: State v. Joe Nestor Chavez," see 10 N.M.L. Rev. 217 (1979-1980).

For note, "Criminal Procedure - Grand Jury - Inadmissible Evidence, Due Process," see 11 N.M.L. Rev. 451 (1981).

For note, "Custodial Interrogation in New Mexico: State v. Trujillo," see 12 N.M.L. Rev. 577 (1982).

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For article, "Separation of Powers and the Judicial Rule-Making Power in New Mexico: The Need for Prudential Restraints," see 15 N.M.L. Rev. 407 (1985).

For note, "Striking the Right Balance in New Mexico's Rape Shield Law - State v. Johnson," see 28 N.M.L. Rev. 611 (1998).

For note, "Curbing Prosecutorial Power-Right to Waive Preliminary Hearing Remains Within Discretion of Defendant - *State ex rel. Whitehead v. Vescovi-Dial*," see 29 N.M.L. Rev. 445 (1999).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 21A Am. Jur. 2d Criminal Law §§ 632 to 1021; 38 Am. Jur. 2d Grand Jury §§ 3, 4, 16; 41 Am. Jur. 2d Indictments and Informations § 4 et seq.; 47 Am. Jur. 2d Jury § 6 et seq.; 75 Am. Jur. 2d Trial §§ 180, 182, 192, 196, 200, 205, 206, 228; 81 Am. Jur. 2d Witnesses §§ 1 to 3, 7, 802, 803, 812, 860.

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Validity and efficacy of minor's waiver of right to counsel - cases decided since application of *Gault*, 387 U.S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967), 101 A.L.R.5th 351.

Propriety and prejudicial effect of prosecutor's argument to jury indicating his belief or knowledge as to guilt of accused - federal cases, 41 A.L.R. Fed. 10.

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16C C.J.S. Constitutional Law §§ 1013, 1014, 1016 to 1021, 1045 to 1052, 1067 to 1073; 22 C.J.S. Criminal Law §§ 277 to 320, 340 to 351; 22A C.J.S. Criminal Law §§ 446, 469 to 485, 578 to 590; 23 C.J.S. Criminal Law §§ 1115 to 1141; 23A C.J.S. Criminal Law § 1152; 24 C.J.S. Criminal Law §§ 1161 to 1167; 38A C.J.S. Grand Juries §§ 6, 7, 11, 20 et seq., 53; 42 C.J.S. Indictments and Informations § 6; 50 C.J.S. Juries §§ 10, 126; 97 C.J.S. Witnesses § 6.

II. INDICTMENT AND INFORMATION.

Prosecuting by information constitutional. — The provisions of this section, permitting the prosecution of a felony by information, does not violate either the fifth amendment requirement of a grand jury indictment or the due process clause of the U.S. Const., amend. XIV. State v. Reyes, 78 N.M. 527, 433 P.2d 506 (Ct. App. 1967).

Simplified forms of information provided for by New Mexico statutes do not offend against the constitution. State v. Shroyer, 49 N.M. 196, 160 P.2d 444 (1945).

The purpose of an indictment or information is: First, to furnish an accused with such a description of the charge against him as will enable him to make his defense and

to avail himself of his conviction or acquittal against a subsequent prosecution for the same offense; and second, that the court may be informed as to the facts alleged so it may determine whether the facts are sufficient to support a conviction, if one should be had. State v. Blea, 84 N.M. 595, 506 P.2d 339 (Ct. App. 1973).

A formal accusation is required to be filed before a person may be punished for a crime. Smith v. Abram, 58 N.M. 404, 271 P.2d 1010 (1954).

That a person may not be punished for a crime without a formal and sufficient accusation even if he voluntarily submits to the jurisdiction of the court cannot be questioned, as it is regarded as fundamental that the accused must be tried only for the offense charged in the information. State v. Villa, 85 N.M. 537, 514 P.2d 56 (Ct. App. 1973).

Purposes of transcript. — Original purpose of transcript of evidence was to inform district attorney and to enlighten judgment of grand jury in determining whether an indictment should be presented; it now serves additional purpose of enlightening district attorney and attorney general as to what, if any, information is to be filed. State v. Melendrez, 49 N.M. 181, 159 P.2d 768 (1945).

Felony must be prosecuted by indictment or information. — A criminal complaint subscribed by a county sheriff and charging defendant with burglary and grand larceny was insufficient to invoke the jurisdiction of the court in that the crimes charged therein purport to be in each case a felony and such as can be prosecuted only upon indictment or presentment by a grand jury, or by an information filed by the district attorney, attorney general or their deputies, as required by this section. State v. Chacon, 62 N.M. 291, 309 P.2d 230 (1957).

Either indictment or information may be used. — District court has jurisdiction to try defendant who is proceeded against by criminal information filed by district attorney, even where defendant did not waive his right to be charged by grand jury indictment, because this section provides that district court proceedings may be based upon either method. State v. Vaughn, 82 N.M. 310, 481 P.2d 98, cert. denied, 403 U.S. 933, 91 S. Ct. 2262, 29 L. Ed. 2d 712 (1971).

Since the 1924 amendment to this section, defendant has had no right to be charged by a grand jury; rather he may be proceeded against by information. Flores v. State, 79 N.M. 420, 444 P.2d 605 (Ct. App. 1968).

Defendant who was charged by a criminal information was not entitled to be indicted by a grand jury because under this section, a defendant may be charged either by grand jury action or by a criminal information. State v. Mosley, 79 N.M. 514, 445 P.2d 391 (Ct. App. 1968).

Under this section, a defendant may be proceeded against either by a grand jury indictment or by a criminal information. State v. Burk, 82 N.M. 466, 483 P.2d 940 (Ct. App.), cert. denied, 404 U.S. 955, 92 S. Ct. 309, 30 L. Ed. 2d 271 (1971).

State may choose to proceed by indictment or information. — In the district court a prosecution proceeds either on the basis of indictment or information, and the choice is the state's. State v. Martinez, 92 N.M. 291, 587 P.2d 438 (Ct. App.), cert. quashed, 92 N.M. 260, 586 P.2d 1089 (1978).

Right not to be tried. — In the sense of a right not to be tried, the right conferred by this section is satisfied by an indictment valid on its face and returned by a legally constituted grand jury. Once such an indictment is returned, there exists no right not to be tried in the sense relevant to the underlying rationale for the collateral order doctrine nor a right for immediate review pursuant to a writ of error or pursuant to N.M. Const., art VI, § 2. State v. Augustin M., 2003-NMCA-065, 133 N.M. 636, 68 P.3d 182, cert. granted, 133 N.M. 727, 69 P.3d 237 (2003).

State may proceed by information after no-bill from grand jury. — Neither the N.M. Const. art. II, § 14, nor 31-6-11.1 NMSA 1978, limits the State's ability to proceed by information after a grand jury has returned a no-bill. State v. Isaac M., 2001-NMCA-088, 131 N.M. 235, 34 P.3d 624, cert. denied, 131 N.M. 221, 34 P.3d 610 (2002).

Effect of amendment of information. — Defendant is not injured where amendment to information apprises him of facts he might have requested by bill of particulars. State v. Shroyer, 49 N.M. 196, 160 P.2d 444 (1945).

Right to demand nature and cause of accusations. — Accused's right to demand nature and cause of accusation is expressly protected by bill of particulars. State v. Shroyer, 49 N.M. 196, 160 P.2d 444 (1945).

The New Mexico constitution does not require that an indictment recite all particulars of an offense. It says only that the accused shall have the right to "demand the nature and cause of the accusation." This can be done by a bill of particulars. State v. Shroyer, 49 N.M. 196, 160 P.2d 444 (1945); Ex parte Kelley, 57 N.M. 161, 256 P.2d 211 (1953).

Appellant was entitled "to demand the nature and cause of the accusation" against him under this section, and while that remedy was available by way of bill of particulars, he did not choose to make use of it. Consequently, any claimed error is waived. State v. Romero, 69 N.M. 187, 365 P.2d 58 (1961).

Although defendant has the right to demand the nature and cause of the accusations, in order to exercise this right defendant must pursue it, and where defendant never requests a hearing, the constitutional provision is waived. State v. Cebada, 84 N.M. 306, 502 P.2d 409 (Ct. App. 1972).

Where the defendant argues that he did not have official notice of the specific charge until the day of trial but his objection to proceeding to trial was pro forma only, he requested no continuance, he made no plea of surprise, he made no claim that he was not prepared for trial, nor did he assert prejudice, then his claim of error is without merit. State v. Valdez, 83 N.M. 632, 495 P.2d 1079 (Ct. App.), aff'd, 83 N.M. 720, 497 P.2d 231, cert. denied, 409 U.S. 1077, 93 S. Ct. 694, 34 L. Ed. 2d 666 (1972).

"Filing" required. — Neither the New Mexico constitution nor the rules of criminal procedure require that indictments be "returned in open court." Those provisions speak only in terms of "filing." State v. Ellis, 89 N.M. 194, 548 P.2d 1212 (Ct. App.), cert. denied, 89 N.M. 206, 549 P.2d 284 (1976).

Time of war or public danger. — When no war or state of public danger exists during the period in which the alleged felonious acts occurred, a military court would be wholly without jurisdiction to try members of the National Guard for the felonies with which they were charged. Clearly then, the civil courts must have jurisdiction to try for alleged violations. State ex rel. Sage v. Montoya, 65 N.M. 416, 338 P.2d 1051 (1959).

Waiver of indictment. — Prior to the 1924 amendment to this section, and in the constitution, as adopted, the permissive use of an information was surrounded by so many safeguards as to render it unlikely that the framers could have contemplated the requirements of this section could be waived otherwise than by the proviso in N.M. Const., art. XX, § 20. State v. Chacon, 62 N.M. 291, 309 P.2d 230 (1957).

Compliance with the terms of this section that no person shall be held to answer for certain crimes unless on presentment of indictment or information is mandatory and may not be made the subject of waiver. State v. Chacon, 62 N.M. 291, 309 P.2d 230 (1957).

"Criminal complaint" not sufficient. — Where a "criminal complaint" fails to meet the requirements of this section, it thereby denies the district court jurisdiction to accept the defendant's guilty plea and impose sentence upon him. State v. Chacon, 62 N.M. 291, 309 P.2d 230 (1957).

Charge in complaint kindred to that in information. — Procedural due process was satisfied where crime charged in complaint in magistrate's court was kindred to that to which defendant was held to answer in district court after a preliminary examination which was otherwise adequate and where information was in substantial accord with magistrate's commitment. State v. Melendrez, 49 N.M. 181, 159 P.2d 768 (1945).

Information need not correspond to arrest complaint. — Information may be framed according to facts developed at preliminary examination and need not correspond with complaint which served as basis for warrant on which accused was arrested, since it must be presumed that magistrate performed his duty fairly. State v. Melendrez, 49 N.M. 181, 159 P.2d 768 (1945).

Information must conform to the magistrate's bind-over order holding the accused to answer. State v. McCrary, 97 N.M. 306, 639 P.2d 593 (Ct. App. 1982).

Information may be amended to conform to bind-over order. — Where a magistrate held a preliminary hearing and orally announced that there was evidence to bind the defendant over for trial on three counts, but because of a clerical error the written bind-over order omitted two of the counts, the trial court may, upon motion, amend the information originally drawn up to conform to the written bind-over order, to include all three courts. State v. Coates, 103 N.M. 353, 707 P.2d 1163 (1985).

Information filed before magistrate's transcript. — An information for murder, filed six days before magistrate's transcript is filed, is not void for lack of jurisdiction, where defendant does not allege or offer to show that preliminary examination was not in fact held. State v. Parker, 34 N.M. 486, 285 P. 490 (1930).

Crimes not capital, felonious or infamous. — The constitution only requires capital, felonious or infamous crimes to be charged by indictment or information, and this provision of the New Mexico constitution is clear and unambiguous. State v. Marrujo, 79 N.M. 363, 443 P.2d 856 (1968).

Where the appellant is not charged with a capital, felonious or infamous crime, there is neither a constitutional nor statutory requirement that the appellant be charged by information or indictment. State v. Marrujo, 79 N.M. 363, 443 P.2d 856 (1968).

So long as the fine for criminal contempt which is, or may be, imposed is not more than $1000, there is no federal constitutional right to jury trial as the crime is a petty offense, nor need prosecution be by information. Seven Rivers Farm, Inc. v. Reynolds, 84 N.M. 789, 508 P.2d 1276 (1973).

The use of initials instead of words in a criminal complaint to identify the offense deprives defendant of due process of law. State v. Raley, 86 N.M. 190, 521 P.2d 1031 (Ct. App.), cert. denied, 86 N.M. 189, 521 P.2d 1030 (1974).

Failure to allege value of embezzled property. — Although information should have alleged value, jurisdiction does not depend upon the value of the property embezzled; value merely denotes the grade of the offense. Roehm v. Woodruff, 64 N.M. 278, 327 P.2d 339 (1958).

Allegation of ownership in larceny case. — Where alleged crime constituted both common-law larceny and statutory grand larceny, allegation that defendant "committed the crime of larceny" would be sufficient, since ownership was not "of the essence of the crime." State v. Shroyer, 49 N.M. 196, 160 P.2d 444 (1945).

Ownership need not be alleged in larceny cases where name given to offense by the common law or by statute is used in information. State v. Shroyer, 49 N.M. 196, 160 P.2d 444 (1945).

Since ownership in a particular individual is not an element of larceny, a statute may dispense with allegation of ownership in information. State v. Shroyer, 49 N.M. 196, 160 P.2d 444 (1945).

Murder. — Information stating that defendant did "murder" a named person is sufficient apprisal of offense charged. State v. Roy, 40 N.M. 397, 60 P.2d 646 (1936).

Manslaughter. — Information charging manslaughter was sufficient to satisfy constitutional requirement where it was in the form provided by 41-6-41, 1953 Comp., now repealed, and it enumerated the section defining the offense and the section fixing the penalty. State v. Romero, 69 N.M. 187, 365 P.2d 58 (1961).

Failure to name rape victim. — An information is not fatally defective in failing to name the victim of the statutory rape charged. Ex parte Kelley, 57 N.M. 161, 256 P.2d 211 (1953).

Indictment sufficient though arrest delayed. — Reasonableness of the conduct of the police in a particular case is to be weighed against the possible prejudice to the defendant resulting from delay in arrest, and where defendant's arrest was postponed in the interest of effective police work, and was not unreasonably delayed after the general investigation was concluded, refusal of the trial court to dismiss the indictment was not error. State v. Baca, 82 N.M. 144, 477 P.2d 320 (Ct. App. 1970).

III. PRELIMINARY EXAMINATION.

A preliminary examination is unknown to the common law and an accused is not entitled to such an examination, unless it is given him by constitutional or statutory provision. Pearce v. Cox, 354 F.2d 884 (10th Cir. 1965), cert. denied, 384 U.S. 976, 86 S. Ct. 1869, 16 L. Ed. 2d 685 (1966).

Defendant has a state constitutional right to a preliminary hearing. Baez v. Rodriguez, 381 F.2d 35 (10th Cir. 1967).

Where defendant is charged by an information, he has a constitutional right to a preliminary examination. State v. Archuleta, 82 N.M. 378, 482 P.2d 242 (Ct. App.), cert. denied, 82 N.M. 377, 482 P.2d 241 (1971).

When the charge is by criminal information, defendant has a right to a preliminary examination. State v. Vasquez, 80 N.M. 586, 458 P.2d 838 (Ct. App. 1969).

Right to hearing is matter of law. — The right to a preliminary hearing is not discretionary with the judge. A person is either entitled to it as a matter of law, or not at all. Williams v. Sanders, 80 N.M. 619, 459 P.2d 145 (1969).

But there exists no absolute right to a preliminary hearing, and this section leaves it in the discretion of the prosecutor to proceed by indictment and thus to obviate the

requirement of preliminary examination. State v. Peavler, 87 N.M. 443, 535 P.2d 650 (Ct. App.), rev'd on other grounds, 88 N.M. 125, 537 P.2d 1387 (1975); State v. Martinez, 92 N.M. 291, 587 P.2d 438 (Ct. App.), cert. quashed, 92 N.M. 260, 586 P.2d 1089 (1978).

Meaning of term "preliminary examination". — Court may assume that term "preliminary examination" was understood to mean preliminary examinations as were in vogue under existing laws of state at time constitutional amendment which is being construed was proposed and adopted. State v. Melendrez, 49 N.M. 181, 159 P.2d 768 (1945).

Purpose and nature of hearing. — A preliminary hearing is not a trial of the person charged with the view of determining his guilt or innocence. Purposes of preliminary examination are, inter alia, (1) to inquire concerning commission of crime and accused's connection with it, (2) to inform accused of nature and character of crime charged, (3) to enable state to take necessary steps to bring accused to trial in event there is probable cause for believing him guilty, (4) to perpetuate testimony and (5) to determine amount of bail which will probably secure attendance of accused to answer charge. State v. Archuleta, 82 N.M. 378, 482 P.2d 242 (Ct. App.), cert. denied, 82 N.M. 377, 482 P.2d 241 (1971); State v. Garcia, 79 N.M. 367, 443 P.2d 860 (1968); State v. Melendrez, 49 N.M. 181, 159 P.2d 768 (1945).

Hearing as federal right. — The right to a preliminary hearing in the state of New Mexico is one guaranteed by the state constitution and only becomes a federal constitutional guarantee by the equal protection clause of the fourteenth amendment because it is a part of the due process of the state. Silva v. Cox, 351 F.2d 61 (10th Cir. 1965), cert. denied, 383 U.S. 919, 86 S. Ct. 915, 15 L. Ed. 2d 673 (1966).

A defendant in a state court is not entitled to a preliminary examination by virtue of a federal constitutional right. Pearce v. Cox, 354 F.2d 884 (10th Cir. 1965), cert. denied, 384 U.S. 976, 86 S. Ct. 1869, 16 L. Ed. 2d 685 (1966).

The preliminary hearing is a critical stage of a criminal proceeding in which counsel must be made available. Neller v. State, 79 N.M. 528, 445 P.2d 949 (1968).

Magistrate's jurisdiction over complaint is to conduct a preliminary hearing and, if probable cause is found that the defendant committed an offense, to bind him over to district court for trial. State v. Martinez, 92 N.M. 291, 587 P.2d 438 (Ct. App.), cert. quashed, 92 N.M. 260, 586 P.2d 1089 (1978).

Duties of magistrate. — Magistrate must determine from preliminary examination as a whole, and not merely from complaint alone, what offense has been committed; commitment by magistrate must name the offense found as a result of such examination. State v. Melendrez, 49 N.M. 181, 159 P.2d 768 (1945).

The effect of denying a constitutional right at a preliminary examination is the same as though there had been no hearing. State v. Vaughn, 74 N.M. 365, 393 P.2d 711 (1964); Mascarenas v. State, 80 N.M. 537, 458 P.2d 789 (1969).

No right to preliminary examination under indictment. — A reading of this section clearly reveals that no right to a preliminary examination exists when the presentment against an accused is by a grand jury indictment. State v. Mosley, 75 N.M. 348, 404 P.2d 304 (1965).

If the state chooses to proceed by indictment, the defendant has no right to a preliminary hearing, even where the proceedings against the defendant are initiated by a criminal complaint in magistrate court. State v. Peavler, 88 N.M. 125, 537 P.2d 1387 (1975).

Where defendant is not proceeded against by information, but by indictment, he is not entitled to a preliminary examination. The fact that proceedings against him are first initiated by a criminal complaint in the magistrate court does not obligate the state to proceed by preliminary examination and information rather than by indictment. State v. Ergenbright, 84 N.M. 662, 506 P.2d 1209 (1973).

This provision affords a right to a preliminary hearing when the accused is charged by a criminal information, but does not afford a right to a preliminary hearing when the accused is indicted by a grand jury. State v. Salazar, 81 N.M. 512, 469 P.2d 157 (Ct. App. 1970).

Standard of proof at preliminary hearing. — The test at a preliminary hearing is not whether guilt is established beyond a reasonable doubt, but whether there is that degree of evidence to bring within reasonable probabilities the fact that a crime was committed by the accused. State v. Garcia, 79 N.M. 367, 443 P.2d 860 (1968).

Admissibility in appellate court of preliminary hearing testimony. — The district attorney's statements that the state attempted to subpoena a material witness and that he was out of state were no more than bare recitals unsupported by factual elaboration, and where the record contained no evidence as to the circumstances of the state's alleged attempt and inability to subpoena the witness, the court of appeals refused to hold that the witness was unavailable for trial, and under Rule 804, N.M.R. Evid. (see now Rule 11-804 NMRA) the witness's preliminary hearing testimony was not admissible in evidence. State v. Mann, 87 N.M. 427, 535 P.2d 70 (Ct. App. 1975).

Hearing is prerequisite to holding on information. — This section requires a preliminary examination before an examining magistrate, or its waiver, as a prerequisite to holding any person on a criminal information. Mascarenas v. State, 80 N.M. 537, 458 P.2d 789 (1969).

Accused may challenge right of state to proceed against him until he has been accorded a valid preliminary hearing, unless he has theretofore waived his right thereto.

Such challenge may be made by a plea in abatement or any other appropriate manner. Pearce v. Cox, 354 F.2d 884 (10th Cir. 1965), cert. denied, 384 U.S. 976, 86 S. Ct. 1869, 16 L. Ed. 2d 685 (1966).

The absence of either a preliminary examination or its intelligent waiver, or the denial of representation by counsel at such hearing, may be called to the attention of the court at any time prior to arraignment, by plea in abatement or in any other appropriate manner. State v. Vaughn, 74 N.M. 365, 393 P.2d 711 (1964); State v. Vega, 78 N.M. 525, 433 P.2d 504 (1967).

The jurisdiction of the district court, acquired by the filing of the information, may be lost "in the course of the proceeding" by failure to remand for a preliminary examination when its absence is timely brought to the court's attention. State v. Vaughn, 74 N.M. 365, 393 P.2d 711 (1964); State v. Vega, 78 N.M. 525, 433 P.2d 504 (1967).

Violation determined initially by state courts. — Where defendant, in federal habeas corpus, alleges that he was denied a preliminary hearing in violation of this section, when the federal court can find no indication, either in the record or by reference in appellant's brief, that the contention has been presented to and argued before New Mexico's state courts, the argument will not be decided by the federal court until first referred to the state judiciary. Campos v. Baker, 442 F.2d 331 (10th Cir. 1971).

Denial of the right of a defendant to call witnesses in his behalf, at a preliminary examination, was error which required the trial judge to sustain a plea in abatement for a full and complete preliminary examination. Mascarenas v. State, 80 N.M. 537, 458 P.2d 789 (1969).

Arraignment. — The statutes do not provide for an arraignment before a justice of the peace; rather, they provide for a preliminary examination by a committing magistrate and arraignment and trial before the district court. However, it is the practice for the magistrate to arraign the defendant at preliminary examination. State v. Elledge, 78 N.M. 157, 429 P.2d 355 (1967).

Powers of visiting judge. — Nonresident judge who sits at request of resident judge is vested with all the latter's powers, including that of holding preliminary hearings. State v. Encinias, 53 N.M. 343, 208 P.2d 155 (1949).

Hearing or waiver need not be proved by state. — The state, prosecuting by information, need not allege or prove that accused has had or waived preliminary examination. State v. Vigil, 33 N.M. 365, 266 P. 920 (1928).

Same charge in hearing and amended information. — Where information is amended, defendant has no constitutional right to an additional preliminary hearing when the preliminary hearing and the amended information pertain to the same statutory charge. State v. Archuleta, 82 N.M. 378, 482 P.2d 242 (Ct. App.), cert. denied, 82 N.M. 377, 482 P.2d 241 (1971).

The state is entitled to a preliminary examination notwithstanding a waiver of the same by the accused. 1965 Op. Att'y Gen. No. 65-149.

Counsel at preliminary examination. — The amount of time counsel spends with defendant prior to a hearing provides no basis for post-conviction relief, as the competence and effectiveness of counsel cannot be determined by the amount of time counsel spends or fails to spend with defendant. Maimona v. State, 82 N.M. 281, 480 P.2d 171 (Ct. App. 1971).

If represented by counsel when arraigned in district court, if no objection is made to a lack of counsel at the preliminary hearing stage, or even of the total absence of a preliminary, without a showing of prejudice, there is a waiver of the right to counsel at the earlier stages. Neller v. State, 79 N.M. 528, 445 P.2d 949 (1968).

Defendant's assertion that two prior felony convictions could not be used against him in prosecution under habitual criminal statute because they were constitutionally defective due to the absence of counsel at his preliminary examination in both prior felony convictions was without merit where the record showed that in each of the two prior felony convictions, defendant entered pleas of guilty, that in each of the guilty pleas, defendant had the advice of counsel, and where no claim was made that the pleas were involuntary, defendant's claimed defect was therefore waived when he pleaded guilty in the two prior felony proceedings. State v. Lopez, 84 N.M. 600, 506 P.2d 344 (Ct. App. 1973).

Absent a showing of prejudice, complaint of absence of counsel during interrogation by authorities and at preliminary hearing is waived by guilty plea. State v. Archie, 78 N.M. 443, 432 P.2d 408 (1967).

The right to representation at the preliminary hearing is waived upon entering a plea in district court when represented by counsel. State v. Sisk, 79 N.M. 167, 441 P.2d 207 (1968).

Failure to assign counsel prior to preliminary examination of an indigent defendant in a noncapital case is not ground for vacating a conviction or sentence based upon a plea of guilty, at least without a showing that prejudice resulted therefrom. Sanders v. Cox, 74 N.M. 524, 395 P.2d 353 (1964), cert. denied, 379 U.S. 978, 85 S. Ct. 680, 13 L. Ed. 2d 569 (1965).

Representation of juvenile by counsel at or during the preliminary investigation can be waived, if this is done knowingly and intelligently. Further, waiver is accomplished when, upon arraignment with counsel in district court, no objection is made to the failure to be represented by counsel during the juvenile court investigation. Neller v. State, 79 N.M. 528, 445 P.2d 949 (1968).

If, at the time of arraignment, complaint had been made that counsel had not been provided in juvenile court, it would possibly have been error for the district court to

refuse to remand to the juvenile court for a proper hearing. But if no objection is voiced, no reason can be advanced to hold there was no waiver of such defect in juvenile court when it is clear that the same shortcoming in the preliminary hearing was effectively waived. Neller v. State, 79 N.M. 528, 445 P.2d 949 (1968), commented on in 9 Nat. Resources J. 310 (1969).

Where juvenile petitioner received all benefits to which he would have been entitled as an adult, his voluntary plea of guilty after consulting counsel, and no showing of prejudice being made, amounted to a waiver of prior failure to provide counsel at a preliminary hearing. Neller v. State, 79 N.M. 528, 445 P.2d 949 (1968), commented on in 9 Nat. Resources J. 310 (1969).

The right to counsel at the preliminary hearing or arraignment in the district court can be competently and intelligently waived and in doing so the constitutional rights of the accused will not be abridged. State v. Cisneros, 77 N.M. 361, 423 P.2d 45 (1967).

The entry of a plea in the district court after intelligent waiver of counsel, or when represented by competent counsel, served as a waiver of any defects in the preliminary hearing, including failure to advise of right or to provide counsel. State v. Blackwell, 76 N.M. 445, 415 P.2d 563 (1966).

Driving while intoxicated. — An accused has no right to a preliminary hearing on a misdemeanor charge of driving while intoxicated. State v. Greyeyes, 105 N.M. 549, 734 P.2d 789 (Ct. App. 1987).

Waiver of preliminary examination. — A defendant who enters plea on arraignment without raising his objection waives right to a preliminary examination. State v. Gallegos, 46 N.M. 387, 129 P.2d 634 (1942).

In case where accused, when brought before examining magistrate, was told that he was entitled to have counsel represent him, that he was entitled to a continuance if he desired, and that it was not necessary for him to plead, but after being so advised accused stated that he was ready to plead, and pleaded guilty, he expressly waived a preliminary examination. State v. Alaniz, 55 N.M. 312, 232 P.2d 982 (1951).

Defendant, by his voluntary plea of guilty to the charge on which he was convicted and sentenced, waived his rights to a preliminary hearing with representation by counsel. State v. Marquez, 79 N.M. 6, 438 P.2d 890 (1968).

Objection that preliminary examination has not been waived must be raised before plea. State v. Vigil, 33 N.M. 365, 266 P. 920 (1928).

The trial court did not err in putting appellant to trial upon an information filed prior to the preliminary examination since, although no person shall be held on information without having had or waived a preliminary examination, appellant not only was accorded a

hearing but waived this right by his plea. State v. Bailey, 62 N.M. 111, 305 P.2d 725 (1956).

The entry of a plea after intelligent waiver of counsel or when represented by competent counsel serves as a waiver of the right to a preliminary examination. State v. Darrah, 76 N.M. 671, 417 P.2d 805 (1966).

Where defendant enters a plea of guilty, he waives his right to a preliminary examination. State v. Darrah, 76 N.M. 671, 417 P.2d 805 (1966).

A plea of guilty or not guilty to an information filed in a district court, in which case no preliminary hearing has been held, constitutes a waiver of the constitutional right to a preliminary examination. Silva v. Cox, 351 F.2d 61 (10th Cir. 1965), cert. denied, 383 U.S. 919, 86 S. Ct. 915, 15 L. Ed. 2d 673 (1966).

The state constitutional guarantee of a preliminary hearing may be waived before a magistrate if the accused acknowledges his guilt of the offense charged. Silva v. Cox, 351 F.2d 61 (10th Cir. 1965), cert. denied, 383 U.S. 919, 86 S. Ct. 915, 15 L. Ed. 2d 673 (1966).

A defendant waives his right to a preliminary hearing when he competently, understandingly and voluntarily pleads to a charge, without asserting the absence of a preliminary hearing. Guerra v. Rodriguez, 372 F.2d 472 (10th Cir. 1967).

Defendant waived his right to a preliminary examination when he competently, understandingly and voluntarily pled to an information, without challenging the information on the ground that he had not been accorded a valid preliminary examination. Cranford v. Rodriguez, 373 F.2d 22 (10th Cir. 1967).

A defendant waives his right to a preliminary examination when he competently, understandingly and voluntarily pleads to an information, without challenging the information on the ground that he had not been accorded either a preliminary examination or a valid preliminary examination. Pearce v. Cox, 354 F.2d 884 (10th Cir. 1965), cert. denied, 384 U.S. 976, 86 S. Ct. 1869, 16 L. Ed. 2d 685 (1966).

Defendant was entitled to a preliminary examination, at which he would be accorded his constitutional rights, before being placed on trial on the information, but he waived that right by his plea of not guilty, entered when he was adequately represented by counsel. The fact that the preliminary examination proceedings were void did not render defendant immune from a trial on the information, since at such trial he was provided with competent counsel and otherwise accorded his constitutional rights. Pece v. Cox, 354 F.2d 913 (10th Cir. 1965), cert. denied, 384 U.S. 1020, 86 S. Ct. 1984, 16 L. Ed. 2d 1044 (1966).

Defendant may be charged by information in the state district court, notwithstanding he either has not had a preliminary examination or has not had a valid preliminary

examination. Pearce v. Cox, 354 F.2d 884 (10th Cir. 1965), cert. denied, 384 U.S. 976, 86 S. Ct. 1869, 16 L. Ed. 2d 685 (1966).

The question of whether a preliminary hearing was competently waived is one of fact and cannot be established by the mere written waiver executed without the advice of counsel. The competency of such a waiver can only be determined after a hearing thereon. State v. Vega, 78 N.M. 525, 433 P.2d 504 (1967).

There is nothing in either the due process clause, nor in any decision which requires a remand to the magistrate's court, to permit an accused thereto waive his right to have a preliminary examination represented by counsel, rather than to waive the right in the district court to be so remanded. State v. Vaughn, 74 N.M. 365, 393 P.2d 711 (1964).

Where defendant's defense may have been prejudiced by the failure to grant a preliminary examination and when its absence was timely called to the court's attention, entry of a plea upon arraignment in the district court did not operate as a waiver of defendant's right to the preliminary examination. State v. Vega, 78 N.M. 525, 433 P.2d 504 (1967).

If the accused has waived a preliminary examination, the state does not have an independent right to compel a preliminary examination over the defendant's waiver. State ex rel. Whitehead v. Vescovi-Dial, 1997-NMCA-126, 124 N.M. 375, 950 P.2d 818, cert. denied, 949 P.2d 282 (N.M. 1997).

IV. GRAND JURY.

For history of institution of grand jury, see Buzbee v. Donnelly, 96 N.M. 692, 634 P.2d 1244 (1981).

Number of grand jurors. — The amendment to this article which took effect January 1, 1925, changing the number of grand jurors necessary to find an indictment, did not infringe any substantial or constitutional guaranty and was not ex post facto in applying to offenses committed prior to its adoption. State v. Kavanaugh, 32 N.M. 404, 258 P. 209 (1927).

A grand jury composed of more than 12 members is not a grand jury under the state constitution, and an indictment returned by that body is void and ineffective. State v. Garcia, 61 N.M. 404, 301 P.2d 337 (1956).

Fair cross section of community. — The right to a jury reflecting a fair cross section of the community under the New Mexico Constitution is at least as broad as that guaranteed by the sixth amendment of the federal constitution. State v. Gonzales, 111 N.M. 590, 808 P.2d 40 (Ct. App. 1991).

Intentional discrimination. — New Mexico Const., art. II, §§ 14 and 18 preclude the state from using its peremptory challenges to strike jurors because of gender in a criminal case. State v. Gonzales, 111 N.M. 590, 808 P.2d 40 (Ct. App. 1991).

The mere showing that the state has used its challenges to exclude members of a cognizable group will not, by itself, establish a prima facie showing. State v. Gonzales, 111 N.M. 590, 808 P.2d 40 (Ct. App. 1991).

It is not essential that all of the members of a cognizable group be removed from the jury in order to establish a prima facie case of purposeful discrimination. State v. Gonzales, 111 N.M. 590, 808 P.2d 40 (Ct. App. 1991).

Although a showing that the state's challenges have caused the jury to contain no members of a cognizable group may help raise an inference of discrimination, this is not dispositive of the issue. State v. Gonzales, 111 N.M. 590, 808 P.2d 40 (Ct. App. 1991).

Burden of proof in intentional discrimination cases. — Once a defendant makes a prima facie showing of purposeful discrimination against members of a cognizable group, the burden shifts to the state to articulate a neutral explanation for the challenge that is related to the particular case and gives a clear, concise, reasonably specific, legitimate explanation for excusing the jurors. The determination of whether a defendant has made a prima facie showing and the determination of whether the defendant has carried his burden of persuasion on the issue are both factual determinations and are reviewed by this court under the substantial evidence standard. State v. Gonzales, 111 N.M. 590, 808 P.2d 40 (Ct. App. 1991).

To raise and resolve allegations of intentional discrimination on the basis of gender, a defendant must make a prima facie showing that the prosecution has used its peremptory challenges to purposefully discriminate against an excluded group. This prima facie showing may be made by showing 1) that the state has exercised its peremptory challenges to remove members of a cognizable group from the jury panel, and 2) that these facts and any other relevant circumstances raise an inference that the state used its challenges to exclude members of the panel solely on account of their membership in the excluded group. State v. Gonzales, 111 N.M. 590, 808 P.2d 40 (Ct. App. 1991).

Method of convening. — A grand jury may be convened either upon a taxpayer's petition or by an order of the district judge. State v. Mosley, 75 N.M. 348, 404 P.2d 304 (1965).

Duty of judge to comply with petition for grand jury. — A district judge does not enjoy discretionary authority to refuse to convene a grand jury requested by petition; a judge is mandated to convene the grand jury or otherwise substantially comply with the request. Cook v. Smith, 114 N.M. 41, 834 P.2d 418 (1992).

Petitions must contain sufficient information. — District courts may limit grand jury investigations to specific incidents identified in the petition. Therefore petition to convene a grand jury must contain sufficient information to enable the court to determine whether the petitioners seek a legitimate inquiry into alleged criminal conduct or malfeasance of a public official or whether petitioners seek nothing more than a witch hunt. District Court v. McKenna, 118 N.M. 402, 881 P.2d 1387 (1994), cert. denied, 514 U.S. 1018, 115 S. Ct. 1361, 131 L. Ed. 2d 218 (1995).

Effect of improper motives of signatory. — If a petition to convene a grand jury sufficiently delimits an area of inquiry that colorably lies within the permissible scope of grand jury inquiry and there is no challenge to the geographical jurisdiction or to the applicable statute of limitations, the petition should be granted. Although our system of justice does not allow the grand jury to be used as a tool by any dissatisfied person or political faction to intimidate or threaten a governing body, the improper motives of one signatory in the petition cannot be imputed to all of the other signatories. Pino v. Rich, 118 N.M. 426, 882 P.2d 17 (1994).

Specific areas of inquiry established by statute. — In New Mexico, a grand jury may not lawfully inquire into any matter whatsoever. Specific areas of inquiry by a grand jury are established by statute. 1982 Op. Att'y Gen. No. 82-14.

Residence as qualification for grand jury service is question of fact. State v. Watkins, 92 N.M. 470, 590 P.2d 169 (Ct. App. 1979).

Residence for jury service similar to voting residence. — There is a similarity between residence for the purpose of voting and residence for the purpose of serving as a juror. State v. Watkins, 92 N.M. 470, 590 P.2d 169 (Ct. App. 1979).

Residency not destroyed by temporary absence. — The temporary absence of a person from the county of his residence, without the intention of abandoning that residence, will not destroy that person's qualification to serve as a grand juror. State v. Watkins, 92 N.M. 470, 590 P.2d 169 (Ct. App. 1979).

Effect of attack on eligibility of grand juror. — An attack on the eligibility of one grand juror does not raise an issue as to the jurisdiction of the court, but goes only to the procedural requirements for returning an indictment. State v. Velasquez, 99 N.M. 109, 654 P.2d 562 (Ct. App.), cert. denied, 99 N.M. 160, 655 P.2d 160 (1982).

V. PERSONAL APPEARANCE.

Private conversation between judge and individual juror not reversible error. — No reversible error exists where the judge confers with prospective individual jurors without the presence of defendant or defense counsel when the conversation was invited by defense counsel and did not prejudice defendant. State v. Henry, 101 N.M. 277, 681 P.2d 62 (Ct. App. 1984).

Questioning defendant's rights improper. — The prosecutor's questioning of the defendant concerning his right to sit at the counsel table and hear everybody testify before he told his story was improper. State v. Carrasco, 1996-NMCA-114, 122 N.M. 554, 928 P.2d 939, rev'd on other grounds, 1997-NMSC-047, 124 N.M. 64, 946 P.2d 1075.

Post-conviction relief. — Under Rule 93, N.M.R. Civ. P. (see now Rule 5-802 NMRA) (only applied to post-conviction motions made prior to September 1, 1975), a court could hear and determine a post-conviction motion without the presence of the prisoner. To do so was not a denial of the constitutional right "to appear and defend" in criminal proceedings because prior to enactment of Rules of Criminal Procedure, post-conviction proceedings were civil, not criminal. State v. Hibbs, 82 N.M. 722, 487 P.2d 150 (Ct. App. 1971).

Where the motion for post-conviction relief is completely groundless, the trial court may determine the motion without the presence of defendant. State v. Sanchez, 78 N.M. 25, 420 P.2d 786 (Ct. App. 1966).

VI. REPRESENTATION BY COUNSEL.

A. RIGHT TO COUNSEL.

Cross-references. — For cases dealing with counsel representation at preliminary examinations specifically, see analysis line III above.

Representation at critical stage of proceeding. — Defendant is entitled to be represented by counsel at every critical stage of the proceeding. Pearce v. Cox, 354 F.2d 884 (10th Cir. 1965), cert. denied, 384 U.S. 976, 86 S. Ct. 1869, 16 L. Ed. 2d 685 (1966).

Right to counsel at a lineup is essential to due process. State v. Garcia, 80 N.M. 21, 450 P.2d 621 (1969).

Right to counsel during custodial interview. — Defendant had a right to have counsel present at the time of statement made during interview while defendant was in custody. State v. Lewis, 80 N.M. 274, 454 P.2d 360 (Ct. App. 1969), overruled on other grounds, State v. Nemrod, 85 N.M. 118, 509 P.2d 885 (Ct. App. 1973).

Right to assistance of counsel applies to both trial and appeal. State v. Lewis, 104 N.M. 218, 719 P.2d 445 (Ct. App. 1986).

Imprisonment contingent on assistance. — The sixth amendment to the United States constitution and this section guarantee the assistance of counsel to an accused. Courts have interpreted these provisions as requiring that no indigent criminal, whether accused of a felony or misdemeanor, may be sentenced to a term of imprisonment

unless the state has afforded the accused the right to assistance of appointed counsel. 1987 Op. Att'y Gen. No. 87-43.

Right while under D.U.I. custodial arrest. — A person issued a citation and placed under custodial arrest for driving while under the influence of intoxicating liquor does not have a constitutional right to counsel immediately following a breath alcohol test since it did not amount to initiation of judicial criminal proceedings or prosecutorial commitment, nor was the period following administration of the test a critical stage. State v. Sandoval, 101 N.M. 399, 683 P.2d 516 (Ct. App. 1984).

Mandatory jail sentence upon DWI conviction. — Provision of 66-8-102 NMSA 1978 subjecting a defendant who refuses to submit to chemical testing to a mandatory jail sentence upon conviction of DWI does not violate the constitutional right to counsel. State v. Kanikaynar, 1997-NMCA-036, 123 N.M. 283, 939 P.2d 1091; Kanikaynar v. Sisneros, 190 F.3d 1115 (10th Cir. 1999), cert. denied, 528 U.S. 1090, 120 S. Ct. 821, 145 L. Ed. 2d 691 (2000).

Right to counsel at arraignment. — A defendant has a constitutional right to counsel in criminal proceedings and thus has a constitutional right to be represented by counsel at his arraignment. State v. Torres, 81 N.M. 521, 469 P.2d 166 (Ct. App.), cert. denied, 81 N.M. 506, 469 P.2d 151 (1970).

Hearing for suspension of jail sentence. — Where petitioner had no counsel at hearing where the suspension of jail sentence was revoked and he was ordered committed, where he was not advised of his right to have counsel appointed if he desired and was indigent, and where there was no intelligent waiver of that right, there was a denial of his constitutional rights. Blea v. Cox, 75 N.M. 265, 403 P.2d 701 (1965), overruled on other grounds State v. Mendoza, 91 N.M. 688, 579 P.2d 1255 (1978).

Right to court-appointed counsel. — Absent competent and intelligent waiver, a person charged with crime in a state court who is a pauper and unable to employ counsel is entitled to have an attorney appointed to defend him. State v. Dalrymple, 75 N.M. 514, 407 P.2d 356 (1965).

When the offense with which the defendant is charged is punishable by imprisonment in the penitentiary, the court is required to assign counsel if the prisoner has not the financial means to procure counsel. State v. Anaya, 76 N.M. 572, 417 P.2d 58 (1966).

No indigent criminal defendant may be sentenced to a term of imprisonment unless the state has afforded him the right to assistance of appointed counsel in his defense. 1981 Op. Att'y Gen. No. 81-4.

Showing of indigency is prerequisite to the right of court-appointed counsel. State v. Powers, 75 N.M. 141, 401 P.2d 775 (1965).

It is not necessary for indigent defendant to request the appointment of counsel in order to preserve his right to counsel. Pearce v. Cox, 354 F.2d 884 (10th Cir. 1965), cert. denied, 384 U.S. 976, 86 S. Ct. 1869, 16 L. Ed. 2d 685 (1966).

Determination of indigency. — The limited determination of indigency for purposes of right to court-appointed counsel under the standard of pauperism does not conform to constitutional mandate. Anaya v. Baker, 427 F.2d 73 (10th Cir. 1970).

No right to appointment of particular counsel. — An indigent defendant may not compel the court to appoint such counsel as defendant may choose. Such appointment lies within the sound discretion of the trial court. State v. Salazar, 81 N.M. 512, 469 P.2d 157 (Ct. App. 1970).

Defendant is not entitled as matter of right to participate as cocounsel in his own defense with his court-appointed counsel. State v. Martinez, 95 N.M. 421, 622 P.2d 1041 (1981).

Standby counsel. — Even when standby counsel is appointed, the trial court must ensure that defendant is aware of the hazards and disadvantages of self-representation. Although appointment of standby counsel is preferred, the presence of advisory counsel in the courtroom does not, by itself, relieve the trial court of its duty to ensure that defendant's waiver is made knowingly and intelligently. State v. Castillo, 110 N.M. 54, 791 P.2d 808 (Ct. App. 1990).

A knowing and voluntary waiver of counsel was not established, where the trial court, without further inquiry of defendant concerning whether he in fact desired to proceed pro se, informed the jury that defendant had fired his public defender and would be representing himself, and then instructed the trial attorney to remain at counsel table as standby counsel. State v. Castillo, 110 N.M. 54, 791 P.2d 808 (Ct. App. 1990).

Refusal to permit counsel to argue point. — On charge that buyer under conditional sales contract unlawfully obtained possession of automobile valued at more than $100, refusal to permit accused's counsel to argue whether such value had been established by evidence violated accused's constitutional right to representation by counsel and statutory right to be heard before jury by an attorney. State v. Shedoudy, 45 N.M. 516, 118 P.2d 280 (1941).

No right to counsel when motion groundless. — Where the motion for post-conviction relief is completely groundless, the trial court need not appoint counsel to represent defendant in connection with the motion. State v. Sanchez, 78 N.M. 25, 420 P.2d 786 (Ct. App. 1966).

Or unless substantial issue raised. — Counsel was not required to be appointed to represent defendant in connection with his post-conviction motion until a factual basis was alleged which raised a substantial issue. State v. Barefield, 80 N.M. 265, 454 P.2d 279 (Ct. App. 1969).

Determination of whether right has been denied. — The obligation of the state court trial judge to fully safeguard the right to counsel has been stated many times by the United States supreme court. That court has stated that no hard and fast rule may be promulgated whereby it can be determined that a defendant's constitutional right to due process of law has been infringed. Rather, this determination must turn on the particular facts of each case, the circumstances present, which shall include consideration of the background, training, experience and conduct of the defendant. State v. Coates, 78 N.M. 366, 431 P.2d 744 (1967).

Denial of right does not invalidate subsequent proceedings. — Where for six days after his arrest defendant was interrogated from time to time by officials but gave no statement and was not allowed to retain or consult with an attorney, defendant was denied his constitutional right to counsel during the first six days after his arrest. However, the denial of a naked constitutional right does not invalidate all subsequent proceedings nor necessarily prevent an accused from acting voluntarily in such proceedings, and where defendant subsequently retained counsel and pleaded guilty upon his advice, the plea was held to be voluntarily given. Murillo v. Cox, 360 F.2d 29 (10th Cir. 1966).

Failure to advise defendant of right to counsel. — Where failure of the police to advise the petitioner of his right to counsel or of his right to remain silent prior to interrogation of him was not shown to have been prejudicial to him at the trial, and no statement was in fact made nor was any testimony offered at the trial concerning any statement asserted to have been made by him, and there was nothing to indicate that the officers may have obtained evidence of any nature as a result of petitioner's statements, then the denial of a naked constitutional right does not invalidate all subsequent proceedings. State v. Selgado, 78 N.M. 165, 429 P.2d 363 (1967).

It is always open to an accused to subjectively deny that he understood the precautionary warning and advice with respect to his right to remain silent and to assistance of counsel, and when the issue is raised in an admissibility hearing it is for the court to objectively determine whether in the circumstances of the case the words were sufficient to convey the required warning. State v. Ramirez, 89 N.M. 635, 556 P.2d 43 (Ct. App. 1976), overruled on other grounds, City of Albuquerque v. Haywood, 1998-NMCA-029, 954 P.2d 93 (Ct. App. 1997).

Failure to object to lack of counsel. — Where defendant, with counsel, proceeded to trial without raising the issue of lack of counsel at arraignment or failure of the trial judge to advise defendant of his right to counsel, defendant waived the claimed error. Under such circumstances, court of appeals was not presuming waiver from a silent record, because the waiver appeared affirmatively. State v. Torres, 81 N.M. 521, 469 P.2d 166 (Ct. App.), cert. denied, 81 N.M. 506, 469 P.2d 151 (1970).

Failure to object constitutes waiver of defects in proceedings. — Appellant could not complain of deprivation of constitutional rights when he was provided with competent counsel in the district court before arraignment, was allowed to preserve his

right to object to any prior denial of rights, and then went to trial without raising the issue of prior failure to provide counsel. By so proceeding, he effectively waived his right to object to prior defects in the proceedings. State v. Blackwell, 76 N.M. 445, 415 P.2d 563 (1966).

Vacillation by defendant may constitute waiver. — When an indigent defendant vacillates as to whether he desires to act pro se or have the services of court-appointed counsel, his vacillation may constitute a waiver of his right to self-representation. State v. Lewis, 104 N.M. 677, 726 P.2d 354 (Ct. App. 1986).

Effect of guilty plea. — By pleading guilty the defendant admits the acts well pleaded in the charge, waives all defenses other than that the indictment or information charges no offense, and waives the right to trial and the incidents thereof, and the constitutional guarantees with respect to the conduct of criminal prosecutions, including right to jury trial, right to counsel subsequent to guilty plea and right to remain silent. State v. Daniels, 78 N.M. 768, 438 P.2d 512 (1968).

Defendant, who voluntarily pleaded guilty, was not entitled to a post-conviction hearing under Rule 93, N.M.R. Civ. P. (see now Rule 5-802 NMRA) (only applied to post-conviction motions before September 1, 1975), for the purpose of determining whether or not the state obtained evidence, which warranted the filing of the complaint, as a result of a claimed questioning of him contrary to his constitutional rights to remain silent and to the aid of counsel. State v. Brewster, 78 N.M. 760, 438 P.2d 170 (1968).

Where no prejudice results from failure to assign counsel. — Failure to assign counsel to represent defendant before the magistrate or at his arraignment did not abridge defendant's constitutional rights where no prejudice was shown. Gantar v. Cox, 74 N.M. 526, 395 P.2d 354 (1964).

The absence of counsel at arraignment, the lack of a specific waiver by defendant, or the failure of the judge to specifically advise the defendant of his right to have appointed counsel at the arraignment does not amount to reversible error absent a showing of prejudice. State v. Torres, 81 N.M. 521, 469 P.2d 166 (Ct. App.), cert. denied, 81 N.M. 506, 469 P.2d 151 (1970).

Where there was no evidence that the circumstances surrounding the arrest, the fact that the defendant had been in jail overnight without arraignment or the fact that he had no lawyer, in any way rendered his statement involuntary and as the trial court ruled, as a matter of law, that the confession was voluntary before submitting it to the jury under proper instructions requiring the jury to consider any questions concerning whether it was voluntary, defendant's constitutional rights were not abridged. State v. James, 83 N.M. 263, 490 P.2d 1236 (Ct. App. 1971), overruled on other grounds State v. Victorian, 84 N.M. 491, 505 P.2d 436 (1973).

Where defendant was given a hearing to ascertain if his confession was in fact involuntary on his Rule 93, N.M.R. Civ. P. (see now Rule 5-802 NMRA) motion (only

applied to post-conviction proceedings prior to September 1, 1975) and the trial court found the statement or confession was voluntary, the fact that he was not furnished counsel prior to giving the statement is not a basis for setting aside his conviction. Burton v. State, 82 N.M. 328, 481 P.2d 407 (1971).

Reference in testimony to exercise of right to counsel. — Defendant's argument that if the exercise of defendant's right to counsel lacked significant probative value any reference to the exercise of the right had an intolerable prejudicial impact requiring reversal was without merit since the relevant question is whether the particular defendant has been harmed by the state's use of the fact that he engaged in constitutionally protected conduct, not whether, for the particular defendant or for persons generally, the state's reference to such activity has burdened or will burden the exercise of the constitutional right. State v. McGill, 89 N.M. 631, 556 P.2d 39 (Ct. App. 1976).

Where the state elicited the fact that defendant engaged in constitutionally protected conduct (having a lawyer present at a lineup) only to show the fairness of the lineup procedure, defendant was not harmed by testimony that defendant had a right to counsel, and the trial court properly denied his motion for a mistrial. State v. McGill, 89 N.M. 631, 556 P.2d 39 (Ct. App. 1976).

Statement admissible though advice to right of counsel not given. — Trial court did not err in allowing admission of evidence of incriminating statement voluntarily made by defendant after he was arrested and released on bond, but was no longer in custody or being questioned, and where such statement was obtained neither surreptitiously nor by threat or promise, without prior showing of evidence that at the time of the claimed admission the defendant had been fully advised of his right to advice of legal counsel and his right not to be compelled to testify against himself. State v. James, 76 N.M. 376, 415 P.2d 350 (1966).

Waiver of right to counsel. — Where officer knew that defendant had counsel and interviewed defendant without giving counsel an opportunity to be present, the officer's conduct was disapproved, but that did not make defendant's statement inadmissible if he intelligently waived the right to have counsel present. State v. Lewis, 80 N.M. 274, 454 P.2d 360 (Ct. App. 1969), overruled on other grounds, State v. Nemrod, 85 N.M. 118, 509 P.2d 885 (Ct. App. 1973).

Where a defendant, old enough to act intelligently, dismissed his attorney following advice from relatives and friends and thereafter entered a plea of guilty, fact that he was disappointed in severity of his sentence was insufficient for setting it aside. State v. Garcia, 47 N.M. 319, 142 P.2d 552 (1943).

Defendant charged with murder who had competent legal assistance from time shortly following his arrest until a day or two before sentence, when he discharged counsel, was not denied due process when shortly thereafter he withdrew his plea of not guilty

and pleaded guilty to second-degree murder. State v. Garcia, 47 N.M. 319, 142 P.2d 552 (1943).

It may be assumed that a defendant, who had assistance of counsel for three months prior to pleading guilty to second-degree murder, knew of his constitutional right to counsel and had been advised concerning other important rights and details concerning his defense. State v. Garcia, 47 N.M. 319, 142 P.2d 552 (1943).

The exercise of the right to assistance of counsel is subject to the necessities of sound judicial administration; and the right may be waived if the defendant knows what he is doing and his choice is made with eyes open. Where defendant consistently asked for continuances and fired one counsel after another, the defendant had a full understanding of his right to counsel and deliberately discharged both his appointed counsel and his retained counsel with his eyes wide open. The right to counsel may not be used to play "a cat and mouse game" with the court, and by his actions the defendant waived his right to counsel. Leino v. United States, 338 F.2d 154 (10th Cir. 1964).

Where defendant voluntarily and knowingly waived his right to the aid of counsel at the time he made and signed the confession, and there is no evidence in the record from which it can be said that defendant was illiterate, inexperienced or otherwise not of normal intelligence, nor that his will was overborne in any respect by the officers, and he was adequately warned, the conclusion that he was fully aware of his right to aid of counsel and waived the right is clearly supportable. State v. Lopez, 80 N.M. 130, 452 P.2d 199 (Ct. App. 1969).

Accused may waive right to counsel provided that he has competent and intelligent knowledge as to his right. State v. Garcia, 47 N.M. 319, 142 P.2d 552 (1943).

Advising a defendant of technical defenses which, as a layman, he could not reasonably be expected to understand would contribute nothing in arriving at an intelligent and understanding waiver of his right to counsel. State v. Coates, 78 N.M. 366, 431 P.2d 744 (1967).

Failure of district judge to explain any possible defenses to criminal charges does not preclude a valid waiver of right to counsel. State v. Gilbert, 78 N.M. 437, 432 P.2d 402 (1967).

Defendant's understanding of the advice concerning appointment of counsel is an item to be considered on the issue of waiver of those rights, but that understanding is to be considered with all the other evidence on the question. State v. Burk, 82 N.M. 466, 483 P.2d 940 (Ct. App.), cert. denied, 404 U.S. 955, 92 S. Ct. 309, 30 L. Ed. 2d 271 (1971).

Court's obligation to make sure that the waiver of right to counsel is valid, and is predicated upon a meaningful decision of the accused, does not require any particular ritual or form of questioning. State v. Gilbert, 78 N.M. 437, 432 P.2d 402 (1967).

No hard and fast rule can be laid down as to what must be stated in each case in order to adequately explain an accused's rights before permitting him to waive counsel. Each case must be decided on its own peculiar facts which shall include consideration of the background, education, training, experience and conduct of the accused and should proceed as long and as thoroughly as the circumstances demand. State v. Montler, 85 N.M. 60, 509 P.2d 252 (1973).

The trial judge, to assure that a defendant's waiver of counsel is intelligently and understandingly made, must investigate to the end that there can be no question about the waiver, which should include an explanation of the charge, the punishment provided by law, any possible defenses to the charge or circumstances in mitigation thereof and explain all other facts of the case essential for the accused to have a complete understanding. Cranford v. Rodriguez, 373 F.2d 22 (10th Cir. 1967).

When a defendant expressly waives his right to counsel, he is not entitled to claim that he was denied the right. State v. Gillihan, 85 N.M. 514, 514 P.2d 33 (1973).

Burden of establishing waiver of right to counsel. — Claims that the state's burden of establishing a waiver of right to counsel is not met where there is a conflict in the evidence is not the law, since it is for the trial court to weigh the evidentiary conflicts. State v. Briggs, 81 N.M. 581, 469 P.2d 730 (Ct. App. 1970).

Where upon the first interview defendant expressly declined to make any statement, then a second or further interview was not barred, but there was imposed upon the prosecution a "heavy burden" to establish that defendant knowingly and intelligently waived his privilege against self-incrimination and his right to the aid of counsel. State v. Lopez, 80 N.M. 130, 452 P.2d 199 (Ct. App. 1969).

Defendant will not be presumed to have waived right to counsel at arraignment if the record is silent as to waiver. State v. Torres, 81 N.M. 521, 469 P.2d 166 (Ct. App.), cert. denied, 81 N.M. 506, 469 P.2d 151 (1970).

Burden on defendant to show that waiver not effective. — The burden is upon appellant to show that his waiver of right to counsel was not intelligently and understandingly made. State v. Gonzales, 77 N.M. 583, 425 P.2d 810 (1967).

Where the accused is found to have expressly waived counsel, the burden falls upon him, in a later federal habeas corpus proceeding, to show by a preponderance of the evidence that his acquiescence was not sufficiently understandingly and intelligently made to amount to an effective waiver. Bortmess v. Rodriguez, 375 F.2d 113 (10th Cir. 1967).

Inadvertent or accidental out-of-court identification was not illegal and inadmissible even though defendant, at that time, was without an attorney, was not advised of his right to an attorney and did not waive this right. State v. Samora, 83 N.M. 222, 490 P.2d 480 (Ct. App. 1971).

B. EFFECTIVE REPRESENTATION.

Compiler's notes. — State v. Orona, 97 N.M. 232, 638 P.2d 1077 (1982), provided that any New Mexico cases which strictly applied the "sham and mockery" standard for effective representation were overruled insofar as they were inconsistent with that opinion.

Counsel must be given a wide latitude in his representation of his client. State v. Helker, 88 N.M. 650, 545 P.2d 1028 (Ct. App. 1975), cert. denied, 89 N.M. 5, 546 P.2d 70, cert. denied, 429 U.S. 836, 97 S. Ct. 103, 50 L. Ed. 2d 102 (1976).

Reviewing court will not second guess counsel. — On questions of whether counsel effectively represented his client, reviewing court will not attempt to second guess trial counsel on appeal. State v. Helker, 88 N.M. 650, 545 P.2d 1028 (Ct. App. 1975), cert. denied, 89 N.M. 5, 546 P.2d 70, cert. denied, 429 U.S. 836, 97 S. Ct. 103, 50 L. Ed. 2d 102 (1976).

Representation to which defendant is entitled is something more than a pro forma appearance. State v. Dalrymple, 75 N.M. 514, 407 P.2d 356 (1965).

Sham, farce or mockery of justice need not be shown. — The "sham and mockery" standard is rejected in favor of the "reasonably competent" test. State v. Orona, 97 N.M. 232, 638 P.2d 1077 (1982).

"Reasonably competent" test. — The sixth amendment demands that defense counsel exercise the skill, judgment and diligence of a reasonably competent defense attorney. State v. Orona, 97 N.M. 232, 638 P.2d 1077 (1982).

In considering a claim of ineffective assistance, the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances. State v. Dean, 105 N.M. 5, 727 P.2d 944 (Ct. App. 1986).

Adoption of this new standard does not represent a departure from case law in this state but merely formalizes a trend found in assistance of counsel cases over the last several years. State v. Orona, 97 N.M. 232, 638 P.2d 1077 (1982).

Even though courts have articulated the "sham and mockery" test, they have been in fact applying the more stringent "reasonably competent" test, and formal adoption of this standard represents only a change in name. State v. Orona, 97 N.M. 232, 638 P.2d 1077 (1982).

Court decides whether counsel to be discharged. — Whether the dissatisfaction of an indigent accused with his court-appointed counsel warrants discharge of that counsel and appointment of new counsel is for the trial court, in its discretion, to decide. State v. Salazar, 81 N.M. 512, 469 P.2d 157 (Ct. App. 1970).

Adequate representation by one attorney sufficient. — Court would not inquire as to the number of attorneys necessary to represent a criminal defendant but as to whether he was effectively represented, and where defendant's trial counsel adequately cross-examined the state's witnesses, including its expert witnesses, and offered witnesses to attack the credibility of state's main witness, defendant was adequately represented. State v. Hernandez, 115 N.M. 6, 846 P.2d 312 (1993).

Burden of sustaining charge of inadequate representation rests upon defendant. State v. Ranne, 80 N.M. 188, 453 P.2d 209 (Ct. App. 1969).

Where appellant attributed his conviction to the incompetence of his court-appointed counsel, the burden of sustaining this charge was on the appellant. State v. Hudman, 78 N.M. 370, 431 P.2d 748 (1967).

Burden of showing prejudice from defective performance. — Even if counsel's performance was constitutionally defective, the defendant must still affirmatively prove prejudice. In other words, the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. State v. Brazeal, 109 N.M. 752, 790 P.2d 1033 (Ct. App. 1990).

Where defendant's assertions as to competency of counsel are conclusions, they fall far short of raising an issue that the trial was a mockery of justice, a sham or a farce. Pavlich v. State, 79 N.M. 473, 444 P.2d 984 (1968).

A claim of "failing to properly represent" is too general to raise an issue as to incompetency of counsel. State v. Follis, 81 N.M. 690, 472 P.2d 655 (Ct. App. 1970).

Claim that defendant's counsel was grossly incompetent is too vague to provide a basis for relief. Barela v. State, 81 N.M. 433, 467 P.2d 1005 (Ct. App. 1970).

Defendant's statement, "I don't believe my lawyer did his level best to win the case," raised no issue as to whether the proceedings leading to defendant's conviction were a sham, farce or mockery, and thus presented no issue for review. State v. Ford, 81 N.M. 556, 469 P.2d 535 (Ct. App. 1970).

Bad tactics, etc., do not amount to incompetency. — If in fact the trial attorney, by introducing the portion of the transcript, used bad tactics or improvident strategy, this did not amount to incompetency or ineffective assistance of counsel. State v. Garcia, 85 N.M. 460, 513 P.2d 394 (1973).

Bad tactics and improvident strategy do not necessarily amount to ineffective assistance of counsel. State v. Hines, 78 N.M. 471, 432 P.2d 827 (1967).

Bad tactics and improvident strategy do not necessarily amount to ineffective assistance of counsel, and defendant is denied effective assistance of counsel only where the trial considered as a whole was a mockery of justice, a sham or farce. State v. Ranne, 80 N.M. 188, 453 P.2d 209 (Ct. App. 1969).

Ineffectiveness of counsel is not established just because a case is lost. Neither is it established when there is a showing of improvident strategy, bad tactics, mistake, carelessness or inexperience on the part of counsel. State v. Chacon, 80 N.M. 799, 461 P.2d 932 (Ct. App. 1969); State v. Baca, 80 N.M. 488, 458 P.2d 92 (Ct. App. 1969).

Where, with knowledge of the inadmissibility, no objection was made to evidence concerning the polygraph test and the results, this was seen as a trial tactic which, in hindsight, was unsuccessful and not as a failure of the trial court to protect defendant's rights, a denial of a fair trial, or a denial of due process. The admission of the evidence which could have been excluded was the decision of defendant and his counsel. State v. Chavez, 80 N.M. 786, 461 P.2d 919 (Ct. App. 1969).

Failure of attorney to advise defendant of all possible defenses is no basis for post-conviction claim of incompetency of counsel. Burton v. State, 82 N.M. 328, 481 P.2d 407 (1971).

Where the trial court's finding that petitioner did not discuss with his attorney any fight between himself and the deceased was supported by substantial evidence, there could have been no obligation on or reason for the attorney to discuss with defendant the matter of self-defense, and petitioner could not claim any violation of any constitutional or other right which would make his conviction on a voluntary plea of guilty subject to collateral attack under Rule 93, N.M.R. Civ. P. (see now Rule 5-802 NMRA). Burton v. State, 82 N.M. 328, 481 P.2d 407 (1971).

Amount of time counsel spends with client. — The competence of court-appointed counsel at probation revocation hearings could not be determined by the amount of time he spent or failed to spend with the accused. Such an allegation, therefore, did not constitute grounds upon which relief could be granted under Rule 93, N.M.R. Civ. P. (see now Rule 5-802 NMRA) (only applied to post-conviction motions made before September 1, 1975). The failure of an attorney to confer with his client, without more, could not establish the incompetence of that attorney. State v. Brusenhan, 78 N.M. 764, 438 P.2d 174 (Ct. App. 1968).

Sufficient time to prepare. — Defendant's trial counsel had adequate time to prepare for trial, which resulted in an adequate defense effort where counsel who represented defendant at trial testified in the evidentiary hearing that he was appointed prior to and represented appellant at his arraignment, that he conferred with defendant at length on several occasions, conducted other investigations, and filed a variety of motions prior to the trial, and that even with additional time he could not have afforded a better defense for defendant. Campos v. Baker, 442 F.2d 331 (10th Cir. 1971).

Prejudice not presumed from short time for preparation. — Prejudice would not be presumed solely from the short time (one week) between the appointment of defense counsel and the trial, where, although a week was a short time to prepare for a felony case, it was a simple case, defense counsel was experienced, and defense counsel was greatly aided in preparation by the prior work on the case. State v. Brazeal, 109 N.M. 752, 790 P.2d 1033 (Ct. App. 1990).

Lack of preparedness due to defendant. — Defendant's claim that his right to "prepared" counsel was denied him by the terms the trial court attached to a continuance was without merit where the record showed any lack of preparedness on the part of defendant's counsel was due to defendant's dilatoriness. In such circumstances, it could not be said that the trial court abused its discretion. State v. Deats, 82 N.M. 711, 487 P.2d 139 (Ct. App. 1971).

Refusal of counsel to discuss certain issues with defendant. — Defendant's plea of guilty could not have been freely, intelligently or knowingly given if court-appointed counsel did not and would not discuss any of such possible issues as police reports, potential defenses or relevant statutory requirements, with defendant. The items, considered together and in relation to the "facts" related in the police report, show manifest error was committed by the trial court in not permitting defendant to withdraw his plea of guilty. The issue is whether under the foregoing undisputed facts, defendant had effective assistance of counsel. State v. Kincheloe, 87 N.M. 34, 528 P.2d 893 (Ct. App. 1974).

Failure to advise defendant of all possible penalties. — Where defendant's original attorney testified at the hearing on the motion for post-conviction relief that he had advised defendant of all possible penalties for the offense charged, the trial court found defendant had been fully advised by competent counsel as to the penalties, and this finding was supported by substantial evidence. The mere fact that defendant testified the attorney had told him the penalty would be imprisonment for a period of from three to 25 years, which was contrary to the attorney's testimony, did not make the attorney's testimony insubstantial and thereby provide a basis for post-conviction relief on grounds of incompetency of counsel. Burton v. State, 82 N.M. 328, 481 P.2d 407 (1971).

Though the accused should ordinarily be advised of the maximum and minimum sentences which can be imposed as well as the consecutive sentence possibilities, failure to do so does not preclude a valid waiver of right to counsel where defendant clearly understood that consecutive sentences could be imposed. State v. Gilbert, 78 N.M. 437, 432 P.2d 402 (1967).

Fact that counsel advises defendant to plead guilty does not establish incompetence and does not provide a basis for post-conviction relief. State v. Montoya, 81 N.M. 233, 465 P.2d 290 (Ct. App. 1970).

The bare fact that counsel advised appellant to plead guilty to one count rather than to risk the consequences of conviction of other charges does not indicate ineffectual

representation by counsel. The plea by the appellant may well have been most beneficial to him. State v. Pavlich, 80 N.M. 747, 461 P.2d 229 (1969).

Failure to call a witness does not establish inadequacy and provides no basis for relief as the decision to call or not to call a witness is a matter of trial tactics and strategy within the control of counsel. Maimona v. State, 82 N.M. 281, 480 P.2d 171 (Ct. App. 1971).

Defense counsel's failure to interview key witnesses prior to trial, to file appropriate motions, interpose timely and proper objections, submit appropriate instructions, and failure to move to exclude the hearsay statement of defendant's husband, all combined to deprive defendant of a fair trial. State v. Crislip, 109 N.M. 351, 785 P.2d 262 (Ct. App. 1989).

Failure of counsel to allege perjury. — Defendant's post-conviction claim that his counsel was incompetent because he failed to bring "perjury" to the attention of the trial judge, apart from the vagueness of the claim, was insufficient in that it is not contended that counsel knew of the alleged "perjury." State v. Hibbs, 82 N.M. 722, 487 P.2d 150 (Ct. App. 1971).

Failure of counsel to check on legality of arrest. — Post-conviction claim of incompetency of counsel based on defense attorney's failure to have subpoenas issued for witnesses and to check on the circumstances of the allegedly illegal arrest was insufficient to raise an issue as to incompetency of counsel. State v. Hibbs, 82 N.M. 722, 487 P.2d 150 (Ct. App. 1971).

Prima facie case for defective direct examination. — Defense counsel's asking defendant to provide an innocent explanation for the use of a straw and razor blade, in the face of evidence that those items are frequently used as drug paraphernalia and uncontroverted stitpulated testimony that residue on the items taken from defendant's residence tested positive for cocaine, constituted prima facie ineffective assistance of counsel. State v. Richardson, 114 N.M. 725, 845 P.2d 819 (Ct. App. 1992).

Separate counsel for codefendant. — Appellant's claim of prejudice arising from the failure of the trial court to assign separate counsel for him was found to be lacking in merit because no conflict of interest is shown to exist between appellant and his codefendant. State v. Gutierrez, 79 N.M. 732, 449 P.2d 334 (Ct. App. 1968), cert. denied, 80 N.M. 33, 450 P.2d 633 (1969).

Where defendant and codefendant were tried jointly and convicted for murder, defendant's assertion on motion for post-conviction relief that he was denied effective counsel on basis of conflict between interests of the two defendants due to fact that codefendant did actual killing while defendant was convicted of aiding and abetting, and due to variations in their confessions concerning details of the crime, was without merit where trial court's unattached finding was that confessions were consistent with one another, and that information concerning defendant in the confession of codefendant

were cumulative only, and did not prejudice defendant. Patterson v. State, 81 N.M. 210, 465 P.2d 93 (Ct. App. 1970).

Joint representation of defendants is not inherent error; it is error only if there was a conflict of interest or if prejudice resulted. Patterson v. State, 81 N.M. 210, 465 P.2d 93 (Ct. App. 1970).

Conflict of interest on part of attorney. — A defendant is denied his constitutional right of effective assistance of counsel if his attorney represents conflicting interests without a disclosure of such facts and a waiver of the conflict by the defendant and when ineffective assistance of counsel is alleged due to conflict of interest between the defendant and the victim, an appellate court will assume prejudice and none need be shown or proved. State v. Aguilar, 87 N.M. 503, 536 P.2d 263 (Ct. App. 1975).

Constitutional rights violated only by actual conflict of interest, not mere possibility. — The possibility of conflict is insufficient to impugn a criminal conviction. In order to demonstrate a violation of his constitutional rights, a defendant must establish that an actual conflict of interest adversely affected his lawyer's performance. State v. Robinson, 99 N.M. 674, 662 P.2d 1341, cert. denied, 464 U.S. 851, 104 S. Ct. 161, 78 L. Ed. 2d 147 (1983); State v. Hernandez, 100 N.M. 501, 672 P.2d 1132 (1983).

Representation of two defendants by same attorney is not per se a violation of constitutional guarantees of effective counsel. Only where a court requires an attorney to represent two codefendants whose interests are in conflict is one of the defendants' sixth amendment right to effective counsel denied. State v. Hernandez, 100 N.M. 501, 672 P.2d 1132 (1983).

Failure to advise defendant that judge could be precluded from sitting. — Defendant's post-conviction claim that he was denied adequate counsel because his attorney had failed to advise him that the judge who resentenced him could be precluded from sitting since that judge had been district attorney at original criminal proceedings was without merit where defendant was aware that the judge had been prosecuting attorney, had been so informed by both the judge and his attorneys, and had specifically consented to the judge. State v. French, 82 N.M. 209, 478 P.2d 537 (1970).

Special assistant attorney general acting as defense attorney. — Convicted defendant did receive the effective assistance of counsel in fact and did receive the assistance of competent counsel as a matter of law, even though defense counsel was engaged as a special assistant attorney general of New Mexico, where the court found that representation of defendant, both in pretrial proceedings and during the trial, was entirely adequate and professionally competent, and said that statute prohibiting any assistants of the attorney general from acting as defense counsel would be modified in special cases to avoid injustice, and that it was well within the trial court's discretion to refuse strict application and to treat the rule as having been modified to "avoid injustice." Lucero v. United States, 335 F.2d 912 (10th Cir. 1964).

Failure to advise of right to appeal a conviction and sentence on a guilty plea, standing by itself, does not establish incompetency of counsel. State v. French, 82 N.M. 209, 478 P.2d 537 (1970).

Claim that appointed counsel was not experienced in criminal practice and therefore defendant was not given adequate assistance of counsel was too general. Where the claim was not supported by specific factual allegation, it did not provide a basis for post-conviction relief. State v. Hibbs, 79 N.M. 709, 448 P.2d 815 (Ct. App. 1968).

A failure to object does not establish ineffective counsel. State v. Chacon, 80 N.M. 799, 461 P.2d 932 (Ct. App. 1969); State v. Rubio, 110 N.M. 605, 798 P.2d 206 (Ct. App. 1990).

Counsel's failure to object at trial to a prior conviction did not amount to ineffective assistance, since defendant did not show counsel's performance to be deficient or prejudicial. United States v. Mejia-Alarcon, 995 F.2d 982 (10th Cir.), cert. denied, 510 U.S. 927, 114 S. Ct. 334, 126 L. Ed. 2d 279 (1993).

The defense counsel's failure to object to the trial court's failure to instruct the jury on the element of mens rea in the defendant's case did not constitute ineffective assistance of counsel since the defendant's mens rea with respect to felony murder was conclusively established by his own testimony and was fully corroborated by the state's evidence; there was no evidence presented by either side that cast doubt on the fact that the defendant fired his rifle at the intended robbery victim, knowing his act created a strong probability of death or great bodily harm; the outcome of the trial would most assuredly have been the same had the jury been instructed on the omitted mens rea element. State v. Lopez, 1996-NMSC-036, 122 N.M. 63, 920 P.2d 1017.

Where lack-of-capacity defense should have been presented, but wasn't, conviction vacated. — Where the trial court expressly found that the facts warranted a determination of the defendant's competency and ability to formulate the requisite intent, but only part of the court's order was complied with, in view of the silence of the record as to the reasons why a defense of lack of capacity was not presented, the trial court must make a factual determination of this issue and defendant's conviction and sentences will be vacated pending the trial court's appointment of an expert to determine defendant's ability to formulate a specific intent to commit the crimes charged and the trial court's factual determination as to why this defense was not timely investigated and presented, and whether there in fact exists any valid basis on this issue. On remand, new counsel should be appointed to represent defendant. If the trial court determines, after assessing the results of the psychiatric examination of the defendant, that defendant's state of mind at the time of the acts charged in the indictment was such that a defense of lack of capacity should have been presented, then defendant should be accorded a new trial; otherwise, defendant's conviction and sentences should be reinstated. State v. Lewis, 104 N.M. 677, 726 P.2d 354 (Ct. App. 1986).

Failure to request instruction. — The defendant in a prosecution for criminal sexual penetration was denied effective assistance of counsel where his trial counsel failed to request, and the trial court did not issue, an intoxication instruction, even though the evidence plainly would have been sufficient to require such an instruction, such an instruction would not have been inconsistent with the defense's "strategy" of arguing consent, and the absence of such an instruction was clearly prejudicial. Florez v. Williams, 281 F.3d 1136 (10th Cir. 2002), cert. denied, U.S. , 123 S. Ct. 624, 154 L. Ed. 2d 532 (2002).

The defendant in a prosecution for criminal sexual penetration was denied effective assistance of counsel when his trial counsel failed to request lesser included offense instructions since it was unreasonable to rely on an unbelievable simple consent defense and there was a reasonable probability that the judge would have issued instructions on the lesser included offenses and that the jury would have convicted on those offenses. Florez v. Williams, 281 F.3d 1136 (10th Cir. 2002), cert. denied, U.S. , 123 S. Ct. 624, 154 L. Ed. 2d 532 (2002).

Counsel who moves for mistrial following juror's prejudicial comment not deficient. — Defense counsel's performance was not deficient where, following a juror's comment in open court that the defendant should not be allowed close to a gun and shells, the attorney moved for a mistrial (though there was no proof that there was sufficient evidence to justify a mistrial) rather than asking the trial court to voir dire the juror or excuse the juror. State v. Price, 104 N.M. 703, 726 P.2d 857 (Ct. App. 1986).

Counsel on appeal must be active advocate, rather than a mere friend of the court assisting in a detached evaluation of appellant's claim. However, once counsel, in his professional judgment, finds a nonfrivolous issue and vigorously argues it, the federal constitutional right to effective assistance of counsel is satisfied. State v. Boyer, 103 N.M. 655, 712 P.2d 1 (Ct. App. 1985).

Illness of defendant's attorney. — Trial court's denial of defense counsel's motion for a continuance based on his illness was not a violation of defendant's right to effective representation absent proof that the condition compromised counsel's ability to provide effective representation on the day in question. State v. Aragon, 1999-NMCA-060, 127 N.M. 393, 981 P.2d 1211.

VII. RIGHT TO CONFRONT AND CROSS-EXAMINE WITNESSES.

Blood alcohol report presents no issue under confrontation clause because the report is non-testimonial. State v. Dedman, 2004-NMSC-037, 136 N.M. 561, 102 P.3d 628.

A district court has no authority to order the Public Defender Department to pay expert witness fees paid from unspecified state funds where counsel represent the indigent defendant pro bono for no fee. State v. Brown, 2004-NMCA-037, 135 N.M. 291, 87 P.3d 1073, cert. granted, 2004-NMCERT-003, 135 N.M. 321, 88 P.3d 261.

Payment for expert witness. — Defendants who select their own counsel must take all the consequences that go along with that selection, and one such consequence is that public funding will not be available for expert witness services. State v. Brown, 2004-NMCA-037, 135 N.M. 291, 87 P.3d 1073, cert. granted, 2004-NMCERT-003, 135 N.M. 321, 88 P.3d 261.

The purposes of confrontation are to secure for the accused the right of cross-examination; the right of the accused, the court and the jury to observe the deportment and conduct of the witness while testifying; and the moral effect produced upon the witness by requiring him to testify at the trial. State v. James, 76 N.M. 376, 415 P.2d 350 (1966); Millican v. State, 91 N.M. 792, 581 P.2d 1287 (1978); State v. Maestas, 92 N.M. 135, 584 P.2d 182 (Ct. App. 1978).

The right of cross-examination is a part of the constitutional right to be confronted with the witnesses against one. State v. Sparks, 85 N.M. 429, 512 P.2d 1265 (Ct. App. 1973), cert. denied, Valles v. State, 90 N.M. 347, 563 P.2d 610 (Ct. App.); 90 N.M. 637, 567 P.2d 486 (1977).

Factors considered in constitutional analysis of hearsay. – In evaluating the "sufficient guarantees of trustworthiness" of a hearsay statement required under the confrontation clause of the New Mexico constitution, New Mexico courts consider four factors leading to unreliability: (1) ambiguity; (2) lack of candor; (3) faulty memory; and (4) misperception; the statement may be admitted only where the test of cross-examination would be of marginal utility, a standard that precludes admission of hearsay statements that contain equivocation and contradiction. State v. Gurule, 2004-NMCA-008, 134 N.M. 804, 82 P.3d 975.

Right is fundamental. — It is fundamental that a person accused of crime is entitled to be confronted with the witnesses against him as well as the right to cross-examine said witnesses. State v. Holly, 79 N.M. 516, 445 P.2d 393 (Ct. App. 1968).

There can be no question that every defendant has the right, subject to certain exceptions, to be confronted by the witnesses who testify against him and to cross-examine such witnesses. State v. Trimble, 78 N.M. 346, 431 P.2d 488 (1967).

Right of cross-examination is a valuable one which cannot be so restricted as to deprive party entirely of opportunity to test witness's credibility. State v. Martin, 53 N.M. 413, 209 P.2d 525 (1949).

Every person accused of a crime has the constitutionally protected right to face his accuser. State v. Martinez, 95 N.M. 445, 623 P.2d 565 (1981), overruled on other grounds, Fuson v. State, 105 N.M. 632, 735 P.2d 1138 (1987).

And essential to fair trial. — The right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal. State v. Mann, 87 N.M. 427, 535 P.2d 70 (Ct. App. 1975).

But must be interpreted in light of existing law. — A person's constitutional right to face his accuser in a criminal prosecution must be interpreted in light of the law as it existed at the time it was adopted. State v. Martinez, 95 N.M. 445, 623 P.2d 565 (1981), overruled on other grounds, Fuson v. State, 105 N.M. 632, 735 P.2d 1138 (1987).

Extent of right. — The right of confrontation extends only to the right to be confronted with witnesses against the accused. State v. Roybal, 107 N.M. 309, 756 P.2d 1204 (Ct. App. 1988).

Infringement of the right of confrontation cannot be harmless error. It is a right so basic to a fair trial that its infraction can never be treated as harmless error. State v. Mann, 87 N.M. 427, 535 P.2d 70 (Ct. App. 1975).

Right is equal to right against self-incrimination. — One person's right against self-incrimination and another's right to be confronted with the witnesses against him cannot be balanced. Both rights stand on an equal footing, and neither is more important than the other. State v. Curtis, 87 N.M. 128, 529 P.2d 1249 (Ct. App. 1974).

State has interest in rigorous cross-examination. — The state has no interest in denying the accused access to all evidence that can throw light on issues in the case, and, in particular, the state should have no interest in convicting on the testimony of witnesses who have not been as rigorously cross-examined and as thoroughly impeached as the evidence permits. Valles v. State, 90 N.M. 347, 563 P.2d 610 (Ct. App.), cert. denied, 90 N.M. 637, 567 P.2d 486 (1977).

Confrontation is right, not rule of evidence. — The right of confrontation is not a mere rule of evidence or procedure but a constitutional right of primary importance in the truth-finding process, because a more effective method of eliciting the truth than effective cross-examination has not yet been devised. Valles v. State, 90 N.M. 347, 563 P.2d 610 (Ct. App.), cert. denied, 90 N.M. 637, 567 P.2d 486 (1977).

Latitude to be given cross-examiner. — Cross-examination is necessarily exploratory, and it is the essence of a fair trial that reasonable latitude be given the cross-examiner, even though he is unable to state to the court what facts a reasonable cross-examination might develop. Prejudice ensues from a denial of the opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to a test, without which the jury cannot fairly appraise them, and to say that prejudice can be established only by showing that the cross-examination, if pursued, would necessarily have brought out facts tending to discredit the testimony in chief is to deny a substantial right and withdraw one of the safeguards essential to a fair trial. Valles v. State, 90 N.M. 347, 563 P.2d 610 (Ct. App.), cert. denied, 90 N.M. 637, 567 P.2d 486 (1977).

Restricted cross-examination may violate right to confront. — Trial court may not so restrict the cross-examination of a witness by the defendant that the defendant's right to confront the witnesses against him is infringed: the defense should have great

latitude in cross-examining prosecution witnesses. Sanchez v. State, 103 N.M. 25, 702 P.2d 345 (1985).

Right is satisfied by opportunity to cross-examine. — The right of confrontation as provided by this section is satisfied if there was the opportunity to cross-examine; the observation of demeanor on the witness stand is a result of cross-examination but it is not part of the confrontation rights. State v. Tijerina, 84 N.M. 432, 504 P.2d 642 (Ct. App. 1972), aff'd, 86 N.M. 31, 519 P.2d 127 (1973), cert. denied, 417 U.S. 956, 94 S. Ct. 3085, 41 L. Ed. 2d 674 (1974).

Where accused has once had opportunity of meeting witness face to face in a lawfully constituted tribunal with opportunity for cross-examination, the constitutional provision has been met. State v. Jackson, 30 N.M. 309, 233 P. 49 (1924).

Even though the state failed to provide the defendant with the statement of a witness for almost one month after it was available, the defendant was not unfairly prejudiced since she had the opportunity to review the statement at length and to conduct an extensive cross-examination. State v. Setser, 1997-NMSC-004, 122 N.M. 794, 932 P.2d 484.

Right to ascertain what testimony will be. — Defendant has constitutional right to compulsory process to obtain witnesses in his behalf. He has also right, personally or by attorney, to ascertain what their testimony will be. State v. Cooley, 19 N.M. 91, 140 P. 1111 (1914).

Admission of statement with "indicia of reliability". — The trial court may admit, as substantive evidence, a statement by an accomplice who was not subject to cross-examination where the statement bears sufficient "indicia of reliability" to satisfy confrontation clause concerns. State v. Earnest, 106 N.M. 411, 744 P.2d 539, cert. denied, 484 U.S. 924, 108 S. Ct. 284, 98 L. Ed. 2d 245 (1987).

Indigent defendant has the right to have subpoenas served upon his witnesses by a sheriff without paying to that sheriff a fee for such service, or mileage expenses. 1953-54 Op. Att'y Gen. No. 6035.

Right applies to preliminary examination. — When the constitution grants to an accused the right to be confronted by the witness against him, it grants that right at all of the criminal proceedings, including the preliminary examination. Mascarenas v. State, 80 N.M. 537, 458 P.2d 789 (1969).

No right to confront witness who is not "against" defendant. — The constitutional guarantee of confrontation extends only to the right "to be confronted with the witnesses against him." Where witness was not a witness against defendant and nothing stated by witness to the police in any way could be construed as connecting defendant with the crime, trial court did not err in not allowing defendant to confront witness at trial. State v. Barton, 79 N.M. 70, 439 P.2d 719 (1968).

Where defense witnesses are beyond jurisdiction of court, but state has admitted that they would testify to facts stated in motion for continuance, if present, overruling the motion is not a denial of rights under this section. State v. Nieto, 34 N.M. 232, 280 P. 248 (1929).

No right to cross-examine grand jury witnesses. — The constitution does not give defendant the right to cross-examine witnesses appearing before the grand jury. State v. Salazar, 81 N.M. 512, 469 P.2d 157 (Ct. App. 1970).

Trial witness's grand jury testimony on same subject subject to cross-examination. — Once the witness has testified at the criminal trial about that which he testified before the grand jury, the accused is entitled to an order permitting examination of that portion of the witness's grand jury testimony relating to the crime for which defendant is charged. The witness may be cross-examined concerning that testimony. If otherwise, an accused is denied the right to confront the witnesses against him. State v. Sparks, 85 N.M. 429, 512 P.2d 1265 (Ct. App. 1973).

The function and importance of the constitutional right to be confronted with the witnesses against one and the concomitant right of cross-examination mandates retroactivity of the rule that once a witness has testified at the criminal trial about that which he testified before the grand jury, the accused is entitled to an order permitting examination of that portion of the witness's grand jury testimony relating to the crime for which defendant is charged. Valles v. State, 90 N.M. 347, 563 P.2d 610 (Ct. App.), cert. denied, 90 N.M. 637, 567 P.2d 486 (1977).

Counsel, not judge, decides whether grand jury minutes helpful. — Whether there is or is not anything in the grand jury minutes that might be of aid to the defendant in cross-examination should not be determined by a court; in the adversary system, it is enough for judges to judge, and a determination of what may be useful to the defense can properly and effectively be made only by an advocate. Valles v. State, 90 N.M. 347, 563 P.2d 610 (Ct. App.), cert. denied, 90 N.M. 637, 567 P.2d 486 (1977).

Prior testimony of witness usually inadmissible. — Unless there has been a waiver of the right of confrontation, or it has been shown that the witness is unavailable after due diligence has been used by the state to attempt to produce him at trial, admission of a witness's prior recorded testimony violates a defendant's right of confrontation. State v. Mann, 87 N.M. 427, 535 P.2d 70 (Ct. App. 1975).

Use of prior testimony when witness unavailable at trial. — Where defendant's counsel cross-examined witness at the preliminary hearing, the trial court's admission into evidence of the transcript of the testimony of the witness taken at the preliminary hearing did not deny defendant's right of confrontation of witnesses where all reasonable attempts to locate witness had failed. State v. Mitchell, 86 N.M. 343, 524 P.2d 206 (Ct. App. 1974).

Where there was introduction at trial of prior testimony of a witness at the preliminary hearing, and that witness was not present at trial, but the record showed diligent efforts to locate the witness and showed defense counsel had opportunity to cross-examine the witness at the preliminary examination, there was no denial of the constitutional right to confront witnesses. State v. Hibbs, 82 N.M. 722, 487 P.2d 150 (Ct. App. 1971).

Prior testimony found admissible. — Trial court did not err in admitting testimony given at the bail bond hearing, in spite of the fact that defendant did not expect that any testimony taken there would be used for any other purpose and therefore did not cross-examine as fully as he might otherwise have done, since the bond hearing was conducted for the limited purpose of determining whether the accused should be admitted to bail, and in spite of the fact that the jury did not have the opportunity to observe witness's demeanor on the witness stand at the trial. State v. Tijerina, 84 N.M. 432, 504 P.2d 642 (Ct. App. 1972), aff'd, 86 N.M. 31, 519 P.2d 127 (1973), cert. denied, 417 U.S. 956, 94 S. Ct. 3085, 41 L. Ed. 2d 674 (1974).

Prior sexual conduct. — Even though evidence of a victim's prior sexual conduct may be admissible to show bias, motive to fabricate or for other purposes consistent with the constitutional right of confrontation, the trial court did not err in rejecting such evidence where defendant failed to show that it was material and relevant, and that its probative value equaled or outweighed its inflammatory nature. State v. Johnson, 1997-NMSC-036, 123 N.M. 640, 944 P.2d 869.

Unavailability of hearsay declarant. — When a hearsay declarant is not present for cross-examination at trial, a showing that he or she is unavailable is required, and, even then, the declarant's statement is admissible only if it bears adequate indicia of reliability. State v. Lopez, 1996-NMCA-101, 122 N.M. 459, 926 P.2d 784.

Deposition admitted where deponent dead but opportunity for cross-examination existed. — Where the trial court admitted into evidence the videotaped deposition of the state's eyewitness, there were reasons of "public policy" and "necessities of the case" to allow the admission of the deposition, including the death of the deponent, and there was sufficient opportunity for cross-examination at the time of the deposition so that its introduction did not run counter to the confrontation clause. State v. Martinez, 95 N.M. 445, 623 P.2d 565 (1981), overruled on other grounds, Fuson v. State, 105 N.M. 632, 735 P.2d 1138 (1987).

Use of hearsay predisposition report to determine delinquency held unconstitutional. — When a predisposition report received by a judge in a juvenile delinquency case is composed primarily of hearsay evidence which would be clearly incompetent within the meaning of former 32-1-31 NMSA 1978 in either of the adjudicatory phases of the proceedings, and it is not shown to be competent, material and relevant in nature, then to use such evidence to determine delinquency is constitutionally impermissible as a denial of the child's constitutional right to confront and cross-examine the witnesses against him; the juvenile is entitled to a fact-finding

process that measures up to the essentials of due process and fair treatment. John Doe v. State, 92 N.M. 74, 582 P.2d 1287 (1978).

Statement against penal interest. — The exception to the hearsay rule for statements against penal interest found in Rule 11-804(B)(3) is a firmly rooted hearsay exception for purposes of satisfying the indicia of reliability requirement of the constitutional right to confrontation. State v. Torres, 1998-NMSC-052, 126 N.M. 477, 971 P.2d 1267.

Admissibility of shooting victim's statements. — Victim's statement in greeting defendant just prior to shooting was supported by particularized guarantees of trustworthiness and the trial court's admission of the statement did not violate defendant's right of confrontation. State v. Salgado, 1999-NMSC-008, 126 N.M. 691, 974 P.2d 661.

Defendant was deprived of right to confront and cross-examine state's witness where deposition, taken for purposes of the preliminary hearing with the defense counsel's consent, had been recorded but the tape recorder malfunctioned and rendered the recording inaudible, whereupon the parties, to facilitate the preliminary hearing, had entered into a stipulation summarizing the deposition testimony, and subsequently at trial the state, unable to secure the witness' attendance because he had moved from the state, offered into evidence the tape recording. Millican v. State, 91 N.M. 792, 581 P.2d 1287 (1978).

But not where parties to hearsay statements available for cross-examination. — Because the victim of the crime was subject to cross-examination and all of the witnesses whose testimony indicated the guilt of the defendant were present and cross-examined, the defendant's rights to due process and to confront and cross-examine witnesses against him were not violated when the trial court admitted into evidence statements made by the victim after the crime was committed to her mother, sister and sister-in-law. State v. Maestas, 92 N.M. 135, 584 P.2d 182 (Ct. App. 1978).

Use of sex crime child-victim's videotape deposition held proper. — In a prosecution for criminal sexual contact with a minor, use of the victim's videotape deposition did not deny the defendant the right of confrontation: the defendant was not deprived of his right to fairly and fully cross-examine the child during the deposition, and the jury, which heard the child's testimony and viewed the child, via videotape, while she testified, had an adequate opportunity to observe the child's demeanor. State v. Vigil, 103 N.M. 583, 711 P.2d 28 (Ct. App. 1985).

In a prosecution for sexual abuse, trial judge did not abuse his discretion in allowing the children to testify by way of depositions that were videotaped outside the presence of the defendant and then shown to the jury, as he made the requisite findings that the individualized harm which would otherwise result in the child victims outweighed the defendant's right to a face-to-face confrontation with his accusers. State v. Fairweather, 116 N.M. 456, 863 P.2d 1077 (1993).

Cross-examination as to prior convictions denied. — The defendant was not deprived of the opportunity to test the credibility of a key witness against him in violation of the sixth amendment where the trial court refused to allow the defense counsel to cross-examine the witness as to prior convictions which were 25 years old. State v. Litteral, 110 N.M. 138, 793 P.2d 268 (1990), appeal dismissed, 203 F.3d 835 (10th Cir. 2000).

Procedure regarding telephone testimony. — Any permissible use of telephone testimony in court proceedings would depend on the specific facts and circumstances involved. Assuming that such testimony is appropriate in some circumstances, the conclusion that a deposition witness must take an oath and testify in the presence of an authorized officer also would apply to any testimony that a witness gives to the court over the telephone. 1988 Op. Att'y Gen. No. 88-81.

Telephone company records used for verification. — Telephone company records used only to verify that a telephone number given by a person who had called an embezzlement victim was assigned to someone named "Armijo" did not constitute a statement by an "accuser" within the constitutional guaranty of confrontation. State v. Roybal, 107 N.M. 309, 756 P.2d 1204 (Ct. App. 1988).

Right to inspect prior statement of witness. — When a witness called to testify by the state in a preliminary examination has made a prior written statement concerning the matter about which he is called to testify, the accused is entitled to an order directing the prosecution to produce for inspection all statements or reports of such witness in its possession touching the events about which the witness will testify. Any other result would be to deny the accused his constitutional right to confront the witnesses against him and would have the same effect as though he were denied a preliminary examination. Mascarenas v. State, 80 N.M. 537, 458 P.2d 789 (1969).

Reading testimony of absent witness. — In allowing the testimony of the witness to be read, the accused was denied his constitutional right of being confronted by the witnesses against him. The mere fact that the witness was absent from the jurisdiction of the court was not enough. The exercise of due diligence on the part of the officers, in an effort to secure his attendance, was essential to the admission of the testimony of the absent witness. State v. Bailey, 62 N.M. 111, 305 P.2d 725 (1956).

This section guarantees to an accused in a criminal prosecution the right to be confronted with the witnesses against him and as early as State v. Archer, 32 N.M. 319, 255 P. 396 (1927), it was held that it was error in the trial of a criminal case to deny an accused the right to cross-examine a witness concerning a prior written statement made by him. The denial of the right of an accused to fully cross-examine a hostile witness deprives him of the right guaranteed by the constitution "to be confronted with the witnesses against him." Mascarenas v. State, 80 N.M. 537, 458 P.2d 789 (1969).

No right to confront victim who is not a witness. — The words, "to be confronted with the witnesses against him," which appear in this section should not be construed as

being synonymous with the words, "to be confronted with his victim." A witness is one who testifies under oath, and the constitutional guarantee contemplates confrontation only by those who actually testify against the accused, or whose testimony or statements are in some way brought to the attention of the court and jury upon the trial. State v. James, 76 N.M. 376, 415 P.2d 350 (1966).

There was no deprivation of appellant's right of confrontation by the alleged victim of his crime as guaranteed by this section, where at no time did appellant seek a continuance based on the absence of evidence, where he made no statement as to what evidence he believed might be developed from the victim, if called as a witness, where at no time did he indicate that he desired to call the victim as a witness, and where the victim was not called as a witness, nor was one word of his testimony even offered by the state by way of deposition, prior testimony or otherwise. State v. James, 76 N.M. 376, 415 P.2d 350 (1966).

The right of confrontation does not embrace a situation where no prior testimony, statement or utterance of any kind by the victim was brought to the attention of the jury, and none was offered by the state. State v. James, 76 N.M. 376, 415 P.2d 350 (1966).

Admission of a coconspirator's testimony may constitute a technical violation of the accused's right to confront and cross-examine the witnesses against him, but such admission does not require a reversal of conviction if it constituted error harmless beyond a reasonable doubt. Admission of such statements was harmless beyond a reasonable doubt where the properly admitted evidence of guilt was overwhelming, and the prejudicial effect of the codefendants' statements was insignificant by comparison. State v. Rondeau, 89 N.M. 408, 553 P.2d 688 (1976).

Inadmissibility of codefendant's extrajudicial statement. — The trial court erred in permitting a codefendant's written extrajudicial statement to be read to the jury since the state cited no other independent corroborative evidence which tended to lend reliability to the codefendant's untested and unsworn statement. State v. Lancaster, 116 N.M. 41, 859 P.2d 1068 (Ct. App. 1993).

Cross-examination of defendant by codefendant. — Where one accused informed against or indicted jointly with another testifies in his own behalf and clearly incriminates the other, the latter may subject him to cross-examination. State v. Martin, 53 N.M. 413, 209 P.2d 525 (1949).

Refusal of codefendant to answer questions. — While the extent to which cross-examination may be allowed is largely within the discretion of the trial court, the right to cross-examine cannot be so restricted as to wholly deprive a party of the opportunity to test the credibility of a witness. Where testimony of a codefendant was virtually immune from the test of credibility, due to his refusal to answer defense counsel's questions on fifth amendment grounds so that the defendant was effectively denied the opportunity to show that the codefendant might be lying or a reason why he might want to lie in order to protect his brother, alleged by defendant to have been involved in the crime rather

than he, codefendant was the only witness to place the defendant in the building and committing the burglary, the restriction and deprivation of cross-examination was prejudicial and defendant's motion for a mistrial should have been granted. State v. Curtis, 87 N.M. 128, 529 P.2d 1249 (Ct. App. 1974).

Refusal of witness to answer questions concerning his direct testimony. — Defendant had a right to cross-examine witness under his constitutional right of confrontation and as the questions that witness refused to answer did not concern collateral issues, the questions went to the truth of his direct testimony; therefore, because of witness's refusal to answer concerning the truth of his direct testimony, the opportunity for probing and testing his statement has failed. The effect is a loss of defendant's right of cross-examination. At the least, witness's statement was subject to a motion to strike. State v. Rogers, 80 N.M. 230, 453 P.2d 593 (Ct. App. 1969).

Right to obtain transcripts. — The state must, as a matter of equal protection, provide indigent prisoners with the basic tools of an adequate defense or appeal, when those tools are available for a price to other prisoners. There can be no doubt that the state must provide an indigent defendant with a transcript of prior proceedings when that transcript is needed for an effective defense or appeal. Two factors that are relevant to the determination of need are: (1) the value of the transcript to the defendant in connection with the appeal or trial for which it is sought, and (2) the availability of alternative devices that would fulfill the same functions as a transcript. This rule should be construed liberally in favor of a defendant's right to equal protection of the law and effective cross-examination. State v. Romero, 87 N.M. 279, 532 P.2d 208 (Ct. App. 1975).

A particularized need for the grand jury testimony of a witness must be shown before a grand jury transcript may be made available to an accused, but where such need is shown, a failure to furnish the transcript would impair the accused's right of cross-examination, and, thus, the full exercise of his right of confrontation. State v. Felter, 85 N.M. 619, 515 P.2d 138 (1973).

Where defendant's basic defense was to persuade the jury that certain statements relied on heavily by the state were involuntary, and that the officer who testified about the circumstances of these statements testified differently at trial than at the suppression hearing, a copy of the prior hearing transcript would have been invaluable, and where there were different judges, court reporters and attorneys in the hearing on the motion to suppress, on the motion for a transcript, and at trial, there were no reasonable alternatives to a transcript of the prior hearing. State v. Romero, 87 N.M. 279, 532 P.2d 208 (Ct. App. 1975).

A transcript of prior testimony is a most useful tool in mounting an attack upon the credibility of witnesses, and the refusal to give a defendant a copy of the grand jury testimony of witnesses who would also testify at trial on the same subject matter has been held to deny him the right of effective cross-examination. Valles v. State, 90 N.M. 347, 563 P.2d 610 (Ct. App.), cert. denied, 90 N.M. 637, 567 P.2d 486 (1977).

Statute authorizing testimony of any witness taken in any court in state to be used in subsequent trial permits transcript of testimony of witness, taken at preliminary hearing, to be read in at trial; such statute is declaratory of common law and does not contravene constitutional right to be confronted by witnesses. State v. Moore, 40 N.M. 344, 59 P.2d 902 (1936).

Transcript inadmissible where no cross-examination took place. — Where accused, in former trial, has been denied right to cross-examine hostile witness, it is error to admit transcript of witness's testimony in subsequent trial. State v. Halsey, 34 N.M. 223, 279 P. 945 (1929).

Inadmissibility of guilty pleas of third persons. — Upon trial of one charged with unlawfully and knowingly permitting game of chance for money to be played on premises occupied by him, record of information charging third persons with unlawfully gaming and their pleas of guilty thereto were inadmissible as depriving defendant of constitutional right to be confronted by witness against him. State v. Martino, 25 N.M. 47, 176 P. 815 (1918).

Right denied by admission of certain res gestae statements. — Admission of testimony concerning statements of children of shooting victims admitted under res gestae exception to hearsay rule denied defendant his constitutional right of confrontation where cross-examination might have revealed poor memory and that statements of one child were partly based on what other child had told him or on what he had overheard. State v. Lunn, 82 N.M. 526, 484 P.2d 368 (Ct. App. 1971).

The alibi rule does not violate the right to compulsory process, since it does not prevent a defendant from compelling the attendance of witnesses, but, rather, provides reasonable conditions for the presentation of alibi evidence. State v. Smith, 88 N.M. 541, 543 P.2d 834 (Ct. App. 1975).

Proceeding pursuant to rules. — The question of a denial of the constitutional right of confrontation was cognizable under a proceeding pursuant to Rule 93, N.M.R. Civ. P. (now superseded by Rule 5-802 NMRA). Valles v. State, 90 N.M. 347, 563 P.2d 610 (Ct. App.), cert. denied, 90 N.M. 637, 567 P.2d 486 (1977).

Waiver of right of confrontation. Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969) requires that state criminal records show an understanding waiver by a defendant entering a guilty plea of three constitutional rights: (1) the privilege against compulsory self-incrimination, (2) the right to trial by jury and (3) the right to confront one's accusers. State v. Guy, 81 N.M. 641, 471 P.2d 675 (Ct. App. 1970).

While the right of cross-examination is a fundamental right, it does not follow that such a fundamental right equates with the concept of fundamental error. There is a difference between such a fundamental right and fundamental error. The latter cannot be waived and is always available to this court on behalf of the accused. But the theory of fundamental error is bottomed upon the innocence of the accused or a corruption of

actual justice. On the other hand, most rights, however fundamental, may be waived or lost by the accused. State v. Rogers, 80 N.M. 230, 453 P.2d 593 (Ct. App. 1969).

Right of confrontation not denied where defendant declined to cross-examine. — Where two witnesses were present at trial and available for a full range of cross-examination as to the circumstances surrounding an identification process, but the defendant chose not to cross-examine them, he was not denied his right to confront the witnesses against him. State v. Duran, 91 N.M. 756, 581 P.2d 19 (1978).

Compulsory process within discretion of trial court. — Compulsory process in criminal cases involves such disparate elements as surprise, diligence, materiality and maintenance of orderly procedures; and the decision is largely within the discretion of the trial court. State v. Montoya, 91 N.M. 752, 580 P.2d 973 (Ct. App.), cert. denied, 91 N.M. 751, 580 P.2d 972 (1978).

Where four days prior to trial the family of an 80-year-old woman suffering from severe hypertension and anxiety showed the judge a physician's note stating that the woman should not appear as a witness, and the court promptly referred the matter to defense counsel, but defense counsel neither sought a continuance, sought to take the woman's deposition nor took any other action on the pretrial information but rather waited until the trial was in progress and then sought the issuance of a bench warrant, there was no abuse of discretion and no violation of the right to compulsory process by the trial court's refusal to issue the bench warrant. State v. Montoya, 91 N.M. 752, 580 P.2d 973 (Ct. App.), cert. denied, 91 N.M. 751, 580 P.2d 972 (1978).

Right denied where unexplained comparison of computer printouts with defendant's records. — Defendant was denied her constitutional right of confrontation at her trial for embezzlement, where the only evidence of shortages attributable to her was obtained by an unexplained comparison of computer printouts with her own records and there was no evidence that the state's only witness understood how the printouts were prepared. State v. Austin, 104 N.M. 573, 725 P.2d 252 (Ct. App. 1985).

Admission of calibration logs of breath-alcohol device. — Admission as business records of calibration logs and printout from a breath-alcohol device in a prosecution for careless driving and driving while intoxicated did not deny the defendant his right to confront witnesses. State v. Ruiz, 120 N.M. 534, 903 P.2d 845 (Ct. App. 1995).

VIII. SPEEDY TRIAL.

Delay weighs against state. — Where defendant’s trial commenced twenty-seven months after his indictment, and the state failed to arraign defendant on the charges until fourteen months after the indictment, and over half of the total delay was caused by the state’s unjustified negligence in not knowing that defendant was in its custody, the delay weighs heavily against the state. State v. Urban, 2004-NMSC-007, 135 N.M. 279, 87 P.3d 1066.

Fourteen month delay. — The state violated defendant's right to a speedy trial where there was an unexplained and unjustifiable fourteen-month gap between defendant's indictment and his arraignment. State v. Urban, 2004-NMSC-007, 135 N.M. 279, 87 P.3d 1066.

Purpose of right to speedy trial. — The constitutional guarantee preventing undue delay between the time of the charge and trial has a three-fold purpose. It protects the accused, if held in jail to await trial, against prolonged imprisonment; it relieves him of long periods of time when there may be public suspicion because of an untried accusation; and it prevents him from being exposed to the hazard of a trial after so great a lapse of time that the means of proving his innocence may not be within his reach, as, for example, by loss of witnesses or the dulling of memory. Raburn v. Nash, 78 N.M. 385, 431 P.2d 874, appeal dismissed, 389 U.S. 999, 88 S. Ct. 582, 19 L. Ed. 2d 613 (1967).

The guarantee of a speedy trial is to prevent undue and oppressive incarceration prior to the trial, to minimize anxiety and concern accompanying public accusation, and to limit the possibility that long delay will impair the ability of the accused to defend himself. State v. Crump, 82 N.M. 487, 484 P.2d 329 (1971).

Orderly expedition of case requires deliberate pace. — Because of the many procedural safeguards provided an accused, criminal prosecutions are necessarily designed to move at a deliberate pace and a requirement of unreasonable speed would have a deleterious effect both upon the rights of the accused and upon the ability of society to protect itself. Therefore, the right of a speedy trial is necessarily relative. It is consistent with delays and depends upon circumstances. It secures rights to a defendant. It does not preclude the rights of public justice. Whether delay in completing a prosecution amounts to an unconstitutional deprivation of rights depends upon the circumstances. The delay must not be purposeful or oppressive. The essential ingredient is orderly expedition and not mere speed. Raburn v. Nash, 78 N.M. 385, 431 P.2d 874, appeal dismissed, 389 U.S. 999, 88 S. Ct. 582, 19 L. Ed. 2d 613 (1967).

The right to a speedy trial is a relative right consistent with delays. The essential ingredient of this right is orderly expedition of the criminal process. State v. Mascarenas, 84 N.M. 153, 500 P.2d 438 (Ct. App. 1972).

Right to speedy trial becomes applicable only upon the initiation of formal prosecution proceedings. Pre-arrest, or pre-formal prosecution, delays may, however, constitute a denial of due process. State v. Polsky, 82 N.M. 393, 482 P.2d 257 (Ct. App.), cert. denied, 82 N.M. 377, 482 P.2d 241 (1971), cert. denied, 404 U.S. 1015, 92 S. Ct. 688, 30 L. Ed. 2d 662 (1972).

Constitutional right to a speedy trial arises, or becomes applicable, only upon the initiation of formal prosecution proceedings. State v. Crump, 82 N.M. 487, 484 P.2d 329 (1971).

The right of a speedy trial arises, or comes into application, only upon the initiation of the formal prosecution proceedings, and where defendant complains only of the delay in initiating the prosecution, the constitutional guarantee of a speedy trial has no application. State v. Polsky, 82 N.M. 393, 482 P.2d 257 (Ct. App.), cert. denied, 82 N.M. 377, 482 P.2d 241 (1971), cert. denied, 404 U.S. 1015, 92 S. Ct. 688, 30 L. Ed. 2d 662 (1972).

The filing of a complaint in magistrate court is insufficient to trigger a defendant's speedy trial right for felony charges. State v. Ross, 1999-NMCA-134, 128 N.M. 222, 991 P.2d 507.

The New Mexico rule stated in 1971 was that the period prior to filing the indictment is not to be considered in determining whether there has been a violation of defendant's right to a speedy trial. But the United States supreme court has held that it is either a formal indictment or information or else the actual restraints imposed by arrest and holding to answer a criminal charge that engage the particular protections of the speedy trial provision of the U.S. Const., amend. VI. State v. Tafoya, 91 N.M. 121, 570 P.2d 1148 (Ct. App. 1977).

Period prior to filing of indictment is not to be considered in determining whether there was a violation of defendant's constitutional right to a speedy trial. State v. Crump, 82 N.M. 487, 484 P.2d 329 (1971).

Speedy trial provisions inapplicable to probation revocation proceedings. — The time constraints of a speedy trial rule and the constitutional right, under the state and federal constitutions, to a speedy trial are inapplicable to probation revocation proceedings; however, a delay in the institution and prosecution of probation revocation proceedings, along with a showing of prejudice to the probationer, may constitute a denial of due process, thereby requiring the state to waive any right to revoke the probation. State v. Chavez, 102 N.M. 279, 694 P.2d 927 (Ct. App. 1985).

Affirmative request for speedy trial. — Where the criminal prosecution was moving at a designedly deliberate pace consistent with the procedural safeguards afforded the defendant, defendant could not be heard to complain (at arraignment of denial of right to speedy trial) unless he had affirmatively made known his desire for a speedy trial previously. State v. Adams, 80 N.M. 426, 457 P.2d 223 (Ct. App. 1969).

Defendant failed in his contention that he was denied a speedy trial because he did not ask for a speedy trial and he raised no question concerning the same before trial. State v. Rodriguez, 83 N.M. 180, 489 P.2d 1178 (1971).

Demands for a speedy trial weigh heavily in favor of defendant in determining whether delays were justified or not. State v. Harvey, 85 N.M. 214, 510 P.2d 1085 (Ct. App. 1973).

The "demand" of trial necessary to avoid a waiver of right to speedy trial is not applicable in "extreme circumstances." State v. Mascarenas, 84 N.M. 153, 500 P.2d 438 (Ct. App. 1972).

Absent extreme circumstances, petitioner may not complain of the lack of a speedy trial unless he has affirmatively made known his desire for a speedy trial. Patterson v. State, 81 N.M. 210, 465 P.2d 93 (Ct. App. 1970).

A defendant may not be heard to complain of absence of speedy trial unless he has affirmatively made known his desire for such a trial. The accused must go on record in the attitude of demanding a trial or resisting delay or be deemed to have waived the privilege. Raburn v. Nash, 78 N.M. 385, 431 P.2d 874, appeal dismissed, 389 U.S. 999, 88 S. Ct. 582, 19 L. Ed. 2d 613 (1967).

Defendant's claim of lack of a speedy trial is not a ground for reversal unless defendant affirmatively made known his desire for a speedy trial. State v. Ford, 81 N.M. 556, 469 P.2d 535 (Ct. App. 1970).

Where defendant timely asserted his right to a speedy trial three times, this factor weighs against the State. State v. Urban, 2004-NMSC-007, 135 N.M. 279, 87 P.3d 1066.

Consenting to or acquiescing in delay. — Regardless of the fact that a delay in a particular case might have been construed to be a deprivation of the right to a speedy trial, the defendant cannot be heard to complain if he consented to or acquiesced in the delay. State v. McCroskey, 79 N.M. 502, 445 P.2d 105 (Ct. App. 1968).

Where defendant consents to the delay, he may not complain of a denial of the right to speedy trial. State v. Mascarenas, 84 N.M. 153, 500 P.2d 438 (Ct. App. 1972).

Factors considered in judging reasonable delay. — Whether right to speedy trial has been denied depends on the reasonableness of the particular delay. In judging reasonableness, the court of appeals has looked to four factors to be considered: length of the delay; the reason for it; prejudice to the defendant; and waiver by the accused of the right. State v. Mascarenas, 84 N.M. 153, 500 P.2d 438 (Ct. App. 1972); State v. Barefield, 92 N.M. 768, 595 P.2d 406 (Ct. App. 1979).

Where there was no indication that complaint at delay was brought about by concerted acts of state officials, defendant was free on bond during the whole period of the continuances, and no undue and oppressive incarceration was involved, there was no denial of the right to a speedy trial. State v. Borunda, 83 N.M. 563, 494 P.2d 976 (Ct. App.), cert. denied, 83 N.M. 562, 494 P.2d 975 (1972).

In determining whether a defendant's right to a speedy trial has been abridged, trial court should weigh four factors: length of delay, reason for delay, defendant's assertion of his right and prejudice to defendant. Fact that defendant was not prejudiced by the

delay is not of itself sufficient to deny a claim on this ground. State v. Harvey, 85 N.M. 214, 510 P.2d 1085 (Ct. App. 1973).

There are at least four factors to be considered in determining whether a defendant has been denied a right to a speedy trial - length of the delay, reason for the delay, defendant's assertion of the right and prejudice to the defendant. They are related factors and must be considered together with such other circumstances as may be relevant. These factors have no talismanic qualities; courts must still engage in a difficult and sensitive balancing process. State v. Tafoya, 91 N.M. 121, 570 P.2d 1148 (Ct. App. 1977).

When an accused asserts that his right to a speedy trial has been violated because of a delay in bringing him to trial, the appellate court will analyze his claim under the four-factor balancing test set forth in Barker v. Wingo, 407 U.S. 514, 92 St. Ct. 2182, 33 L. Ed. 2d 101 (1972). These factors are the length of the delay, the reason for the delay, the assertion of the right to a speedy trial, and the prejudice to the defendant as a result of the delay. State v. Tartaglia, 108 N.M. 411, 773 P.2d 356 (Ct. App. 1989), overruled on other grounds Zurla v. State, 109 N.M. 640, 789 P.2d 588 (1990).

Whenever there is a delay of more than six months between the time of arraignment and the date of the trial, four factors are to be considered in determining whether a defendant has been denied the right to a speedy trial. These are length of delay, reason for delay, defendant's assertion of his right, and ensuing prejudice to the defendant. State v. Mendoza, 108 N.M. 446, 774 P.2d 440 (1989).

Initially, the court determines whether the delay is presumptively prejudicial; if so, the length of delay is balanced against the reason for delay, the defendant's assertion of the right, and actual prejudice to the defendant. State v. Laney, 2003-NMCA-144, 134 N.M. 648, 81 P.3d 591, cert. denied, 2004-NMCERT-003, 135 N.M. 51, 84 P.3d 668.

Determination of whether delay is presumptively prejudicial requires consideration of the length of time between arrest of indictment and prosecution, the complexity of the charges, and the nature of the evidence against the accused. State v. Laney, 2003-NMCA-144, 134 N.M. 648, 81 P.3d 591, cert. denied, 2004-NMCERT-003, 135 N.M. 51, 84 P.3d 668.

Minimum delay required to trigger further inquiry. – A minimum of nine months delay is necessary to trigger further inquiry into the claim of a violation of the right to a speedy trial in simple cases, twelve months in cases of intermediate complexity, and fifteen months in complex cases. State v. Laney, 2003-NMCA-144, 134 N.M. 648, 81 P.3d 591, cert. denied, 2004-NMCERT-003, 135 N.M. 51, 84 P.3d 668.

To be denied a speedy trial, the delay must partake of the purposeful and oppressive, or even smack of deliberate, obstruction on the part of the government. Miller v. Rodriguez, 373 F.2d 26 (10th Cir. 1967).

Facts showing purposeful delay by state. — Where case was brought by information after grand jury failed to indict defendant on felony charges, where there was an unexplained delay of some 10 and one-half months between the time of filing the information and the time defendant submitted to arrest upon learning that officers were looking for him, and where the uncontradicted showing was that defendant was available to the state at any time the state wished to proceed, this showed a purposeful delay by the state amounting to a denial of the right to a speedy trial. State v. Lucero, 91 N.M. 26, 569 P.2d 952 (Ct. App. 1977).

Delay without prejudice does not violate right. — Where defendant claims a denial of a speedy trial solely because of the elapsed time between the offenses and his trial, but he does not claim any prejudice resulting from this elapsed time, defendant's claim is an insufficient basis for a holding that his constitutional right to a speedy trial has been denied. State v. Baca, 82 N.M. 144, 477 P.2d 320 (Ct. App. 1970).

That defendant was not taken before a magistrate for two and one-half days after his arrest provided no legal basis for relief where there is no showing or claim that the delay deprived defendant of a fair trial or that he was prejudiced in any way. Barela v. State, 81 N.M. 433, 467 P.2d 1005 (Ct. App. 1970).

To obtain a dismissal for preindictment delay, defendant must show that he has been substantially prejudiced. Where the contentions of prejudice in the trial court were (1) that a nine-month delay, between arrest and indictment, was a showing of prejudice and (2) that because defendant was intoxicated at the time of the offense he had a memory problem which had been compounded by the nine-month delay, neither claim was a showing of substantial prejudice, and the delay was not a violation of due process. State v. Tafoya, 91 N.M. 121, 570 P.2d 1148 (Ct. App. 1977).

Without a showing of prejudice, delay in bringing the defendant before a magistrate provides no basis for reversal of the conviction. State v. Ford, 81 N.M. 556, 469 P.2d 535 (Ct. App. 1970).

Where the procedural defect is the delay in filing the information, absent a showing of prejudice from this delay, a prosecution under the information is proper. State v. Keener, 97 N.M. 295, 639 P.2d 582 (Ct. App. 1981).

The defendant’s constitutional right to speedy sentencing was not violated where, despite a presumptively prejudicial delay in re-sentencing, the defendant did not show any actual prejudice because he did not show that he suffered undue anxiety or concern rising to the level of a constitutional violation, he failed to state what defense was impaired by the delay, and the record confirmed that the sentence initially imposed by the trial court would not have been reduced had the re-sentencing occurred earlier. State v. Brown, 2003-NMCA-110, 134 N.M. 356, 76 P.3d 1113.

Showing of substantial prejudice prerequisite to dismissal for preindictment delay. — A showing of substantial prejudice is required before one can obtain a

dismissal for preindictment delay. Elapsed time in itself does not determine whether prejudice has resulted from the delay, nor does every delay-caused detriment amount to substantial prejudice; where the defendant shows actual prejudice, it must be balanced against the reasons for the delay in determining whether he has been substantially prejudiced. State v. Duran, 91 N.M. 756, 581 P.2d 19 (1978).

Substantial prejudice means actual prejudice to the defendant together with unreasonable delay of the prosecution in obtaining an indictment. State v. Duran, 91 N.M. 756, 581 P.2d 19 (1978).

To make showing of actual prejudice defendant must establish in what respect his defense might have been more successful if the delay between his arrest and his indictment had been shorter. State v. Duran, 91 N.M. 756, 581 P.2d 19 (1978).

A 23-month delay in the bringing of a defendant to trial is presumptively prejudicial. State v. Barefield, 92 N.M. 768, 595 P.2d 406 (Ct. App. 1979).

Mere possibility that deceased witness might have helped defendant's case is insufficient to establish actual prejudice in a delay between arrest and indictment. State v. Duran, 91 N.M. 756, 581 P.2d 19 (1978).

The lengthy unexplained delay in the prosecution violated defendant's right to a speedy trial. State v. Kilpatrick, 104 N.M. 441, 722 P.2d 692 (Ct. App. 1986).

Certain delays presumptively prejudicial. — In relation to the policy disclosed in former Rule 95, N.M.R. Civ. P. (superseded by Rule 5-604 NMRA), concerning right to speedy trial, delays of 15 months between arrest and trial and of 10 months between filing of information and trial were presumptively prejudicial. State v. Mascarenas, 84 N.M. 153, 500 P.2d 438 (Ct. App. 1972).

A nine-month delay between arrest and indictment was presumptively prejudicial whether or not there was an explanation for the delay. The delay and the lack of explanation of the reason for the delay were two factors to be considered. However, the failure of defendant to show any prejudice was also to be considered. Where the trial court failed to consider the factors required to be considered and failed to apply the balancing test required, the order dismissing the indictment will be reversed and the cause is remanded with instructions to reinstate the indictment. State v. Tafoya, 91 N.M. 121, 570 P.2d 1148 (Ct. App. 1977).

A twenty-seven month delay from the date of the indictment to the date defendant pleaded no contest is presumptively prejudicial. State v. Urban, 2004-NMSC-007, 135 N.M. 279, 87 P.3d 1066.

And then burden is on state to show absence of prejudice. — Where delay is presumptively prejudicial, the state has the burden of demonstrating an absence of

prejudice to the defendant. State v. Mascarenas, 84 N.M. 153, 500 P.2d 438 (Ct. App. 1972).

Eleven and one-half month delay between date of arraignment and date available for trial was presumptively prejudicial and triggered inquiry into the four factors which must be balanced in deciding speedy trial issue: length of delay, reason for delay, defendant's assertion of right, and prejudice to defendant. State v. Romero, 101 N.M. 661, 687 P.2d 96 (Ct. App. 1984).

But showing of delay not enough. — Trial court did not err in denying defendant's motion to dismiss for lack of speedy trial based on 11*1*/2 month delay attributable to the state where defendant asserted his right to speedy trial only one month prior to available trial date and where his only assertion of possible prejudice was absence of psychiatrist who examined him. State v. Romero, 101 N.M. 661, 687 P.2d 96 (Ct. App. 1984).

Constitutional analysis not required even though six month rule violated. — If a violation of the six month rule of Rule 8-506 NMRA is found, the court is not required to automatically make a constitutional speedy trial analysis. County of Los Alamos v. Beckman, 120 N.M. 596, 904 P.2d 45 (Ct. App. 1995).

Determination of delay on case to case basis. — Every defendant charged with crime has the right to a speedy trial. Whether or not a delay amounts to an unconstitutional deprivation of this right depends on the circumstances of the particular case. State v. McCroskey, 79 N.M. 502, 445 P.2d 105 (Ct. App. 1968).

Delay caused in part by defendant. — Defendant's motion for dismissal of the indictment because of a delay of 15 months from indictment to trial was properly denied when such delay was caused in part by the defendant because of vacating an early setting, and because of hearing on his own motions. State v. Montoya, 86 N.M. 119, 520 P.2d 275 (Ct. App. 1974).

Delay of about 19 months between arrest and trial did not warrant dismissal of charges where the defendant was responsible for some of the delay, he invoked his speedy trial rights just prior to trial, and he could not demonstrate any prejudice from his pretrial incarceration. State v. Ortiz-Burciaga, 1999-NMCA-146, 993 P.2d 96, cert. denied, 128 N.M. 149, 990 P.2d 823 (1999).

Where a defendant causes or contributes to the delay he may not complain of a denial of the right to speedy trial. State v. Mascarenas, 84 N.M. 153, 500 P.2d 438 (Ct. App. 1972).

Where petitioner's plea of insanity was instrumental in delaying the disposition of his trial, and where, in addition, the petitioner had not asserted that the passage of time had impaired his ability to defend himself, thereby rendering the delay prejudicial or oppressive, his constitutional right to a speedy trial was not violated. Raburn v. Nash, 78

N.M. 385, 431 P.2d 874, appeal dismissed, 389 U.S. 999, 88 S. Ct. 582, 19 L. Ed. 2d 613 (1967).

One test in determining whether defendant was denied a speedy trial under this section is whether the delay was caused wholly by act of the state or whether some act of the defendant caused or contributed to the delay. Raburn v. Nash, 78 N.M. 385, 431 P.2d 874, appeal dismissed, 389 U.S. 999, 88 S. Ct. 582, 19 L. Ed. 2d 613 (1967).

A delay in conducting an appeal de novo in district court following the conviction in municipal court did not establish a deprivation of the defendant's constitutional rights since the defendant had a responsibility to try to keep the case from slipping through the cracks. Town of Bernalillo v. Garcia, 118 N.M. 610, 884 P.2d 501 (Ct. App. 1994).

Twenty-one month delay in bringing defendant's case to trial was presumptively prejudicial, but none of the delays were attributable to the state; thus, defendant was not denied the right to a speedy trial. State v. Plouse, 2003-NMCA-048, N.M. , 64 P.3d 522, cert. denied, N.M. , 65 P.3d 1094 (2003).

Although a delay of 62 days over the minimum 9-month period was presumptively prejudicial in a "high end" simple case, the delay did not violate the defendant's constitutional right to a speedy trial where both parties were equally culpable in causing the delay, the defendant waited "until the eleventh hour" to specifically and meaningfully assert the right, and the defendant was primarily responsible for any prejudice to his case. State v. Laney, 2003-NMCA-144, 134 N.M. 648, 81 P.3d 591, cert. denied, 2004-NMCERT-003, 135 N.M. 51, 84 P.3d 668.

Delay caused by judicial review initiated by defendant. — Delay caused by judicial review initiated by the defendant would not be considered under a speedy-trial claim unless the defendant showed an unreasonable delay caused by the prosecution in that review, or a wholly unjustifiable delay by the reviewing court. State v. Wittgenstein, 119 N.M. 565, 893 P.2d 461 (Ct. App. 1995).

Right not forfeited because of incarceration. — A prisoner does not forfeit his right to a speedy trial solely because he is confined in the penitentiary under sentence for another offense. This is particularly true when the state that holds him in prison is the same state that presents the indictments. Raburn v. Nash, 78 N.M. 385, 431 P.2d 874, appeal dismissed, 389 U.S. 999, 88 S. Ct. 582, 19 L. Ed. 2d 613 (1967).

Extradition procedures must be used to avoid delay. — Where administrative machinery exists to secure extradition of person against whom charges are pending, the prosecutor has a constitutional duty to attempt to use it to avoid infringement upon defendant's right to speedy trial. The fact that a less cumbersome method of vindicating a prisoner's rights is not available does not excuse the failure to use available means. State v. Harvey, 85 N.M. 214, 510 P.2d 1085 (Ct. App. 1973).

Claim of lack of speedy trial raised too late. — A claimed lack of a speedy trial does not provide a basis for post-conviction relief where the claim was not raised prior to trial. Patterson v. State, 81 N.M. 210, 465 P.2d 93 (Ct. App. 1970).

Waiver of claim of undue delay. — Assuming there was undue delay, that delay did not deprive the magistrate of jurisdiction to bind defendant over to district court, and when defendant was arraigned in district court, his guilty plea waived the claim of undue delay in the absence of a showing of prejudice. State v. Elledge, 78 N.M. 157, 429 P.2d 355 (1967).

The entry of a voluntary plea of guilty constitutes a waiver of whatever right a defendant may have had to a speedy trial. State v. McCroskey, 79 N.M. 502, 445 P.2d 105 (Ct. App. 1968).

Where there is no showing of any prejudice to defendant by whatever delay may have occurred between his arrest and preliminary hearing and his position at trial could not have been prejudiced, because he was convicted and sentenced upon his voluntary plea of guilty, the entry of his plea operated as a waiver of any claim of undue delay. State v. Gonzales, 80 N.M. 168, 452 P.2d 696 (Ct. App. 1969).

The entry of voluntary plea of guilty constituted a waiver of whatever right defendant may have had to a speedy trial. State v. Gonzales, 80 N.M. 168, 452 P.2d 696 (Ct. App. 1969).

Interval of 52 days between arrest and trial, without more, is insufficient for a determination that a speedy trial has been denied. State v. Ford, 81 N.M. 556, 469 P.2d 535 (Ct. App. 1970).

Delay of 144 days from arrest to trial. — The time interval between arrest on March 3rd and trial on July 25th, without more, is insufficient for a determination that the right to a speedy trial has been denied. State v. Adams, 80 N.M. 426, 457 P.2d 223 (Ct. App. 1969).

A 15-month delay between arrest and trial was contrary to the purpose of the right to speedy trial because one of the purposes of that right is to prevent undue incarceration prior to trial. State v. Mascarenas, 84 N.M. 153, 500 P.2d 438 (Ct. App. 1972).

Eighteen-month delay between arraignment and trial did not violate defendant's right to a speedy trial, where he acquiesced to a stay in the proceedings during determination of his competency and did not assert his right to a speedy trial until the day the trial began, six months after the trial court lifted the stay. State v. Mendoza, 108 N.M. 446, 774 P.2d 440 (1989).

Where trial was delayed for 26 months due to defendant's incarceration in another state, no adequate reason was given for delay, and defendant repeatedly insisted that he be tried, defendant was denied his right to a speedy trial, despite an equivocal

showing on the question of prejudice. State v. Harvey, 85 N.M. 214, 510 P.2d 1085 (Ct. App. 1973).

A six-year delay in imposing a correct sentence was not a denial of appellant's constitutional right to a speedy trial as guaranteed by U.S. Const., amend. VI, or this section. Miller v. Rodriguez, 373 F.2d 26 (10th Cir. 1967).

Delay caused by ongoing narcotics undercover operation. — A showing of reasonable delay in a defendant's prosecution, by reason of an ongoing narcotics undercover operation, is a permissible basis for preindictment delay. State v. Lewis, 107 N.M. 182, 754 P.2d 853 (Ct. App. 1988).

Thirteen-month delay in a prosecution for aggravated assault on a police officer was presumptively prejudicial, in light of the simple nature of the charge and the readily available evidence. State v. Lujan, 112 N.M. 346, 815 P.2d 642 (Ct. App. 1991).

Charge under new information after previous dismissal. — Where charge against defendant was filed and then dismissed under writ of habeas corpus, prosecution and conviction three years later under information containing same charge did not violate defendant's constitutional right to a speedy public trial under this section. State v. Rhodes, 77 N.M. 536, 425 P.2d 47 (1967).

Whether general public may be excluded from trial is discretionary with trial court, and in determining whether discretion was abused the appellate court starts with the view that the interest of a defendant in having ordinary spectators present during trial is not an absolute right but must be balanced against other interests which might justify excluding them. State v. Padilla, 91 N.M. 800, 581 P.2d 1295 (Ct. App. 1978).

Where disinterested persons were excluded from courtroom during rape victim's testimony, whereupon she controlled her emotions while testifying, there was no denial of a public trial, and the defendant's claim of actual prejudice, asserting that the absence of spectators lent credibility to the victim's testimony, was no more than speculation since the absence of spectators might just as well have lessened the impact of the testimony. State v. Padilla, 91 N.M. 800, 581 P.2d 1295 (Ct. App. 1978).

IX. IMPARTIAL JURY.

Impartial jury means a jury where each and every one of the 12 members constituting the jury is totally free from any partiality whatsoever. State v. McFall, 67 N.M. 260, 354 P.2d 547 (1960); Mares v. State, 83 N.M. 225, 490 P.2d 667 (1971).

Trial by impartial jury means a jury that does not favor one side more than another, treats all alike, is unbiased, equitable, fair and just. If the members of the jury do not have these qualifications, defendant is denied an impartial jury. State v. Verdugo, 78 N.M. 762, 438 P.2d 172 (Ct. App. 1968).

By "impartial jury" is meant a jury where each and every one of the 12 members constituting the jury is totally free from any partiality whatsoever. "Impartial" is defined in Webster's New International Dictionary (2nd Ed.), as "not partial; not favoring one more than another; treating all alike; unbiased; equitable; fair; just." Accordingly, the jury which one charged with crime is guaranteed is one that does not favor one side more than another, treats all alike, is unbiased, equitable, fair and just. If any juror does not have these qualities, the jury upon which he serves is thereby deprived of its quality of impartiality. State v. Pace, 80 N.M. 364, 456 P.2d 197 (1969).

The difference in the purposes of this section and N.M. Const., art. II, § 12 is that § 12 guarantees a trial by jury while this section provides, among other things, that the trial shall be by an "impartial" jury. State v. Sweat, 78 N.M. 512, 433 P.2d 229 (Ct. App. 1967).

Burden of establishing partiality by juror is upon party making such a claim. State v. Baca, 99 N.M. 754, 664 P.2d 360 (1983).

Trial court must exercise discretion in process of obtaining fair trial. — The trial court has the duty of seeing that there is a fair and impartial jury. In doing so, it must exercise discretion. The trial court's decision will not be disturbed unless there is manifest error or a clear abuse of discretion. State v. Ford, 81 N.M. 556, 469 P.2d 535 (Ct. App. 1970); State v. Maes, 81 N.M. 550, 469 P.2d 529 (Ct. App.), cert. denied, 81 N.M. 588, 470 P.2d 309 (1970); State v. Verdugo, 78 N.M. 762, 438 P.2d 172 (Ct. App. 1968).

Court's decision as to juror not disturbed absent manifest error or abused discretion. — Where there is nothing to indicate either manifest error or abuse of discretion by the trial court in permitting a person to serve as a juror, then the trial court's decision will not be disturbed on appeal. State v. Baca, 99 N.M. 754, 664 P.2d 360 (1983).

Court's refusal to allow additional questions. — If the questions allowed are sufficient to probe juror bias on a specific issue, the court's refusal to allow additional fact-specific questions does not amount to an abuse of discretion. State v. Sosa, 1997-NMSC-032, 123 N.M. 564, 943 P.2d 1017.

Right applies to state as well as to defendant. — The right to trial by an impartial jury is a right extending to the public, represented by the state, as well as the criminally accused. State v. Valdez, 83 N.M. 632, 495 P.2d 1079 (Ct. App.), aff'd, 83 N.M. 720, 497 P.2d 231, cert. denied, 409 U.S. 1077, 93 S. Ct. 694, 34 L. Ed. 2d 666 (1972).

No right to jury prejudiced in defendants' favor. — It is no error to excuse a prospective juror who indicates that he might be favorably prejudiced by the fact that defendants are members of the American Indian movement. Defendants are entitled to an impartial jury. They are not entitled to a juror prejudiced in their favor. State v.

Cutnose, 87 N.M. 300, 532 P.2d 889 (Ct. App. 1975), overruled on other grounds State v. McCormack, 100 N.M. 657, 674 P.2d 1117 (1984).

Defendant's argument that he could not obtain a fair and impartial trial jury from a panel which did not include a member or members who might be partial to him was without merit. State v. Sluder, 82 N.M. 755, 487 P.2d 183 (Ct. App. 1971).

The rights of an accused in respect to the panel and final jury are (1) that there be no systematic, intentional exclusion of any section of the community and (2) that there be left as fitted for service no biased or prejudiced person. State v. Ortiz, 88 N.M. 370, 540 P.2d 850 (Ct. App. 1975).

Right to challenge jurors. — The right to an impartial jury carries with it the concomitant right to take reasonable steps to insure that the jury is impartial. One of the most important methods of securing this right is the right to challenge. State v. Ortiz, 88 N.M. 370, 540 P.2d 850 (Ct. App. 1975).

Right to challenge jurors has little meaning if it is unaccompanied by the right to ask relevant questions on voir dire upon which the challenge for cause can be predicated. State v. Ortiz, 88 N.M. 370, 540 P.2d 850 (Ct. App. 1975).

Full knowledge essential to exercise of right to challenge juror. — Full knowledge of all relevant and material matters that might bear on possible disqualification of a juror is essential to a fair and intelligent exercise of the right of counsel to challenge either for cause or peremptorily. Mares v. State, 83 N.M. 225, 490 P.2d 667 (1971).

Challenge jury selection before jury sworn. — Generally, a challenge to jury selection must be made before the jury is sworn. State v. Wilson, 117 N.M. 11, 868 P.2d 656 (Ct. App. 1993).

It is the duty of a juror to make full and truthful answers to such questions as are asked, neither falsely stating any fact nor concealing any material matter. Mares v. State, 83 N.M. 225, 490 P.2d 667 (1971).

New trial awarded for false answers by juror. — If a juror falsely represents his interest or situation or conceals a material fact relevant to the controversy, and such matters, if truthfully answered, might establish prejudice or work a disqualification of the juror, the party misled or deceived thereby, upon discovering the fact of the juror's incompetency or disqualification after trial, may assert that fact as ground for and obtain a new trial, upon a proper showing of such facts, even though the bias or prejudice is not shown to have caused an unjust verdict, it being sufficient that a party, through no fault of his own, has been deprived of his constitutional guarantee of a trial of his case before a fair and impartial jury. Mares v. State, 83 N.M. 225, 490 P.2d 667 (1971).

Concealing bias destroys integrity of jury. — The integrity of a jury is destroyed if one of the jurors serves while concealing bias. State v. Chavez, 78 N.M. 446, 432 P.2d 411 (1967).

Excusing juror is matter of trial court's discretion. — The trial court has the duty of seeing that there is a fair and impartial jury and, in doing so, it must exercise discretion. The trial court's decision not to excuse a juror will not be disturbed unless there is a manifest error or a clear abuse of discretion. State v. Valdez, 83 N.M. 632, 495 P.2d 1079 (Ct. App.), aff'd, 83 N.M. 720, 497 P.2d 231, cert. denied, 409 U.S. 1077, 93 S. Ct. 694, 34 L. Ed. 2d 666 (1972).

The trial court may properly exclude a juror for cause if the juror's views would substantially impair the performance of the juror's duties in accordance with the instructions and oath. State v. Clark, 1999-NMSC-035, 128 N.M. 119, 990 P.2d 793.

Trial court did not abuse discretion in refusing to disqualify prospective juror who was the wife of a railroad employee holding a commission as a special deputy sheriff for which he received no remuneration. State v. McFall, 67 N.M. 260, 354 P.2d 547 (1960).

Peremptory challenges by multiple defendants. — In a prosecution for first degree murder, the defendant was not denied due process of law because the trial court failed to permit him to exercise 12 peremptory challenges for himself, but instead allowed the defendant and codefendant a total of 14 challenges. Multiple defendants have no constitutional right to more peremptory challenges than given them by rule, provided they are given a fair trial by an impartial jury. State v. Sutphin, 107 N.M. 126, 753 P.2d 1314 (1988).

Voir dire on prejudice as to use of alcohol. — Trial court did not infringe defendant's right to impartial jury trial by restricting voir dire of prospective jurors on the question of prejudice as to the use of alcohol and denying a challenge to those jurors for cause, where jurors stated that, in spite of possible prejudice in this area, they would be able to listen to the evidence and the court's instructions and follow the law, and thereby reach a fair and impartial verdict. State v. Fransua, 85 N.M. 173, 510 P.2d 106, 58 A.L.R.3d 656 (Ct. App. 1973).

Peremptory challenges used on persons who should be excused for cause. — Prejudice is presumed where a party is compelled to use peremptory challenges on persons who should be excused for cause and that party exercises all of his or her peremptory challenges before the court completes the venire. Fuson v. State, 105 N.M. 632, 735 P.2d 1138 (1987).

Bias alleged in driving under the influence case. — In a prosecution for driving under the influence, the defendant's right to an impartial jury was not denied by the court's refusal to strike a juror who stated that she believed alcohol was the cause of many problems and that she was a member of Mothers Against Drunk Drivers. The juror never stated that she would find against the defendant or that she believed that

someone accused of a crime probably committed that crime if they had been using alcohol. State v. Wiberg, 107 N.M. 152, 754 P.2d 529 (Ct. App. 1988).

Voir dire on death penalty. — It is not improper to voir dire potential jurors on the death penalty merely because they do not have any discretion in imposing it. State v. Ortiz, 88 N.M. 370, 540 P.2d 850 (Ct. App. 1975).

The trial court did not abuse its discretion in excluding prospective jurors who indicated that they would automatically vote against the death penalty. The basis for excluding these individuals was their inability to apply the law, rather than their religious views. State v. Allen, 2000-NMSC-002, 128 N.M. 482, 994 P.2d 728, cert. denied, 530 U.S. 1218, 120 S. Ct. 2225, 147 L. Ed. 2d 256 (2000); State v. Jacobs, 2000-NMSC-026, 129 N.M. 448, 10 P.3d 127.

The trial court did not abuse its discretion in complying with UJI 14-121 by not allowing defense counsel to refer prospective jurors specifically to "the case we are dealing with now" and, at the same time, allowing counsel for both sides considerable latitude in asking generalized, hypothetical questions. State v. Allen, 2000-NMSC-002, 128 N.M. 482, 994 P.2d 728, cert. denied, 530 U.S. 1218, 120 S. Ct. 2225, 147 L. Ed. 2d 256 (2000).

Questions regarding jurors' ability to vote for death penalty. — It is not error to allow the prosecutor to question jurors to ascertain whether they could impose the death penalty if they find that the aggravating circumstances outweigh the mitigating circumstances. State v. Clark, 1999-NMSC-035, 128 N.M. 119, 990 P.2d 793.

Panel, not actual jury, must reflect community population. — There is no requirement that petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population. Defendants are not entitled to a jury of any particular composition, but the jury wheels, pools of names, panels or venires from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof. State v. Ortiz, 88 N.M. 370, 540 P.2d 850 (Ct. App. 1975).

Selection of jury from panel which heard possibly damaging statements. — Where five prospective jurors made statements in the presence of other members of the jury panel that the name of defendant in a marijuana case had come up in another marijuana trial and were thus excused from jury duty, it was neither error nor abuse of discretion by trial court to select a jury from persons who heard these statements of excused members where nothing in the record indicated that the jurors selected were influenced by the statements or were other than impartial in reaching their verdict. State v. Verdugo, 78 N.M. 762, 438 P.2d 172 (Ct. App. 1968).

Excusing jurors opposed to capital punishment. — Allowing the prosecutor in a first-degree murder trial to voir dire prospective jurors on their feelings regarding capital punishment and excusing for cause those jurors who were opposed to capital

punishment did not deprive defendant of his right to trial by a cross-section of the community. State v. Ortiz, 88 N.M. 370, 540 P.2d 850 (Ct. App. 1975).

The trial court did not err in denying the defendant's objection to the state's use of peremptory challenges to remove potential jurors who were reluctant to impose capital punishment. State v. Clark, 1999-NMSC-035, 128 N.M. 119, 990 P.2d 793.

Excusing jurors with religious objections. — Where a potential juror's inability to perform his or her duty is based upon religious objection and belief, his or her removal does not violate the religious protections of this section, because exclusion from the jury is not based upon religious affiliation. State v. Clark, 1999-NMSC-035, 128 N.M. 119, 990 P.2d 793.

Striking black prospective jurors for trial of Hispanic defendant. — Prosecutor's use of peremptory challenges to strike the only two blacks who had a chance to serve on the jury unconstitutionally deprived Hispanic defendant of a jury reflecting a representative cross section of the community. State v. Aragon, 109 N.M. 197, 784 P.2d 16 (1989).

Conversing with juror in absence of defendants. — Where, after the jury was selected but before it was sworn, one juror wanted to tell the trial court that she feared the other jurors were not intelligent enough to decide the case, in the presence of all counsel and defendants, and before anyone knew what the juror wanted, the participants decided that only the trial court and counsel would talk with the juror, and both counsel, by their remarks after the conversation, expressed satisfaction with the jury and with this particular juror, error, if any, in conversing with the juror in the absence of defendants was both harmless and invited. State v. Ramming, 106 N.M. 42, 738 P.2d 914 (Ct. App.), cert. denied, 484 U.S. 986, 108 S. Ct. 503, 98 L. Ed. 2d 501 (1987).

Misconduct involving information learned at trial. — A juror who first fabricated a story as to the defendant's alibi and told it to the jury, and then perjured herself under oath regarding that story during the initial hearing on a motion for a new trial, was not disqualified. Her fellow jurors were unaffected by her comments and her misconduct was motivated only by her appraisal of the evidence heard at trial and her desire for peer recognition, and was not clearly the product of personal experience or the gathering of extraneous information that would have disqualified her from serving and deliberating as one of the 12-person jury. State v. Sacoman, 107 N.M. 588, 762 P.2d 250 (1988).

Juror's acquaintance with counsel. — The defendant did not show that the trial court abused its discretion in excusing a potential juror who was acquainted with defense counsel, even though at the time of voir dire she had no knowledge regarding the case. State v. Jim, 107 N.M. 779, 765 P.2d 195 (Ct. App. 1988).

Juror's lack of knowledge of English. — It would be a violation of this section and N.M. Const., art. II, § 12 to allow one unqualified juror to serve in a criminal cause for

the reason that any verdict rendered in such a situation would be less than unanimous; and a juror who did not possess a working knowledge of English would be unable to serve, in the absence of an interpreter, because he could not possibly understand the issues or evaluate the evidence to arrive at an independent judgment as to the guilt or innocence of the accused. When the court learned in the midst of the jury's deliberations that one juror did not understand English very well, it should have conducted a summary hearing to determine for itself the ability of the juror in question to understand English. State v. Gallegos, 88 N.M. 487, 542 P.2d 832 (Ct. App.), cert. denied, 89 N.M. 6, 546 P.2d 71 (1975).

Juror's unassertiveness. — The prosecution's peremptory challenge to remove the only black juror who could have served on the jury panel based on the prospective juror's failure to make eye contact and lack of assertiveness was not shown to be purposeful discrimination or to be unsupported by substantial evidence. State v. Jones, 1996-NMCA-020, 121 N.M. 383, 911 P.2d 891, aff'd, 1997-NMSC-016, 123 N.M. 73, 934 P.2d 267.

No absolute right to jury of certain county. — The framers of the New Mexico constitution sought to guarantee the right to trial by an impartial jury, rather than an absolute right to trial by a jury of the county wherein the crime is alleged to have occurred. State v. Lopez, 84 N.M. 805, 508 P.2d 1292 (1973).

No right to have certain number of persons from particular precinct on jury. — See State v. Williams, 76 N.M. 578, 417 P.2d 62 (1966).

Relationship between juror and brother as retired police officer not, in itself, prejudicial. — The relationship between a juror and his brother as a retired police officer, or a misapprehension or misstatement on this matter made on a juror questionnaire or at voir dire by the juror, does not of itself constitute sufficient bias or partiality resulting in prejudice to the defendant's case. State v. Baca, 99 N.M. 754, 664 P.2d 360 (1983).

Unintentional exclusion of political party members from jury wheel permissible. — Defendants' contention that the method of selecting names for the jury wheel precludes selection of a fair and impartial jury, where that jury wheel does not include the names of any members of their political group, is without merit where there is no showing that there was an intentional exclusion of party members as a group. State v. Lopez, 96 N.M. 456, 631 P.2d 1324 (Ct. App. 1981).

As is exclusion of nonvoting registered voters. — Where there is no proof that registered voters who do not vote are a "distinctive" or "cognizable" group which has been systematically excluded or substantially underrepresented, the exclusion is not unconstitutional. State v. Lopez, 96 N.M. 456, 631 P.2d 1324 (Ct. App. 1981).

Any unauthorized contact with a juror is presumptively prejudicial to a criminal defendant. Mares v. State, 83 N.M. 225, 490 P.2d 667 (1971).

Refusal to take witness stand does not impair right to trial by impartial jury. — An accused may hesitate to take the witness stand if his past criminal record is such that his credibility will probably be completely destroyed in the eyes of the jury if this record is made known to the jury. However, this in no way impairs his right against self-incrimination, his right not to be deprived of his life, liberty or property without due process of law, nor his right to a public trial by an impartial jury. State v. Duran, 83 N.M. 700, 496 P.2d 1096 (Ct. App.), cert. denied, 83 N.M. 699, 496 P.2d 1095 (1972).

X. VENUE.

The word "trial" in criminal procedure means the proceedings in open court after the pleadings are finished and the prosecution is otherwise ready, down to and including the rendition of the verdict; and the term "trial" does not extend to such preliminary steps as the arraignment and giving of the pleas, nor does it comprehend a hearing in error. State v. Eckles, 79 N.M. 138, 441 P.2d 36 (1968).

Word "district" does not mean "judicial district," but simply means territory over which court may have jurisdiction. State v. Balles, 24 N.M. 16, 172 P. 196 (1918).

No absolute common-law right to jury of county where offense committed. — The right of a trial by jury as that right was known at the time of the adoption of the constitution did not include an absolute right to a trial by a jury of the county where the offense was committed, but that the right was conditioned upon the possibility of a fair and impartial trial being had in that county. State v. Valdez, 83 N.M. 632, 495 P.2d 1079 (Ct. App.), aff'd, 83 N.M. 720, 497 P.2d 231, cert. denied, 409 U.S. 1077, 93 S. Ct. 694, 34 L. Ed. 2d 666 (1972).

Prosecution for violation of municipal ordinance must be laid in municipality where the violation presumably occurred. City of Roswell v. Gallegos, 77 N.M. 170, 420 P.2d 438 (1966).

Venue improper where offenses completed before reaching county. — Where the first six criminal sexual penetration offenses were completed before reaching Bernalillo county, trial in Bernalillo county as to those offenses was improper. State v. Ramirez, 92 N.M. 206, 585 P.2d 651 (Ct. App. 1978).

Right of venue distinguished from magistrate's territorial jurisdiction. — The defendant's personal right of venue is a legal concept, separate and distinct from the territorial jurisdiction of the magistrate, and a statute affecting one does not necessarily affect the other. 1979 Op. Att'y Gen. No. 79-12.

Court may change venue sua sponte. — There is nothing in the constitution or statutes limiting the inherent power of the court to order a change of venue sua sponte when an impartial trial cannot be had in a particular district. State v. Valdez, 83 N.M. 632, 495 P.2d 1079 (Ct. App.), aff'd, 83 N.M. 720, 497 P.2d 231, cert. denied, 409 U.S. 1077, 93 S. Ct. 694, 34 L. Ed. 2d 666 (1972).

Motion for venue change by prosecution. — Trial court did not abuse its discretion in holding, following two highly publicized trials in Taos County, both of which ended in hung juries, that the prosecution was unable to obtain a fair trial in that county and the trial could be relocated. State v. House, 1999-NMSC-014, 127 N.M. 151, 978 P.2d 967.

Change of venue over defendant's objection. — Change of venue will lie in favor of state where impartial jury cannot be had in county where crime was allegedly committed. State v. Holloway, 19 N.M. 528, 146 P. 1066, 1915F L.R.A. 922 (1914). But see, State v. Tijerina, 84 N.M. 432, 504 P.2d 642 (1972).

Venue of criminal case may be changed on application of state, even over objection of defendant, when public excitement and local prejudice would prevent fair trial. State v. Archer, 32 N.M. 319, 255 P. 396 (1927). But see, State v. Tijerina, 84 N.M. 432, 504 P.2d 642 (1972).

Any statute which authorizes a change of venue in a criminal case, on motion of the state, from one county to another, or from one judicial district to another against the objection of the defendant, is void because it is in conflict with this section. State v. Tijerina, 84 N.M. 432, 504 P.2d 642 (1972).

Unnecessary to allege venue in indictment. — Rule of trial court that it is unnecessary to allege venue in indictment or information does not conflict with this section, and objection not made until after plea of guilty and conviction is waived. State v. Joyce, 41 N.M. 4, 62 P.2d 1150 (1936); State v. Wallace, 41 N.M. 3, 62 P.2d 1150 (1936); State v. Bogart, 41 N.M. 1, 62 P.2d 1149 (1936).

Objection that venue not alleged in indictment is waived if not made until after plea of guilty and conviction. State v. Joyce, 41 N.M. 4, 62 P.2d 1150 (1936); State v. Wallace, 41 N.M. 3, 62 P.2d 1150 (1936); State v. Bogart, 41 N.M. 1, 62 P.2d 1149 (1936).

Waiver of constitutional vicinage. — Once defendant has successfully moved for a change of venue, he cannot subsequently claim a constitutional right to the original venue, as he has waived his right to trial in the county of constitutional vicinage. State v. House, 1999-NMSC-014, 127 N.M. 151, 978 P.2d 967.

Waiver of right of venue. — If defendant had any right to object to trial for murder in the federal courthouse, she waived it by remaining silent until after her conviction. Smith v. State, 79 N.M. 450, 444 P.2d 961 (1968).

Right to trial in the county or district in which the offense is alleged to have been committed is waived by failure to make timely objection. City of Roswell v. Gallegos, 77 N.M. 170, 420 P.2d 438 (1966).

Defendant's appearance and participation in preliminary examination, making bond to appear before district court and, after disqualifying presiding judge, waiving right to jury

trial, signing stipulation for another judge to try case and requesting a continuance, resulted in waiver of his right to object to venue. State v. Shroyer, 49 N.M. 196, 160 P.2d 444 (1945).

The right to be tried in the county or district is a right or privilege to a particular venue which may be waived by an accused person in a number of ways, and when defendant goes to trial in another judicial district, without objection on his part, he has waived the privilege, and cannot be heard to say that the court trying him was without jurisdiction. State v. Lopez, 84 N.M. 805, 508 P.2d 1292 (1973).

This provision of the constitution confers a personal privilege of venue upon an accused, and that this privilege may be waived. State v. Lopez, 84 N.M. 805, 508 P.2d 1292 (1973).

To the extent that the language in State v. Glasscock, 76 N.M. 367, 415 P.2d 56 (1966) may suggest or be construed as holding that venue may not be waived, the opinion in that case is overruled. State v. Lopez, 84 N.M. 805, 508 P.2d 1292 (1973).

Record need not show waiver. — The record need not affirmatively show that the trial court fully informed defendant of his right of venue and of his privilege to waive this right, or at least was advised that defendant had been so fully informed; that defendant then affirmatively waived this right; and that the trial court then announced its satisfaction as to the genuineness of this waiver. State v. Lopez, 84 N.M. 805, 508 P.2d 1292 (1973).

Purpose of removal of causes. — All laws for removal of causes from one vicinage to another were passed for the purpose of promoting the ends of justice by getting rid of the influence of some local prejudice which might be supposed to operate detrimentally to the interests and rights of one or the other of the parties to the suit. State v. Valdez, 83 N.M. 632, 495 P.2d 1079 (Ct. App.), aff'd, 83 N.M. 720, 497 P.2d 231, cert. denied, 409 U.S. 1077, 93 S. Ct. 694, 34 L. Ed. 2d 666 (1972).

Racial makeup of county. — Although defendant argued he was prejudiced by prosecution's transfer of venue to a county with few Native Americans, he failed to present evidence of actual discrimination in the selection of the petit jury, and thus there was no constitutional violation. State v. House, 1999-NMSC-014, 127 N.M. 151, 978 P.2d 967.

Removal is a common-law right belonging to the New Mexico courts, and as such can be exercised by them in all cases, when not modified or controlled by state constitutional or statutory enactments. State v. Valdez, 83 N.M. 632, 495 P.2d 1079 (Ct. App.), aff'd, 83 N.M. 720, 497 P.2d 231, cert. denied, 409 U.S. 1077, 93 S. Ct. 694, 34 L. Ed. 2d 666 (1972).

By the common law an accused had the right to be tried in the county in which the offense was alleged to have been committed, where the witnesses were supposed to

have been accessible, and where he might have the benefit of his good character if he had established one there, but, if an impartial trial could not be had in such county, it was the practice to change the venue upon application of the people to some other county where such trial could be obtained. State v. Valdez, 83 N.M. 632, 495 P.2d 1079 (Ct. App.), aff'd, 83 N.M. 720, 497 P.2d 231, cert. denied, 409 U.S. 1077, 93 S. Ct. 694, 34 L. Ed. 2d 666 (1972).

Right not denied by trial in federal courthouse. — Where the trial was before a jury of the county where crime was committed, and was presided over by the judge of the district in which the county is located, appellant was denied none of the rights guaranteed her by this section or N.M. Const., art. II, § 12, notwithstanding the trial was in a federal courthouse. Smith v. State, 79 N.M. 450, 444 P.2d 961 (1968).

Burden of proof for enhanced sentence. — Once a defendant makes a prima facie showing, challenging the validity of his prior uncounseled convictions, the burden shifts to the state to establish by a preponderance of the evidence that the conviction was not obtained in violation of defendant's constitutional rights. State v. Watchman, 111 N.M. 727, 809 P.2d 641 (Ct. App. 1991), overruled in part on other grounds, State v. Hosteen, 1996-NMCA-084, 122 N.M. 228, 923 P.2d 595.

Sec. 15. [Self-incrimination; double jeopardy.]

No person shall be compelled to testify against himself in a criminal proceeding, nor shall any person be twice put in jeopardy for the same offense; and when the indictment, information or affidavit upon which any person is convicted charges different offenses or different degrees of the same offense and a new trial is granted the accused, he may not again be tried for an offense or degree of the offense greater than the one of which he was convicted.

ANNOTATIONS

I. GENERAL CONSIDERATION.

Cross references. — See Kearny Bill of Rights, cls. 7, 8 in Pamphlet 3. For authority to grant immunity from prosecution under the Organized Crime Act, see 29-9-9 NMSA 1978. As to defense of double jeopardy being raised at any time and provision that defense may not be waived, see 30-1-10 NMSA 1978.

Comparable provisions. — Idaho Const., art. I, § 13.

Montana Const., art. II, § 25.

Utah Const., art. I, § 12.

Wyoming Const., art. I, § 11.

Law reviews. — For comment, "Criminal Law - Appeal by State - Double Jeopardy," see 7 Nat. Resources J. 304 (1967).

For comment, "Two-Tiered Test for Double Jeopardy Analysis in New Mexico," see 10 N.M.L. Rev. 195 (1979-1980).

For note, "Custodial Interrogation in New Mexico: State v. Trujillo," see 12 N.M.L. Rev. 577 (1982).

For note, "Criminal Procedure - The Fifth Amendment Privilege Against Self-Incrimination Applies to Juveniles in Court-Ordered Psychological Evaluations: State v. Christopher P.," see 23 N.M.L. Rev. 305 (1993).

For note, "State Constitutional Law - New Mexico Rejects Prosecutorial Goading as Test for Double Jeopardy Bar - State v. Breit," see 28 N.M.L. Rev. 151 (1998).

For article, "New Developments in Fourth, Fifth and Sixth Amendment Law," see 31 N.M.L. Rev. 175 (2001).

For note, "Criminal Procedure - Civil Forfeiture and Double Jeopardy: State v. Nunez," see 31 N.M.L. Rev. 401 (2001).

For note, "Criminal Law: Applying the General/Specific Statute Rule in New Mexico - *State v. Santillanes*," see 32 N.M.L. Rev. 313 (2002).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 21 Am. Jur. 2d Criminal Law §§ 243 to 314; 21A Am. Jur. 2d Criminal Law §§ 701 to 716, 936 to 952; 81 Am. Jur. 2d Witnesses §§ 80 to 90, 97 to 102, 117 to 122, 804, 961.

Association, former jeopardy of member of, 1 A.L.R. 431.

Limitation statute, discharge under as bar to subsequent prosecution, 3 A.L.R. 519.

Jury discharged for occurrences during view, accused as in jeopardy, 4 A.L.R. 1266.

Jury not sworn, jeopardy where, 12 A.L.R. 1006.

State and federal offenses arising out of same transaction, prosecutions for, 16 A.L.R. 1231, 22 A.L.R. 1551, 48 A.L.R. 1106.

Effect of contractual agreement to submit to examination, 18 A.L.R. 749.

Juror substituted after completion of panel as sustaining plea of double jeopardy, 28 A.L.R. 849, 33 A.L.R. 142.

Admission of evidence of refusal to comply with orders or requests which might tend to incriminate, 35 A.L.R. 1236.

Perjury, acquittal as bar to prosecution of accused for, 37 A.L.R. 1290, 89 A.L.R.3d 1098.

Former jeopardy, discharge of jury because of misconduct or disqualification of one or more jurymen, 38 A.L.R. 706.

Jury discharged for misconduct or disqualification of member, accused as in jeopardy, 38 A.L.R. 706.

Application to answer to pleadings, 52 A.L.R. 143.

Jury discharged for inability of prosecution to present testimony, accused as in jeopardy, 74 A.L.R. 803.

Award of venire de novo or new trial after verdict of guilty as to one or more counts and acquittal as to another as permitting retrial or conviction on latter count, 80 A.L.R. 1106.

Comment on failure of accused to testify in his own behalf as violation of constitutional privilege against self-incrimination, 104 A.L.R. 478.

Calling upon accused in the presence of jury to produce document in his possession as violation of privilege against self-incrimination, 110 A.L.R. 101.

Necessity and sufficiency of pleading by prosecution to contest defendant's plea of former jeopardy, 113 A.L.R. 1146.

Plea of former jeopardy as affected by declaration of mistrial after impaneling and swearing of jury on original trial because of errors, or supposed errors, regarding examination or challenging of jurors, 113 A.L.R. 1428.

Plea of former jeopardy where jury is discharged because of illness or insanity of juror, 125 A.L.R. 694.

Juvenile court, power of, to require children to testify, 151 A.L.R. 1229.

Child labor in streets, validity of provision of statute or ordinance requiring disclosure of name of child, 152 A.L.R. 579.

Accused who testifies in his own behalf as subject to cross-examination to show previous conviction in order to enhance punishment, 153 A.L.R. 1159.

Privilege against self-incrimination as applicable to articles belonging to or taken from accused and used as evidence in another action or proceeding, 154 A.L.R. 994.

Subsequent offense, admissibility in prosecution for, of testimony of incriminating character which witness had previously been compelled to give, by virtue of immunity statute or otherwise, 157 A.L.R. 428.

Emergency Price Control Act, witness in action for penalty under, 158 A.L.R. 1473.

Alcoholic test for alcohol in system as violating privilege against self-incrimination, 159 A.L.R. 216.

Requiring submission to physical examination or test as violation of constitutional rights, 164 A.L.R. 967, 25 A.L.R.2d 1407.

Evidence of party's refusal to permit examination or inspection of property or article as violation of privilege against self-incrimination, 175 A.L.R. 240.

Waiver of privilege against self-incrimination in exchange for immunity from prosecution as barring reassertion of privilege on account of prosecution in another jurisdiction, 2 A.L.R.2d 631.

Use in subsequent prosecution of self-incriminating testimony given without invoking privilege, 5 A.L.R.2d 1404.

Habeas corpus, former jeopardy as ground for, 8 A.L.R.2d 285.

Power of prosecuting attorney to extend immunity from prosecution to witness claiming privilege against self-incrimination, 13 A.L.R.2d 1439, 4 A.L.R.4th 617, 4 A.L.R.4th 1221.

Validity of governmental requirement of oath of allegiance or loyalty, 18 A.L.R.2d 268.

Pretrial requirement that suspect or accused wear or try on particular apparel as violating constitutional rights, 18 A.L.R.2d 796.

Right of witness to refuse to answer, on the ground of self-incrimination, as to membership in or connection with party, society or similar organization or group, 19 A.L.R.2d 388.

Alleged incompetent as witness in lunacy inquisition, 22 A.L.R.2d 756.

Statutes relating to sexual psychopaths, 24 A.L.R.2d 350.

Fingerprints, palm prints or bare footprints as evidence, 28 A.L.R.2d 1115, 45 A.L.R.4th 1178.

Right to notice and hearing before revocation of suspension of sentence, parole, conditional pardon, or probation, 29 A.L.R.2d 1074.

Validity and construction of statutes providing for psychiatric examination of accused to determine mental condition, 32 A.L.R.2d 434.

Homicide: acquittal on homicide charge as bar to subsequent prosecution for assault and battery or vice versa, 37 A.L.R.2d 1068.

Conviction or acquittal in criminal proceeding as bar to action for statutory damages or penalty, 42 A.L.R.2d 634.

Blood grouping tests, 46 A.L.R.2d 1000, 43 A.L.R.4th 579.

Discharge of accused for holding him excessive time without trial as bar to subsequent prosecution for same offense, 50 A.L.R.2d 943.

Conspiracy: conviction or acquittal of attempt to commit particular crime as bar to prosecution for conspiracy to commit same crime, or vice versa, 53 A.L.R.2d 622.

Adequacy of immunity offered as condition of denial of privilege against self-incrimination, 53 A.L.R.2d 1030, 29 A.L.R.5th 1.

Severance where codefendant has incriminated himself, 54 A.L.R.2d 830.

Lesser offense: conviction of lesser offense as bar to prosecution for greater on new trial, 61 A.L.R.2d 1141.

Appeal: conviction from which appeal is pending as bar to another prosecution for same offense under rule against double jeopardy, 61 A.L.R.2d 1224.

Jury: what constitutes accused's consent to court's discharge of jury or to grant of state's motion for mistrial which will constitute waiver of plea of former jeopardy, 63 A.L.R.2d 782.

Waiver of privilege against self-incrimination, testifying in civil proceeding as, 72 A.L.R.2d 830.

Guilty plea as basis of claim of double jeopardy in attempted subsequent prosecution for same offense, 75 A.L.R.2d 683.

Right not to testify, court's duty to inform accused who is not represented by counsel, 79 A.L.R.2d 643.

Propriety, and effect as double jeopardy, of court's grant of new trial on own motion in criminal case, 85 A.L.R.2d 486.

Plea of nolo contendere or non vult contendere, 89 A.L.R.2d 540.

Former jeopardy as ground for prohibition, 94 A.L.R.2d 1048.

Conviction or acquittal of one offense, in court having no jurisdiction to try offense arising out of same set of facts, later charged in another court, as putting accused in jeopardy of latter offense, 4 A.L.R.3d 874.

Subsequent trial, after stopping former trial to try accused for greater offense, as constituting double jeopardy, 6 A.L.R.3d 905.

Plea of guilty or conviction as resulting in loss of privilege against self-incrimination as to crime in question, 9 A.L.R.3d 990.

Necessity of informing suspect of rights under privilege against self-incrimination, prior to police interrogation, 10 A.L.R.3d 1054.

Homicide: earlier prosecution for offense during which homicide was committed as bar to prosecution for homicide, 11 A.L.R.3d 834.

Increased punishment: propriety of increased punishment on new trial for same offense, 12 A.L.R.3d 978.

Requiring suspect or defendant in criminal case to demonstrate voice for purposes of identification, 24 A.L.R.3d 1261.

Right of motorist stopped by police officers for traffic offense to be informed at that time of his federal constitutional rights under Miranda v. Arizona, 25 A.L.R.3d 1076.

Larceny: single or separate larceny predicated upon stealing property from different owners at the same time, 37 A.L.R.3d 1407.

Validity of statute, ordinance or regulation requiring fingerprinting of those engaging in specified occupations, 41 A.L.R.3d 732.

When does jeopardy attach in a nonjury trial, 49 A.L.R.3d 1039.

Prosecution for robbery of one person as bar to subsequent prosecution for robbery committed of another person at the same time, 51 A.L.R.3d 693.

Censorship and evidentiary use of unconvicted prisoner's mail, 52 A.L.R.3d 548.

Acquittal in criminal proceeding as precluding revocation of probation on same charge, 76 A.L.R.3d 564.

Acquittal in criminal proceeding as precluding revocation of parole on same charge, 76 A.L.R.3d 578.

Instruction allowing presumption or inference of guilt from possession of recently stolen property as violation of defendant's privilege against self-incrimination, 88 A.L.R.3d 1178.

Admissibility in evidence of confession made by accused in anticipation of, during or following polygraph examination, 89 A.L.R.3d 230.

Double jeopardy as bar to retrial after grant of defendant's motion for mistrial, 98 A.L.R.3d 997.

Right of defendant sentenced after revocation of probation to credit for jail time served as condition of probation, 99 A.L.R.3d 781.

Propriety of requiring criminal defendant to exhibit self, or perform physical act, or participate in demonstration, during trial and in presence of jury, 3 A.L.R.4th 374.

Applicability of double jeopardy to juvenile court proceedings, 5 A.L.R.4th 234.

Conviction or acquittal in federal court as bar to prosecution in state court for state offense based on same facts - modern view, 6 A.L.R.4th 802.

Mental subnormality of accused as affecting voluntariness or admissibility of confession, 8 A.L.R.4th 16.

Concern for possible victim (rescue doctrine) as justifying violation of Miranda requirements, 9 A.L.R.4th 595.

Propriety of using otherwise inadmissible statement, taken in violation of Miranda rule, to impeach criminal defendant's credibility - state cases, 14 A.L.R.4th 676.

Admissibility of evidence concerning words spoken while declarant was asleep or unconscious, 14 A.L.R.4th 802.

Retrial on greater offense following reversal of plea-based conviction of lesser offense, 14 A.L.R.4th 970.

What constitutes "manifest necessity" for state prosecutor's dismissal of action, allowing subsequent trial despite jeopardy's having attached, 14 A.L.R.4th 1014.

Right of partners to assert personal privilege against self-incrimination with respect to production of partnership books or records, 17 A.L.R.4th 1039.

Propriety and prejudicial effect of prosecution's calling as witness, to extract claim of self-incrimination privilege, one involved in offense charged against accused, 19 A.L.R.4th 368.

Impeachment of defense witness in criminal case by showing witness' prior silence or failure or refusal to testify, 20 A.L.R.4th 245.

Necessity and sufficiency of statements informing one under investigation for involuntary commitment of right to remain silent, 23 A.L.R.4th 563.

Right of prosecution to discovery of case-related notes, statements, and reports - state cases, 23 A.L.R.4th 799.

Propriety of increased sentence following revocation of probation, 23 A.L.R.4th 883.

Propriety of requiring suspect or accused to alter, or to refrain from altering, physical or bodily appearance, 24 A.L.R.4th 592.

Sufficiency of showing that voluntariness of confession or admission was affected by alcohol or other drugs, 25 A.L.R.4th 419.

Power of state court, during same term, to increase severity of lawful sentence - modern status, 26 A.L.R.4th 905.

Admissibility in criminal case of evidence that accused refused to take test of intoxication, 26 A.L.R.4th 1112.

Extent and determination of attorney's right or privilege against self-incrimination in disbarment or other disciplinary proceedings - post-Spevack cases, 30 A.L.R.4th 243.

Blood grouping tests, 46 A.L.R.2d 1000, 43 A.L.R.4th 579.

Failure to object to improper questions or comments as to defendant's pretrial silence or failure to testify as constituting waiver of right to complain of error - modern cases, 32 A.L.R.4th 774.

Former jeopardy as bar to retrial of criminal defendant after original trial court's sua sponte declaration of a mistrial - state cases, 40 A.L.R.4th 741.

Propriety of governmental eaves-dropping on communications between accused and his attorney, 44 A.L.R.4th 841.

Automobiles: validity and construction of legislation authorizing revocation or suspension of operator's license for "habitual," "persistent," or "frequent" violations of traffic regulations, 48 A.L.R.4th 367.

Voluntariness of confession as affected by police statements that suspect's relatives will benefit by the confession, 51 A.L.R.4th 495.

Double jeopardy: various acts of weapons violations as separate or continuing offense, 80 A.L.R.4th 631.

What constitutes assertion of rights to counsel following Miranda warnings - state cases, 83 A.L.R.4th 443.

Admissibility, in prosecution in another state's jurisdiction, of confession or admission made pursuant to plea bargain with state authorities, 90 A.L.R.4th 1133.

Determination that state failed to prove charges relied upon for revocation of probation as barring subsequent criminal action based on same underlying charges, 2 A.L.R.5th 262.

Propriety, under state constitutional provisions, of granting use or transactional immunity for compelled incriminating testimony - post-Kastigar cases, 29 A.L.R.5th 1.

Seizure or detention for purpose of committing rape, robbery, or other offense as constituting separate crime of kidnapping, 39 A.L.R.5th 283.

Coercive conduct by private person as affecting admissibility of confession under state statutes or constitutional provisions-post-connelly cases, 48 A.L.R.5th 555.

Sufficiency of showing that voluntariness of confession or admission was affected by alcohol or other drugs - Drugs or narcotics administered as part of medical treatment and drugs or intoxicants administered by the police, 96 A.L.R.5th 523.

Conviction or acquittal in federal court as bar to prosecution in state court for state offense based on same facts - Modern view, 97 A.L.R.5th 201.

Acquittal or conviction in state court as bar to federal prosecution based on same act or transaction, 18 A.L.R. Fed. 393.

Right of witness in federal court to claim privilege against self-incrimination after giving sworn evidence on same matter in other proceedings, 42 A.L.R. Fed. 793.

Propriety of court's failure or refusal to strike direct testimony of government witness who refuses, on grounds of self-incrimination, to answer questions on cross-examination, 55 A.L.R. Fed. 742.

Propriety of search involving removal of natural substance or foreign object from body by actual or threatened force, 66 A.L.R. Fed. 119.

Display of physical appearance or characteristic of defendant for purpose of challenging prosecution evidence as "testimony" resulting in waiver of defendant's privilege against self-incrimination, 81 A.L.R. Fed. 892.

Availability of sole shareholder's Fifth Amendment privilege against self-incrimination to resist production of corporation's books and records - modern status, 87 A.L.R. Fed. 177.

Construction and application of provision of Omnibus Crime Control and Safe Streets Act of 1968, as amended (18 USCS § 3501(c)), that defendant's confession shall not be inadmissible in evidence in federal criminal prosecution solely because of delay in presentment before magistrate, 124 A.L.R. Fed. 263.

Duty of court, in federal criminal prosecution, to conduct inquiry into voluntariness of accused's statement - modern cases, 132 A.L.R. Fed. 415.

Double jeopardy considerations in federal criminal cases - supreme court cases, 162 A.L.R. Fed. 415.

22 C.J.S. Criminal Law §§ 208 to 276; 22A C.J.S. Criminal Law §§ 645 to 654; 98 C.J.S. Witnesses §§ 431 to 456.

II. SELF-INCRIMINATION.

A. IN GENERAL.

Purpose of right against self-incrimination. — In the search and seizure context the prime purpose of an exclusionary rule is to deter future unlawful police conduct, and this rationale may be applicable to the right against compulsory self-incrimination. State v. Ramirez, 89 N.M. 635, 556 P.2d 43 (Ct. App. 1976), overruled on other grounds, City of Albuquerque v. Haywood, 1998-NMCA-029, 954 P.2d 93 (Ct. App. 1997).

Privilege of not being witness against oneself. — The privilege against self-incrimination is the privilege of not being a witness against oneself. State v. Kendall, 90 N.M. 236, 561 P.2d 935 (Ct. App.), aff'd, 90 N.M. 191, 561 P.2d 464 (1977).

Right against self-incrimination equal with right of confrontation. — One person's right against self-incrimination and another's right to be confronted with the witnesses against him cannot be balanced. Both rights stand on an equal footing, and neither is more important than the other. State v. Curtis, 87 N.M. 128, 529 P.2d 1249 (Ct. App. 1974).

Elements necessary to sustain privilege. — To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result. State v. Zamora, 84 N.M. 245, 501 P.2d 689 (Ct. App. 1972).

Privilege against self-incrimination is limited to disclosures that are "testimonial" or "communicative" in nature. State v. Mordecai, 83 N.M. 208, 490 P.2d 466 (Ct. App. 1971).

The scope of the privilege against self-incrimination is limited to disclosures which are testimonial in nature. State v. Ramirez, 78 N.M. 584, 434 P.2d 703 (Ct. App. 1967).

State may require nontestimonial acts of criminal defendants. — The rule in New Mexico has consistently been that the state may require nontestimonial acts of criminal defendants which tend to identify them without offending the right to remain silent. State v. Baca, 111 N.M. 270, 804 P.2d 1089 (Ct. App. 1990).

Privilege does not include identifying physical characteristics by photograph. State v. Mordecai, 83 N.M. 208, 490 P.2d 466 (Ct. App. 1971).

The privilege against self-incrimination applies to disclosures that are "communicative" or "testimonial"; the privilege does not include identifying physical characteristics. State v. Jamerson, 85 N.M. 799, 518 P.2d 779 (Ct. App. 1974).

The act of allowing the prosecutrix to view the defendant for the purpose of identifying him did not violate his constitutional privilege against self-incrimination. State v. White, 77 N.M. 488, 424 P.2d 402 (1967).

Or voice identification, wearing mask or walking. — Defendant's constitutional privilege against self-incrimination was not violated by the fact that, following arrest, defendant was brought before two prosecuting witnesses for the purpose of identification and was directed to talk for voice identification and to wear a mask of the kind claimed to have been worn by the robber and to walk for the purpose of supplying additional identifying characteristics. State v. Ramirez, 78 N.M. 584, 434 P.2d 703 (Ct. App. 1967).

Fingerprinting is not within the privilege against self-incrimination. Therefore, motion during trial and alleged statement during closing argument, both of which referred to fingerprinting, did not violate the privilege. State v. Jamerson, 85 N.M. 799, 518 P.2d 779 (Ct. App. 1974).

Nor is drawing of blood. — The privilege against self-incrimination applies to disclosures that are communicative or testimonial, and the defendant was not compelled to testify against himself by the drawing of blood from his body. State v. Richerson, 87 N.M. 437, 535 P.2d 644 (Ct. App.), cert. denied, 87 N.M. 450, 535 P.2d 657 (1975).

A police officer may authorize the taking of blood from a dead person to determine alcoholic content without violating any rights the person or his heirs might have and without incurring any personal liability for his actions so long as the taking of blood is

done in a manner consistent with the normal rule of human decency. 1959-60 Op. Att'y Gen. No. 60-104.

Or the furnishing of handwriting exemplars. — Where the content of handwriting exemplars is neither testimonial nor communicative matter, defendant's privilege against self-incrimination is not violated by being compelled to furnish the exemplars. State v. Archuleta, 82 N.M. 378, 482 P.2d 242 (Ct. App.), cert. denied, 82 N.M. 377, 482 P.2d 241 (1971).

Since handwriting exemplars themselves do not violate a defendant's constitutional privilege, the compulsion in furnishing the exemplars also do not violate the privilege. State v. Archuleta, 82 N.M. 378, 482 P.2d 242 (Ct. App.), cert. denied, 82 N.M. 377, 482 P.2d 241 (1971).

Or psychiatric examination. — A court-ordered psychiatric examination does not violate defendant's privilege against self-incrimination. State v. Kendall, 90 N.M. 236, 561 P.2d 935 (Ct. App.), aff'd, 90 N.M. 191, 561 P.2d 464 (1977).

A compelled psychological examination does not violate the rights of a criminal defendant who raises insanity as an affirmative defense, and who intends to present expert testimony as to his sanity at trial. State v. Mireles, 2004-NMCA-100, 136 N.M. 337, 98 P.3d 727, cert. denied, 2004-NMCERT-008, 136 N.M. 492, 100 P.3d 197.

Or any real or physical evidence. — The distinction which has emerged, often expressed in different ways, is that the privilege against self-incrimination is a bar against compelling "communications" or "testimony," but that compulsion which makes a suspect or accused the source of "real or physical evidence" does not violate it. State v. Williamson, 78 N.M. 751, 438 P.2d 161, cert. denied, 393 U.S. 891, 89 S. Ct. 212, 21 L. Ed. 2d 170 (1968).

Appellant's contention that the cutting of his hair and subsequent use for comparison with other hair was a violation of his rights against self-incrimination was without merit where although the appellant was unaware of the nature of the future use of the samples taken he made no protest. State v. Williamson, 78 N.M. 751, 438 P.2d 161, cert. denied, 393 U.S. 891, 89 S. Ct. 212, 21 L. Ed. 2d 170 (1968).

Trial judge determines whether question calls for incriminating answer. — Whether question propounded, on its face, calls for answer reasonably calculated or tending to incriminate the witness is for trial judge to say, after considering the matter from all standpoints, and the witness is not entitled to decide this matter for himself. Apodaca v. Viramontes, 53 N.M. 514, 212 P.2d 425 (1949).

Witness compelled to answer nonincriminating question. — Prosecution may by proper questioning compel answer to fact within witness's knowledge, divulgence of which has no reasonable or rational likelihood of connecting witness with commission of crime. Apodaca v. Viramontes, 53 N.M. 514, 212 P.2d 425 (1949).

Statements given prior to custodial interrogation. — Where defendant, prior to interview given to district attorney and police chief in office where she worked, was told she did not have to say anything, but where she voluntarily disclosed that she knew decedent and had been with him shortly before he was found by police, and after which disclosure she was immediately given her Miranda warnings, defendant was not subject to custodial interrogation prior to her disclosure and therefore was not entitled to Miranda warnings prior to time they were given. State v. McLam, 82 N.M. 242, 478 P.2d 570 (Ct. App. 1970).

Where defendant talked with police officers briefly prior to receiving any warning as to his rights, but where at this stage he was disclaiming knowledge of what had happened to the victim; was expressing a desire and willingness to assist the police; was not being accused by the police of any wrong; and was not in custody, and where immediately upon arrival at the police station, and prior to being questioned, he was advised of rights, trial court did err in refusing to suppress statements made to police by defendant. State v. Webb, 81 N.M. 508, 469 P.2d 153 (Ct. App. 1970).

Where appellant had neither been placed under arrest nor in any way detained when he volunteered the statement, and it was made in answer to a question concerning what occurred and can be described as an answer to a general question of a person who knew something of what transpired as a part of the fact-finding process, this is not prohibited by Miranda. State v. Lopez, 79 N.M. 282, 442 P.2d 594 (1968).

Where officer was in a fact-finding process when the question was asked and the incriminating statements made by appellant were voluntary, they were made before any type of custodial interrogation, within the meaning of Miranda, could be said to have begun. State v. Chambers, 84 N.M. 309, 502 P.2d 999 (1972).

Admission of the statement by defendant did not violate his privilege against self-incrimination, where the remark by defendant was completely uncoerced, and was not made in connection with any interrogation of him and it was voluntarily made in response to a remark made by the officer, even where remark by the officer might have suggested some expected response, but was not put as a question to defendant, and did not suggest that the officer contemplated any such response as was made by defendant. State v. Smith, 80 N.M. 126, 452 P.2d 195 (Ct. App. 1969).

Where appellant had been neither placed under arrest nor in any way detained when he volunteered the incriminating statement, and it was made in answer to a question concerning what occurred and can be described as an answer to a general question of a person who knew something of what transpired as a part of the fact-finding process, the statement is not prohibited by Miranda. State v. Chambers, 84 N.M. 309, 502 P.2d 999 (1972).

Where defendant is not in custody, nor under indictment nor being interrogated, the advisory system has not begun to operate against the defendant so as to require that he

be informed of his right to remain silent. State v. Tapia, 81 N.M. 365, 467 P.2d 31 (Ct. App. 1970).

Right against self-incrimination must involve an element of coercion since the clause provides that a person shall not be compelled to give evidence against himself; where defendant's statements were obtained in a manner indicating that they were given voluntarily within the meaning of fundamental fairness, then the deterrence of over-zealous and unlawful police activity would not be served by their exclusion. State v. Ramirez, 89 N.M. 635, 556 P.2d 43 (Ct. App. 1976), overruled on other grounds, City of Albuquerque v. Haywood, 1998-NMCA-029, 954 P.2d 93 (Ct. App. 1997).

Voluntary statements admissible. — Admission of statements made by defendant while in custody after he had been advised of right not to answer questions and had made no request to have counsel is not constitutionally impermissible and does not constitute error on review. State v. Hall, 78 N.M. 564, 434 P.2d 386 (1967).

Purpose of exclusionary rule. — In the search and seizure context the prime purpose of an exclusionary rule is to deter future unlawful police conduct, and this rationale may be applicable to the right against compulsory self-incrimination. State v. Ramirez, 89 N.M. 635, 556 P.2d 43 (Ct. App. 1976), overruled on other grounds, City of Albuquerque v. Haywood, 1998-NMCA-029, 954 P.2d 93 (Ct. App. 1997).

The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right, and by refusing to admit evidence gained as a result of such conduct, the courts hope to instill in those particular investigating officers, or in their future counterparts, a greater degree of care toward the rights of an accused, but where the official action was pursued in complete good faith, the deterrence rationale loses much of its force. State v. Ramirez, 89 N.M. 635, 556 P.2d 43 (Ct. App. 1976), overruled on other grounds, City of Albuquerque v. Haywood, 1998-NMCA-029, 954 P.2d 93 (Ct. App. 1997).

One purpose of an exclusionary rule is related to the quality of the evidence, this issue being framed in terms of voluntariness, which was used as a test for protecting the courts from relying on untrustworthy evidence, before Miranda. State v. Ramirez, 89 N.M. 635, 556 P.2d 43 (Ct. App. 1976), overruled on other grounds, City of Albuquerque v. Haywood, 1998-NMCA-029, 954 P.2d 93 (Ct. App. 1997).

Admissibility of statement made while released on bond. — Trial court did not err in allowing admission of evidence of incriminating statement voluntarily made by defendant after he was arrested and released on bond, but was no longer in custody or being questioned, and where such statement was obtained neither surreptitiously nor by threat or promise, without prior showing of evidence that at the time of the claimed admission the defendant had been fully advised of his right to advice of legal counsel and his right not to be compelled to testify against himself. State v. James, 76 N.M. 376, 415 P.2d 350 (1966).

Admissibility of statement made at preliminary parole revocation hearing. — The defendant's right against self-incrimination was not violated when the defendant's statement admitting cocaine use made at a preliminary parole revocation hearing was used in a subsequent trial because the preliminary parole hearing is not distinguishable from other administrative and judicial proceedings in which a witness is only entitled to protection when the witness invokes the right and refuses to answer. State v. Gutierrez, 119 N.M. 618, 894 P.2d 395 (Ct. App. 1995).

Testimony before grand jury. — Witness may assert his immunity at trial even though he testified before grand jury. Apodaca v. Viramontes, 53 N.M. 514, 212 P.2d 425 (1949).

Monitored telephone calls from jail. — The defendant's right to *Miranda* warnings was not implicated by the monitoring of his phone calls from jail because there was no evidence that he was compelled, coerced, or improperly influenced into making calls. State v. Coyazo, 1997-NMCA-029, 123 N.M. 200, 936 P.2d 882.

Use of derivative use immunity. — Section 31-6-15 NMSA 1978 and its implementing rules, 5-116 and 11-412 NMRA, allow the government to compel a witness to testify and then prosecute the witness for the crimes mentioned in the compelled testimony, as long as neither the testimony itself nor any information directly or indirectly derived from the testimony is used in the prosecution. However, in this case it was not enough for the prosecutor to simply assert that all evidence to be used at trial was obtained prior to the defendant's immunized testimony; instead, the state should have included testimony from key witnesses, along with testimony from the prosecutor and the investigators, that the witnesses had not had access or otherwise been exposed to the defendant's immunized testimony. State v. Vallejos, 118 N.M. 572, 883 P.2d 1269 (1994).

Court to determine whether precautionary warning adequate. — It is always open to an accused to subjectively deny that he understood the precautionary warning and advice with respect to his right to remain silent and to assistance of counsel, and when the issue is raised in an admissibility hearing it is for the court to objectively determine whether in the circumstances of the case the words used were sufficient to convey the required warning. State v. Ramirez, 89 N.M. 635, 556 P.2d 43 (Ct. App. 1976), overruled on other grounds, City of Albuquerque v. Haywood, 1998-NMCA-029, 954 P.2d 93 (Ct. App. 1997).

Words of warning found adequate. — Warning given by the district attorney - that anything defendant said "could" (not "could and would") be used against him - was constitutionally adequate. State v. Briggs, 81 N.M. 581, 469 P.2d 730 (Ct. App. 1970).

Reference to refusal to take blood test. — Testimony relative to the refusal of a person charged with driving while intoxicated to take a blood-alcohol test is admissible in a criminal proceeding against him and does not violate a defendant's right against self-incrimination (opinion based in part on former 41-12-9, 1953 Comp., which

permitted comment on a defendant's failure to testify in his own behalf). 1963-64 Op. Att'y Gen. No. 64-38.

Comment by expert. — A DNA expert's comment that "If I were a defendant, and I were falsely accused as being the source of biological evidence, I would want to continue testing until I found the probe that would prove the exclusion" was not an improper comment on defendant's right to remain silent. State v. Peters, 1997-NMCA-084, 123 N.M. 667, 944 P.2d 896.

No right to warning of consequences of refusing blood test. — Miranda-type warnings are necessary only in situations of either testimonial or communicative evidence, and New Mexico has consistently excluded physical evidence from the scope of the protection; it follows that an accused has no constitutional right to a warning concerning the consequences of refusing a blood test. State v. Myers, 88 N.M. 16, 536 P.2d 280 (Ct. App. 1975).

No right to instruction on right to refuse blood test. — There is nothing in this section or N.M. Const., art. II, § 14, or in New Mexico laws or decisions which gives an accused the legal right to an instruction that he has a right to refuse to take a blood alcohol test, where defendant did not object to admission of evidence that he refused to take such test. State v. Fields, 74 N.M. 559, 395 P.2d 908 (1964).

Comment by state differs in effect from comment by witness. — Where the prosecutor comments on or inquires about the defendant's silence, such a reference can have an intolerable prejudicial impact and may require reversal under the "plain error" rule of the rules of evidence. Any reference to the defendant's silence by the state, if it lacks significant probative value, constitutes plain error and as such it would require reversal even if the defendant fails to timely object. However, where a witness refers to the defendant's silence, the defendant must object to this testimony in order to preserve the error. State v. Baca, 89 N.M. 204, 549 P.2d 282 (1976).

Burden on state to prove that error did not contribute to verdict. — When there is a reasonable possibility that prosecutor's inappropriate remark on defendant's exercise of his right to refuse to testify might have contributed to the conviction, the state, as beneficiary of that constitutional infringement, must prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. State v. Martin, 84 N.M. 27, 498 P.2d 1370 (Ct. App. 1972).

Comment by prosecution on accused's failure to testify at trial is reversible error. Gonzales v. State, 94 N.M. 495, 612 P.2d 1306 (1980).

Comment on failure to testify found not to require reversal. — Where defendant did not object to the court's instruction regarding defendant's right to not testify and the district attorney's comment on defendant's failure to take the stand in his own behalf closely followed the initial clause of the court's instruction, and the trial court firmly admonished the jury to attach no significance to the district attorney's remark and the

jury stated that it would do so, then, under these circumstances, if the district attorney's comment was error, it did not amount to a violation of defendant's constitutional rights and does not require a reversal. State v. Leyba, 80 N.M. 190, 453 P.2d 211 (Ct. App.), cert. denied, 80 N.M. 198, 453 P.2d 219 (1969).

Compelled handwriting not self-incrimination. — Compelled handwriting exemplars are nontestimonial and do not constitute self-incrimination. State v. Hovey, 106 N.M. 300, 742 P.2d 512 (1987).

Prosecution's questions on defendant's post-arrest silence not necessarily reversible error. — Where prosecution is permitted to ask questions involving defendant's post-arrest silence, this will not constitute reversible error when these questions logically ensued and were invited by defendant's voluntary testimony and were not directed at post-arrest silence. State v. Molina, 101 N.M. 146, 679 P.2d 814 (1984).

State's comment on defendant's silence when asked for his identification did not violate his constitutional right to remain silent. State v. Baca, 111 N.M. 270, 804 P.2d 1089 (Ct. App. 1990).

Objections by prosecutor not construed as comment on failure to testify. — Where although the statements of the prosecutor in making his objections might possibly have been construed as suggesting that it was for the defendant to take the stand and make the explanations, the court was of the opinion that considering the time and the manner in which the statements came into the case they could not reasonably be construed as comments to the jury on defendant's failure to take the stand and testify on his own behalf. State v. Lindsey, 81 N.M. 173, 464 P.2d 903 (Ct. App. 1969), cert. denied, 398 U.S. 904, 90 S. Ct. 1692, 26 L. Ed. 2d 62 (1970).

Silent defendant cannot complain of unfavorable inferences by jury. — If the jury feels that the facts are strong enough to call upon the defendant to offer explanatory evidence to counter them, and he prefers not to do so in the exercise of a constitutional right and privilege accorded him, he cannot justly complain if the jury draws inferences unfavorable to him under the circumstances. State v. Compton, 57 N.M. 227, 257 P.2d 915 (1953).

Where defendant opens door to comment on failure to testify. — Where prosecutor's comments in closing argument on defendant's failure to testify could at best be characterized as indirect, where defendant "opened the door" to such comment in his own closing argument, thus effectively waiving any claim of error, and where trial court instructed jury that no presumption was to be made from defendant's failure to testify, nor should prosecutor's remarks be given weight if contrary to statements of law given them by the court, defendant's constitutional right to remain silent was not violated. State v. Carmona, 84 N.M. 119, 500 P.2d 204 (Ct. App. 1972).

Where remarks of the prosecutor concerning defendant's failure to testify were clearly impermissible and in the absence of waiver would constitute reversible error, and where defendant objected to the prosecutor's remarks, but where, out of the hearing of the jury, the trial court indicated that the prosecutor's remark was invited by defendant's argument, and for unexplained reasons the record failed to include defendant's argument to the jury, court of appeals could not presume error; consequently, no reviewable question was presented. State v. Gunthorpe, 81 N.M. 515, 469 P.2d 160 (Ct. App.), cert. denied, 81 N.M. 588, 470 P.2d 309 (1970), cert. denied, 401 U.S. 941, 91 S. Ct. 943, 28 L. Ed. 2d 221 (1971).

Generally, the prosecutor may not properly comment on a defendant's failure to testify, but such comment is permissible where the remarks of the prosecuting attorney were made by way of response to the comments of defendant's counsel concerning defendant's reasons for not testifying, and such remarks by the assistant district attorney were within the realm of reasonable reply to defendant's argument. State v. Ergenbright, 84 N.M. 662, 506 P.2d 1209 (1973).

Where the prosecutor's comment on defendant's failure to take the stand was made in response to the defendant's own argument, the defendant waived any right which he might have had to claim violation of privilege against compulsory self-incrimination because of the prosecutor's comment. State v. Paris, 76 N.M. 291, 414 P.2d 512 (1966).

Decision not to take stand does not impair right against self-incrimination. — An accused may hesitate to take the witness stand if his past criminal record is such that his credibility will probably be completely destroyed in the eyes of the jury if this record is made known to the jury. However, this in no way impairs his right against self-incrimination, his right not to be deprived of his life, liberty or property without due process of law, nor his right to a public trial by an impartial jury. State v. Duran, 83 N.M. 700, 496 P.2d 1096 (Ct. App.), cert. denied, 83 N.M. 699, 496 P.2d 1095 (1972).

Nor does decision to take stand. — The fact that in taking the stand in his own behalf, defendant may thereby incriminate himself, does not, in itself, establish that defendant was deprived of due process. State v. Silver, 83 N.M. 1, 487 P.2d 910 (Ct. App. 1971).

Refusal of witness to answer incriminating question cannot prejudice parties. — When a witness, other than the accused, declines to answer a question on the ground his answer would tend to incriminate him, the refusal alone cannot be made the basis of any inference by the jury, either favorable to the prosecution or favorable to the defendant. State v. Polsky, 82 N.M. 393, 482 P.2d 257 (Ct. App.), cert. denied, 82 N.M. 377, 482 P.2d 241 (1971), cert. denied, 404 U.S. 1015, 92 S. Ct. 688, 30 L. Ed. 2d 662 (1972).

No weight can be given accused's silence. — The constitution forbids prosecutor and court from commenting on an accused's failure to testify on his own behalf. Even where there is no interrogation and the accused merely remains silent, no weight whatever can

be given to the accused's silence. State v. Ford, 80 N.M. 649, 459 P.2d 353 (Ct. App. 1969).

The test of voluntariness of waiver of right against self-incrimination is not dependent upon the utterance of a shibboleth, but rather upon a clear manifestation by words and circumstances of a free and unconstrained choice. State v. Smith, 80 N.M. 126, 452 P.2d 195 (Ct. App. 1969).

Burden on state to establish waiver of rights. — Where upon the first interview defendant expressly declined to make any statement, a second or further interview was not barred, but there was imposed upon the prosecution a "heavy burden" to establish that defendant knowingly and intelligently waived his privilege against self-incrimination and his right to the aid of counsel. State v. Lopez, 80 N.M. 130, 452 P.2d 199 (Ct. App. 1969).

Burden on defendant to show that waiver not understandingly made. Under Escobedo v. Illinois, 378 U.S. 478, 84 S. Ct. 1758, 12 L. Ed. 2d 977 (1964) the burden is on a defendant to prove his contentions that the waiver of his rights was not intelligently and understandingly made. State v. Beachum, 78 N.M. 390, 432 P.2d 101 (1967), cert. denied, 392 U.S. 911, 88 S. Ct. 2068, 20 L. Ed. 2d 1369 (1968).

Waiver need not be written. — A voluntary waiver of the right or privilege against self-incrimination need not be reduced to writing and signed by defendant. State v. Smith, 80 N.M. 126, 452 P.2d 195 (Ct. App. 1969).

Determinations of waiver and voluntariness binding on appellate court. — Where the evidence in prosecution for murder substantially supports the preliminary determination by the trial court, that waiver of right against incrimination was voluntary and a determination was made by the jury that the statements were voluntarily made, these determinations are binding upon court of appeals. State v. Smith, 80 N.M. 126, 452 P.2d 195 (Ct. App. 1969).

Where the judge, on record, passed on the voluntariness and admissibility of defendant's statements at a suppression hearing, and submitted the statements to the jury with a charge which complied with UJI Crim. 40.40 (see now UJI 14-5040 SCSA 1986), the defendant's argument that his statements were the product of promises and inducements was to be considered with all the conflicting evidence, and it was not for the appellate court to substitute its own judgment for that of the trier of fact and the trial judge. State v. Ramirez, 89 N.M. 635, 556 P.2d 43 (Ct. App. 1976), overruled on other grounds, City of Albuquerque v. Haywood, 1998-NMCA-029, 954 P.2d 93 (Ct. App. 1997).

Transcript found necessary to determine voluntariness of statements. — Where defendant's basic defense was to persuade the jury that certain statements relied on heavily by the state were involuntary, and that the officer who testified about the circumstances of these statements testified differently at trial than at the suppression

hearing, a copy of the prior hearing transcript would have been invaluable, and where there were different judges, court reporters and attorneys in the hearing on the motion to suppress, on the motion for a transcript, and at trial, there were no reasonable alternatives to a transcript of the prior hearing. State v. Romero, 87 N.M. 279, 532 P.2d 208 (Ct. App. 1975).

Waiver of rights as result of guilty plea. — Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969) requires that state criminal records show an understanding waiver by a defendant entering a guilty plea of three constitutional rights: (1) the privilege against compulsory self-incrimination, (2) the right to trial by jury and (3) the right to confront one's accusers. State v. Guy, 81 N.M. 641, 471 P.2d 675 (Ct. App. 1970).

Plea of guilty, voluntarily made, foreclosed an accused's right to object to the manner in which he was arrested or how the evidence had been obtained against him. The plea was a waiver of all nonjurisdictional defenses, and sentence which followed such a plea of guilty was a result of the plea and not the evidence theretofore obtained. State v. Brewster, 78 N.M. 760, 438 P.2d 170 (1968).

Where appellant admittedly incriminated himself by his plea of guilty, he could not be heard to complain since by his plea he confessed the charge contained in the information. State v. Daniels, 78 N.M. 768, 438 P.2d 512 (1968).

By pleading guilty the defendant admitted the acts well pleaded in the charge, waived all defenses other than that the indictment or information charges no offense, and waived the right to trial and the incidents thereof, and the constitutional guarantees with respect to the conduct of criminal prosecutions, including right to jury trial, right to counsel subsequent to guilty plea and right to remain silent. State v. Daniels, 78 N.M. 768, 438 P.2d 512 (1968).

Defendant, who voluntarily pleaded guilty, was not entitled to a post-conviction hearing under Rule 93, N.M.R. Civ. P. (see now Rule 5-802 NMRA) (only applied to post-conviction motions before September 1, 1975), for the purpose of determining whether or not the state obtained evidence, which warranted the filing of the complaint, as a result of a claimed questioning of him contrary to his constitutional rights to remain silent and to the aid of counsel. State v. Brewster, 78 N.M. 760, 438 P.2d 170 (1968).

Plea of guilty must be voluntary. — It is fundamental that a plea of guilty must be voluntarily made. If not so made but induced by threats or promises, it is void and subject to collateral attack. State v. Tipton, 78 N.M. 600, 435 P.2d 430 (1967).

It is a fundamental rule of criminal procedure that a judgment and sentence cannot stand if based upon an involuntary plea of guilty induced by an unkept promise of leniency. A guilty plea induced by either promises or threats which deprive it of the character of a voluntary act is void and subject to collateral attack. To withhold the privilege of withdrawing a guilty plea in order to reassume the position occupied prior to

its entry would constitute a denial of due process of law. State v. Ortiz, 77 N.M. 751, 427 P.2d 264 (1967).

Plea of guilty is binding if made voluntarily after proper advice of counsel and with full understanding of the consequences. State v. Tipton, 78 N.M. 600, 435 P.2d 430 (1967).

Guilty plea found voluntary. — Defendant who was told by his attorney that if he didn't plead guilty to second-degree murder he would die in gas chamber could not claim on motion for post-conviction relief that his guilty plea was induced by coercion, threats or promise of leniency, because such plea represented a choice between two alternatives and a voluntary selection of a plea to a lesser charge. State v. French, 82 N.M. 209, 478 P.2d 537 (1970).

Where for six days after his arrest defendant was interrogated from time to time by officials but gave no statement and was not allowed to retain or consult with an attorney, defendant was denied his constitutional right to counsel during the first six days after his arrest. However, the denial of a naked constitutional right does not invalidate all subsequent proceedings nor necessarily prevent an accused from acting voluntarily in such proceedings, and where defendant subsequently retained counsel and pleaded guilty upon his advice, the plea was held to be voluntarily given. Murillo v. Cox, 360 F.2d 29 (10th Cir. 1966).

The fact that alternatives are considered in reaching a decision to plead guilty does not necessarily render the decision involuntary, and where there is substantial evidence that a plea was made voluntarily after proper advice of counsel and with full understanding of the consequences, there is no basis for post-conviction relief. Mondragon v. State, 84 N.M. 175, 500 P.2d 999 (Ct. App. 1972).

Consequences of guilty plea must be understood. — Defendant's claim upon motion for post-conviction relief that trial court failed in its duty to inform him at the arraignment and before accepting his plea of guilty that the maximum possible penalty for second-degree murder was life imprisonment, thereby contributing to his failure to understand the consequences of his plea, was without merit where defendant had been fully advised by competent counsel as to both maximum and minimum penalties which could be imposed upon being adjudged guilty, and where defendant admitted that trial court asked if he understood the charge against him. Burton v. State, 82 N.M. 328, 481 P.2d 407 (1971).

Sufficient mental capacity required for defendant to make valid statement. — For defendant to make a valid statement the defendant must have had sufficient mental capacity at the time he made the statement, to be conscious of the physical acts performed by him, to retain them in his memory, and to state them with reasonable accuracy, and where there was evidence which met this standard, the trial court did not err in refusing to suppress the statement. State v. Chavez, 88 N.M. 451, 541 P.2d 631 (Ct. App. 1975).

Failure to object waives right to exclude testimony. — Where no objection was made to the testimony of officer in which he related the content of his remark and defendant's response thereto and defendant had already been advised of his rights to an attorney and to remain silent, even if defendant had a right to have this testimony excluded, he waived such right when he failed to make objection thereto or to raise any question as to its admissibility. State v. Smith, 80 N.M. 126, 452 P.2d 195 (Ct. App. 1969).

Waiver of right to have public defender notified. — Failure of police to comply with 31-15-12 NMSA 1978, requiring that peace officers notify public defender of any person not represented by counsel who was being forcibly detained and charged with a crime, did not infringe upon defendant's rights against self-incrimination where defendant was advised of those rights both at time of arrest and booking, voluntarily acknowledged that he understood them and signed waiver of rights form. State v. Rascon, 89 N.M. 254, 550 P.2d 266 (1976).

State has burden to show that statement not exploitive of prior illegal statement. — The fact that defendant may understand his rights at the time of a later statement does not discharge state's burden of showing that later statement is not exploitation of prior illegal statement, and it is improper to admit the later incriminating statement at trial. State v. Dickson, 82 N.M. 408, 482 P.2d 916 (Ct. App. 1971).

Plain error to question defendant's silence. — In defendant's murder trial, there being no basis for a question concerning defendant's silence at the time of his arrest, the district attorney's question about it was "plain error" because it was a comment by the district attorney on defendant's silence. State v. Lara, 88 N.M. 233, 539 P.2d 623 (Ct. App. 1975).

If the prosecution's reference to a defendant's silence at time of arrest lacks significant probative value, the reference to silence has an intolerable prejudicial impact requiring reversal. State v. Lara, 88 N.M. 233, 539 P.2d 623 (Ct. App. 1975).

Remaining silent in the face of an accusation, under a claim of right to do so until counsel can be consulted, is not such a circumstance as will permit admission of testimony of the action of the accused or the content of the accusation. State v. Hatley, 72 N.M. 280, 383 P.2d 247 (1963).

Even if brother, not defendant, was asked the question. — The fact that the question regarding silence was asked of the brother and not the defendant makes no difference, since the prejudicial impact was the same. State v. Lara, 88 N.M. 233, 539 P.2d 623 (Ct. App. 1975).

Probative value must be outweighed by danger of unfair prejudice in order to exclude testimony. — Defendant's motion for mistrial was correctly denied when there was no showing that the probative value of testimony mentioning defendant's refusal to talk to interviewing detective was substantially outweighed by the danger of unfair

prejudice, confusion of the issues or misleading the jury as required by Rule 403, N.M.R. Evid. (see now Rule 11-403 NMRA). State v. Baca, 89 N.M. 204, 549 P.2d 282 (1976).

Showing prior inconsistent statements is not improper comment on defendant's silence. — Questioning defendant on cross-examination, after he testified that he had found certain stolen property in an abandoned house, about why he had not told the police the same thing when he was arrested was not an improper comment on his silence at the time of arrest. When arrested the defendant did not remain silent, not only stating that he did not know anything, but also offering an explanation which tended to deny his possession, the question was proper cross-examination under Rule 611, N.M.R. Evid. (see now Rule 11-611 NMRA), and was admissible for the purpose of impeaching defendant's credibility by showing prior inconsistent statements. State v. Olguin, 88 N.M. 511, 542 P.2d 1201 (Ct. App. 1975).

Eliciting hearsay statement regarding defendant. — It was improper for the prosecutor to call the defense's alibi witness during the prosecutor's case-in-chief and to attempt to impeach her by eliciting from her a prior statement made to her by the defendant. The defendant's statement was hearsay, and was not admissible as an exception under Rule 11-801 D(1) NMRA, since the defendant had not testified. Its admission into evidence approached a violation of his constitutional right not to testify. State v. Duran, 107 N.M. 603, 762 P.2d 890 (1988).

Time at which Miranda warnings should be given. — Defendant's claim that he should have been given the Miranda warnings immediately prior to selling the heroin to informer was without merit since defendant was neither in custody, under indictment nor being interrogated. His freedom of action had not been interfered with in any way, nor had the adversary system begun to operate against him. State v. Maes, 81 N.M. 550, 469 P.2d 529 (Ct. App.), cert. denied, 81 N.M. 588, 470 P.2d 309 (1970).

Voluntary statements inadmissible if Miranda procedures not followed. — Voluntariness relates to the trustworthiness or reliability of statements, whereas waiver of rights relates to the compliance with the strictures of Miranda; Miranda requires law enforcement officers, before questioning someone in custody, to give specified warnings and follow specified procedures during the course of an interrogation, and any statement given without compliance with these procedures cannot be admitted in evidence against the accused over his objection, even if it is wholly voluntary. State v. Ramirez, 89 N.M. 635, 556 P.2d 43 (Ct. App. 1976), overruled on other grounds, City of Albuquerque v. Haywood, 1998-NMCA-029, 954 P.2d 93 (Ct. App. 1997).

Miranda holds that if the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease; this is directive only and does not require a warning prior to interrogation to the effect that defendant has a right to stop the questioning at any point and time. State v. Carlton, 83 N.M. 644, 495 P.2d 1091 (Ct. App.), cert. denied, 83 N.M. 631, 495 P.2d 1078 (1972).

Miranda-type warnings in school disciplinary matters. — Miranda-type warnings are not required in cases involving in-school disciplinary matters since the purpose of most schoolhouse interrogations is to find facts related to violations of school rules or relating to social maladjustments of the child with a view toward correcting it, and giving Miranda-type warnings would only frustrate this purpose by putting the school official and student in an adversary position, in direct opposition to the school official's role of counselor. Doe v. State, 88 N.M. 347, 540 P.2d 827 (Ct. App.), cert. denied, 88 N.M. 318, 540 P.2d 248 (1975).

Promises of immunity. — Neither district attorney nor court is granted constitutional or statutory power, acting either singly or in concurrence, to extend immunity to a witness so as to compel him to testify regardless of incriminating character of his testimony. Apodaca v. Viramontes, 53 N.M. 514, 212 P.2d 425 (1949).

Where defendant's presence at the scene of a burglary, which from the record appeared to have included larceny, could tend to incriminate him and subject him to prosecution for larceny, the district court could not properly require defendant to answer questions about whether defendant saw another person charged with burglary at the scene of the crime, in light of defendant's self-incrimination claim, and his refusal to answer did not constitute criminal contempt, even where the district attorney stated that "under no consideration would he file any other charges" against defendant growing out of the burglary. State v. Watson, 82 N.M. 769, 487 P.2d 197 (Ct. App. 1971).

Incriminating statements admitted. — Where there is no evidence that an officer knew or should have known that his simple statement, "Is he the one?" made to a fellow officer in the presence of the defendant, would result in defendant making incriminating statements, and there is no evidence of coercion or interrogation and no indication that defendant perceived that he was being interrogated, the trial court properly refused to suppress defendant's statements. State v. Edwards, 97 N.M. 141, 637 P.2d 572 (Ct. App. 1981).

Narrow scope of inquiry in consolidated cases. — Where prosecutions against two or more defendants are consolidated, the consolidation results in compelling adoption for both cases of the narrowest scope of inquiry applicable to either since witnesses may not be prejudiced in exercising their claims of privilege by having the scope of inquiry in the one case extended to the permissible scope obtaining in the other. Apodaca v. Viramontes, 53 N.M. 514, 212 P.2d 425 (1949).

Results of polygraph test are not admissible over objection. Chavez v. New Mexico, 456 F.2d 1072 (10th Cir. 1972).

Where defendant had sought polygraph test and had freely and voluntarily agreed that the results thereof, and their interpretation by the examiner, would be admissible as evidence, and with full knowledge that all evidence as to the test, including the results and interpretation thereof by the examiner, could still be kept from the jury by objecting thereto, made no objection, defendant thereupon waived all rights he had concerning

introduction into evidence of matters he claimed were self-incriminating. State v. Chavez, 82 N.M. 238, 478 P.2d 566 (Ct. App. 1970).

Results of voluntary polygraph test not equated with self-incrimination. — The voluntary submission by defendant to polygraph examination, which was conducted at his request, without first being given the Miranda warnings and without knowing all that would be asked of him, his responses thereto, and the results of the examination, is not to be equated with self-incrimination, nor is the examiner's interpretation of the results of such examination to be equated with an interpretation from one language into another of self-incriminating statements. State v. Chavez, 82 N.M. 238, 478 P.2d 566 (Ct. App. 1970).

Failure to sign written statement does not make oral statements inadmissible. — Where the record shows that defendant was warned of his rights and signed a waiver and that later he refused to sign a written statement and stated that he would wait until an attorney was present before he signed it, the trial court's admission of pretrial oral statements in evidence was not error as the fact that defendant declined to sign a written statement did not make his oral statement inadmissible as a matter of law. State v. Courtright, 83 N.M. 474, 493 P.2d 959 (Ct. App. 1972).

Interrogating accused in absence of counsel. — Any practice on the part of officials of interrogating an accused in the absence of his counsel whether retained or appointed is strongly disapproved, particularly after the accused has been charged with the crime and the interrogation is designed to secure evidence of guilt to be introduced in the criminal trial against the accused. State v. Lopez, 80 N.M. 130, 452 P.2d 199 (Ct. App. 1969).

Fact that perjury is the crime with which witness might incriminate himself is immaterial. When a witness is asked a question the answer to which could show that he had already committed a crime (perjury at a prior trial or hearing), his refusal to answer is permissible almost by the definition of self-incrimination. State v. Zamora, 84 N.M. 245, 501 P.2d 689 (Ct. App. 1972).

Alibi rule does not violate privilege against self-incrimination. — In applying the alibi rule so as to exclude evidence of alibi not disclosed to the district attorney and thus giving defendant a choice between foregoing the defense or taking the stand himself to present it, the trial court did not violate defendant's privilege against self-incrimination. State v. Smith, 88 N.M. 541, 543 P.2d 834 (Ct. App. 1975).

Applicability of privilege to corporations. — The evidentiary privilege against self-incrimination of this section, the Fifth Amendment of the U.S. Constitution, and 29-9-9 NMSA 1978, does not apply to corporations or a corporation's agent in his representative capacity. Doe v. State ex rel. Governor's Organized Crime Prevention Comm'n, 114 N.M. 78, 835 P.2d 76 (1992).

Instruction on defendant's failure to testify. — It has been firmly established that an instruction on defendant's failure to testify is actually a benefit as a caution to the jury and is not erroneous, even though the defendant did not request it. State v. Garcia, 84 N.M. 519, 505 P.2d 862 (Ct. App.), cert. denied, 84 N.M. 512, 505 P.2d 855 (1972).

Failure to request jury instruction. — Where defendant never requested an instruction on the voluntariness of certain statements made by him, any error committed by the court in failing to give one was waived. State v. Romero, 87 N.M. 279, 532 P.2d 208 (Ct. App. 1975).

Instruction not error though not requested by defendant. — Where trial court instructed the jury not to draw any inferences against petitioner because of his failure to testify in his own behalf, petitioner's contention that such instruction was error because he did not request such an instruction and that the instruction amounted to a comment concerning defendant's failure to testify was without merit since the instruction was for the benefit of a defendant. Patterson v. State, 81 N.M. 210, 465 P.2d 93 (Ct. App. 1970).

Instruction that state could comment on defendant's failure to take stand was not denial of his constitutional protection against self-incrimination where the court did not make any comment and the prosecution made no comment or argument whatsoever on appellant's silence. State v. James, 76 N.M. 376, 415 P.2d 350 (1966).

Admissibility of tape recorded evidence. — Where informer making purchases of heroin from defendants had an electronic device concealed on his person that transmitted sounds to a receiver in a police car and the sounds were recorded on tape, defendants' contention that the tapes were erroneously admitted as evidence, that they were victims of an illegal search and seizure, and that their privilege against self-incrimination was violated was without merit. The informer having testified as to the conversations, the tapes were admissible to corroborate the informer's testimony. State v. Maes, 81 N.M. 550, 469 P.2d 529 (Ct. App.), cert. denied, 81 N.M. 588, 470 P.2d 309 (1970).

Questions answered at probation revocation hearing. — Where defendant at probation revocation hearing was not called or sworn as a witness, but was advised by the court as to the nature of each charge made against him and was asked whether or not the charge was true, and thereby was given an opportunity to admit or deny the charge, and where he was also given an opportunity to explain his plea to each charge, and in some instances he offered an explanation, this did not constitute compelled, coerced or required testimony by defendant against himself. These proceedings were in the nature of an arraignment. State v. Brusenhan, 78 N.M. 764, 438 P.2d 174 (Ct. App. 1968).

Procedure under legislative committees. — In the investigation of bribery charges by the legislature, members of the press appearing before its committee may be compelled to divulge the source of their information, but no person may be compelled to be a

witness against himself in any criminal case, and this prohibition will be given a liberal construction, and each house of the legislature may determine its rules of procedure and punish its members or others for contempt or disorderly conduct in its presence. 1937-38 Op. Att'y Gen. No. 65.

Juvenile proceedings regarded as "criminal". — Juvenile proceedings to determine "delinquency," which may lead to commitment to a state institution, must be regarded as "criminal" for purposes of the privilege against self-incrimination. Peyton v. Nord, 78 N.M. 717, 437 P.2d 716 (1968).

Statute not violative of section. — Statute providing that accused may testify but that his failure to do so would create no presumption against him and that accused was entitled to jury instruction on the subject if his failure to testify was the object of comment or argument did not violate this section. State v. Sandoval, 59 N.M. 85, 279 P.2d 850 (1955).

Statute requiring any person who kills bovine to preserve its hide unmutilated for 30 days does not violate constitutional immunities from self-incrimination and unreasonable search and seizure. State v. Walker, 34 N.M. 405, 281 P. 481 (1929). See also State v. Knight, 34 N.M. 217, 279 P. 947 (1929).

B. CONFESSIONS.

Voluntary confession not violation of section. — When confession was freely and voluntarily made, it follows as a matter of course that appellant was not compelled to testify against himself in violation of this section. State v. Ascarate, 21 N.M. 191, 153 P. 1036 (1915), writ of error dismissed, 245 U.S. 625, 38 S. Ct. 8, 62 L. Ed. 517 (1917).

Massachusetts rule followed in New Mexico. — New Mexico procedure as to confessions does not follow the New York method; rather, the court of appeals follows the Massachusetts rule, i.e., the jury passes on voluntariness only after the judge has fully and independently resolved the issue against the accused. State v. Burk, 82 N.M. 466, 483 P.2d 940 (Ct. App.), cert. denied, 404 U.S. 955, 92 S. Ct. 309, 30 L. Ed. 2d 271 (1971).

Judge's comment that voluntariness decided by jury. — Where after a hearing, the judge concluded that the defendant's incriminating statement met legal requirements for admissibility and his findings on disputed issues of fact are also ascertainable from the record, the trial court's statement that the issue of voluntariness was entirely up to the jury is no more than a comment that, having determined the statement was obtained in accordance with legal requirements, and was admissible as a matter of law, the final decision in connection with the statement was for the jury and as such was not constitutionally inadequate. State v. Burk, 82 N.M. 466, 483 P.2d 940 (Ct. App.), cert. denied, 404 U.S. 955, 92 S. Ct. 309, 30 L. Ed. 2d 271 (1971).

Involuntary confession not to be heard by jury. — A confession by the defendant found to be involuntary by the trial judge is not to be heard by the jury which determines his guilt or innocence. State v. Soliz, 79 N.M. 263, 442 P.2d 575 (1968).

Right to hearing on voluntariness of confession. — Where approximately 47 days before trial defendant filed a motion to suppress all statements made by the defendant relating to the offenses charged in the indictment, and where on the day of trial defendant renewed his motion to suppress, the trial court erred in not holding a hearing out of the presence of the jury in order to determine the voluntariness of the confession, since defendant had the constitutional right at some stage in the proceeding to object to the use of the confession and to have a fair hearing and a reliable determination on the issue of voluntariness; a determination uninfluenced by the truth or falsity of the confession. State v. LaCour, 84 N.M. 665, 506 P.2d 1212 (Ct. App. 1973).

Defendant alleging duress in the taking of his confession has a constitutional right to have a fair hearing and a reliable determination on the issue of voluntariness uninfluenced by the truth or falsity of that confession. State v. Gurule, 84 N.M. 142, 500 P.2d 427 (Ct. App. 1972).

A prima facie case for admission of a confession is made where the officers testify that the confession was obtained without threat or coercion or promise of immunity. State v. Watson, 82 N.M. 769, 487 P.2d 197 (Ct. App. 1971).

Error not to hear defendant's statement on integrity of confession. — Any time a defendant makes it known he has something to say touching the integrity of a confession claimed to have been made by him, however incredible it may appear to the trial court, the judge must hear him. He has no choice. In declining to do so, the court commits reversible error. State v. Armijo, 64 N.M. 431, 329 P.2d 785 (1958).

Appellate court must accept determinations by triers of fact. — It is for the trial court in the preliminary inquiry out of the presence of the jury, and for the jury ultimately under proper instructions, to determine the question of the voluntariness of confessions, and the court of appeals must accept these determinations by the triers of the fact, unless the evidence is so lacking in support of these determinations as to work fundamental unfairness. State v. Fagan, 78 N.M. 618, 435 P.2d 771 (Ct. App. 1967).

Confession made prior to appearance before magistrate. — Defendant's confession having been held to be voluntary by the trial court, and the evidence at the motion hearing not requiring a contrary conclusion, the fact that the statement was made prior to defendant's appearance before a magistrate did not require that the statement be suppressed. State v. Rael, 81 N.M. 791, 474 P.2d 83 (Ct. App. 1970).

Having determined that it was voluntary, the fact that appellant was not taken forthwith before a magistrate cannot be held to make the confession inadmissible. State v. Gray, 80 N.M. 751, 461 P.2d 233 (Ct. App. 1969).

Advice of counsel not essential. — A confession by a defendant at a time he is in custody and does not have counsel to advise him is not ipso facto involuntary and inadmissible. Pece v. Cox, 354 F.2d 913 (10th Cir. 1965), cert. denied, 384 U.S. 1020, 86 S. Ct. 1984, 16 L. Ed. 2d 1044 (1966).

A voluntary confession given before counsel was obtained is admissible. State v. Dena, 28 N.M. 479, 214 P. 583 (1923).

Promise of lesser punishment. — If the accused confesses because he was induced by the promise that his punishment will not be so severe as it otherwise might be, the confession is not admissible because it was not voluntary. State v. Watson, 82 N.M. 769, 487 P.2d 197 (Ct. App. 1971).

Inducement need not be made by a person in position of authority to be unlawful. — Where defendant in larceny case had a private conversation with a former district attorney after his arrest, the former district attorney was a person of some standing in the community, who had been seen on the day of the crime by defendant with the victim of the larceny, and where defendant's mother had told her son to go to this man if he ever got into any trouble because he would help him out, defendant might reasonably have considered the promissor as a person able to afford him aid, and his confession, consisting of the act of showing the police where the stolen property was hidden and the statements made to the police after emerging from the conference room and on route to the cache site, was unlawfully induced, involuntary and, therefore, inadmissible. State v. Benavidez, 87 N.M. 223, 531 P.2d 957 (Ct. App. 1975).

A confession is presumed to be given by mentally competent person. State v. Lujan, 87 N.M. 400, 534 P.2d 1112, cert. denied, 423 U.S. 1025, 96 S. Ct. 469, 46 L. Ed. 2d 400 (1975).

And burden is on defendant to show evidence to contrary. State v. Lujan, 87 N.M. 400, 534 P.2d 1112, cert. denied, 423 U.S. 1025, 96 S. Ct. 469, 46 L. Ed. 2d 400 (1975).

Test to determine mental competence to make voluntary confession. — For a defendant to make a valid confession, he must have had sufficient mental capacity at the time to be conscious of the physical acts performed by him, to retain them in his memory and to state them with reasonable accuracy. Mere mental instability or temporary lack of faculties only goes to the weight to be given the confession. The test used to determine mental competence to make a voluntary confession is whether the defendant's mental capacities and his actions after the commission of the crime clearly demonstrate that he had sufficient mental capacity at that time to be conscious of what he was doing, to retain memory of his actions and to relate with reasonable accuracy the details of his actions. State v. Lujan, 87 N.M. 400, 534 P.2d 1112, cert. denied, 423 U.S. 1025, 96 S. Ct. 469, 46 L. Ed. 2d 400 (1975).

When sanity hearing required. — An evidentiary hearing on the issue of involuntariness to confess due to insanity is constitutionally required when a defendant requests it or when the defendant attempts to offer proof that he was not mentally competent to make the confession. State v. Lujan, 87 N.M. 400, 534 P.2d 1112, cert. denied, 423 U.S. 1025, 96 S. Ct. 469, 46 L. Ed. 2d 400 (1975).

Where defendant failed to demand evidentiary hearing regarding insanity and did not show that he had evidence to submit on his incompetence to confess, nor was there evidence in the record of coercion, prolonged interrogation or anything which might make the confession involuntary, it was proper for the court to admit the evidence of the confession, along with evidence of the defendant's state of mind at the time of the confession, to allow the jury to decide the weight to be accorded the confession. State v. Lujan, 87 N.M. 400, 534 P.2d 1112, cert. denied, 423 U.S. 1025, 96 S. Ct. 469, 46 L. Ed. 2d 400 (1975).

Failure to object to admission of confession. — Objection to admission of a confession could not be considered if not made in trial court. State v. Layton, 32 N.M. 188, 252 P. 997 (1927).

Confession found voluntary. — Where there was no evidence that the circumstances surrounding the arrest, the fact that the defendant had been in jail overnight without arraignment, or the fact that he had no lawyer, in any way rendered his statement involuntary and as the trial court ruled, as a matter of law, that the confession was voluntary before submitting it to the jury under proper instructions requiring the jury to consider any questions concerning whether it was voluntary, defendant's constitutional rights were not abridged. State v. James, 83 N.M. 263, 490 P.2d 1236 (Ct. App. 1971), overruled on other grounds State v. Victorian, 84 N.M. 491, 505 P.2d 436 (1973).

Defendant's claim that his confession was involuntary was without merit, even though defendant agreed to waive his rights only if officers promised not to put him in the same cell with a codefendant, who might kill him, since the answer of the police officer to the effect that such would not be done was a natural one and not phrased in a threatening or otherwise unjustified manner. State v. LeMarr, 83 N.M. 18, 487 P.2d 1088 (1971).

Where defendant, before giving the confession, was twice advised of his right to make no statement and his right to consult with counsel, by two different officers, and at the suppression hearing the trial court made full inquiry into the voluntariness of the confession and determined that the defendant had knowingly and intelligently waived his right to remain silent, then trial court did not err in admitting into evidence the written confession of the defendant. State v. Baros, 87 N.M. 49, 529 P.2d 275 (Ct. App.), cert. denied, 87 N.M. 47, 529 P.2d 273 (1974).

Where the elapsed time of three and one-half hours from arrest to defendant's giving of statement of admission and the absence of counsel during that time did not, under the circumstances of the case, require a holding that the statement was involuntary and

therefore should have been suppressed. State v. Rael, 81 N.M. 791, 474 P.2d 83 (Ct. App. 1970).

III. DOUBLE JEOPARDY.

A. IN GENERAL.

Policies underlying double jeopardy prohibition. — Several policies underlie the double jeopardy prohibition: First, guilt should be established by proving the elements of a crime to the satisfaction of a single jury, not by capitalizing on the increased probability of conviction resulting from repeated prosecutions before many juries; second, the prosecutor should not be able to search for an agreeable sentence by bringing successive prosecutions for the same offense before different judges; third, criminal trials should not become an instrument for unnecessarily badgering individuals; and finally, judges should not impose multiple punishments for a single legislatively defined offense. State v. Tanton, 88 N.M. 5, 536 P.2d 269 (Ct. App.), rev'd on other grounds, 88 N.M. 333, 540 P.2d 813 (1975).

This section applies to prevent a person from being punished twice for the same offense. State v. McAfee, 78 N.M. 108, 428 P.2d 647 (1967).

The double jeopardy clause is designed to prohibit the government from harassing citizens by subjecting them to multiple suits on the same offense until a conviction is obtained. State v. Spillmon, 89 N.M. 406, 553 P.2d 686 (1976).

The purpose of the double jeopardy prohibition is to prevent the government from harassing citizens by subjecting them to multiple suits until a conviction is reached, or from repeatedly subjecting citizens to the expense, embarrassment and ordeal of repeated trials. State v. Lujan, 103 N.M. 667, 712 P.2d 13 (Ct. App. 1985), cert. denied, 103 N.M. 740, 713 P.2d 556 (1986).

The goal of the multiple prosecution component of the double jeopardy clause is to protect a defendant from embarrassment, expense, ordeal, anxiety and insecurity, and to protect his right to conclusion of criminal charges against him. State v. Davis, 1998-NMCA-148, 126 N.M. 297, 968 P.2d 808.

Constitutional prohibition against "double jeopardy" designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense. State v. Mares, 92 N.M. 687, 594 P.2d 347 (Ct. App.), cert. denied, 92 N.M. 675, 593 P.2d 1078 (1979).

This section prohibits double punishment for the same crime. State v. Ranne, 80 N.M. 188, 453 P.2d 209 (Ct. App. 1969).

No double jeopardy where significant time has elapsed. — The defense of double jeopardy did not apply to successive prosecutions where twenty months elapsed

between the prior alleged violation and a distinct criminal act. City of Roswell v. Hancock, 1998-NMCA-130, 126 N.M. 109, 967 P.2d 449, cert. denied, 126 N.M. 107, 967 P.2d 447 (1998).

Double jeopardy statute. — Section 30-1-10 NMSA 1978 provides the same protections as this section, although those protections are more clearly stated in the statute. State v. Lynch, 2003-NMSC-020, 134 N.M. 139, 74 P.3d 73.

State and federal provisions similar. — There is little to distinguish the language of state constitutional prohibition against double jeopardy from that found in the federal constitution. Since the two provisions are so similar in nature, they should be construed and interpreted in the same manner. State v. Rogers, 90 N.M. 604, 566 P.2d 1142 (1977).

But state protections broader than those of federal constitution. — The differences between this section and 30-1-10 NMSA 1978 suggest that the legislature was attempting to articulate the protections of this section as being broader than those of the federal constitution. The statute says, more clearly than the constitutional provision, that the new trial ought not concern an offense of a greater degree than the degree of which the defendant had been convicted at the prior trial. State v. Lynch, 2003-NMSC-020, 134 N.M. 139, 74 P.3d 73.

Section subject to same construction as federal counterpart. — The double jeopardy clause in this section is subject to the same construction and interpretation as its counterpart in the fifth amendment to the United States constitution. State v. Day, 94 N.M. 753, 617 P.2d 142, cert. denied, 449 U.S. 860, 101 S. Ct. 163, 66 L. Ed. 2d 77 (1980).

Respecting multiple punishments. – The double jeopardy clause in this section has not been construed more broadly than its federal counterpart in the context of multiple punishments. State v. Andazola, 2003-NMCA-146, 134 N.M. 710, 82 P.3d 77.

Where the defendant, although referring to this section, neither argued that his rights were not adequately protected under the federal constitution nor justified a departure from federal precedent, his double jeopardy claim would be resolved under federal double jeopardy principles. State v. Andazola, 2003-NMCA-146, 134 N.M. 710, 82 P.3d 77.

Application of double jeopardy clause. — The double jeopardy clause only comes to the aid of defendants subjected to multiple prosecutions for the identical offense, or in such situations in which collateral estoppel, the concept of lesser included offenses or the same evidence test apply. State v. Tanton, 88 N.M. 333, 540 P.2d 813 (1975).

Words "same offense" mean same offense, not the same transaction, not the same acts, not the same circumstances or same situation. State v. Goodson, 54 N.M. 184, 217 P.2d 262 (1950).

Legislative definition of offenses not affected. — Few, if any, limitations are imposed by the double jeopardy clause on the legislative power to define offenses. State v. Edwards, 102 N.M. 413, 696 P.2d 1006 (Ct. App. 1984), cert. quashed, 102 N.M. 412, 696 P.2d 1005 (1985).

Application to municipal violations. — State and federal constitutional prohibitions against double jeopardy apply to prosecutions for violation of municipal ordinances. City of Roswell v. Hancock, 1998-NMCA-130, 126 N.M. 109, 967 P.2d 449, cert. denied, 126 N.M. 107, 967 P.2d 447 (1998).

When no bar to consecutive sentencing. — Under the "same evidence" test where different elements are required to be proved in order to sustain each of three convictions, and different evidence was admitted to prove the different elements, it appears that the three convictions are based in part on separate evidence and the prohibition against double jeopardy does not bar consecutive sentencing under the circumstances of the case. State v. Manus, 93 N.M. 95, 597 P.2d 280 (1979).

Guilty plea not a bar to raising issue on appeal. — The defendant was not barred by the fact that he pled guilty to the first two counts of a three count indictment, in which all of the counts were identically worded, including the name of the victim, from raising the double jeopardy claim on appeal. State v. Handa, 120 N.M. 38, 897 P.2d 225 (Ct. App. 1995).

The word "jeopardy" as used in the U.S. Const., amend. V and in this section is used in its technical sense and is only applicable to criminal proceedings. Svejcara v. Whitman, 82 N.M. 739, 487 P.2d 167 (Ct. App. 1971).

Prosecution in both state and federal courts for same offense. — This section is subject to the doctrine of dual sovereignty, and does not prohibit the prosecution of a defendant in both state and federal courts for criminal charges arising out of an alleged criminal activity. Each government can determine what shall be an offense against its peace and dignity, thereby permitting each sovereign to prosecute regardless of what the other has done. State v. Rogers, 90 N.M. 604, 566 P.2d 1142 (1977).

Under limited definition of double jeopardy in New Mexico, which used the "same evidence" test rather than the "same transaction" test, state was not precluded from prosecuting defendant for kidnapping and receiving stolen goods after defendant had been acquitted in federal court of bank robbery, which charge assumedly arose from the "same transaction" as the other charges. However, since the common-law collateral estoppel doctrine would have prevented the kidnapping conviction if not for the principle of dual sovereignty, that conviction was reversed on policy grounds. State v. Rogers, 90 N.M. 673, 568 P.2d 199 (Ct. App.), aff'd in part and rev'd in part, 90 N.M. 604, 566 P.2d 1142 (1977).

Civil damages awarded after criminal conviction. — Punitive damage serves a civil end to an individual, while criminal sanctions serve a criminal end to the public and an

award to punitive damages in tort action against defendant after defendant has been convicted of reckless driving and driving under the influence does not constitute double jeopardy. Svejcara v. Whitman, 82 N.M. 739, 487 P.2d 167 (Ct. App. 1971).

Factual basis must appear in record in order to support a double jeopardy defense. State v. Wood, 117 N.M. 682, 875 P.2d 1113 (Ct. App. 1994).

Defendant's assertion of mere possibility of double jeopardy is insufficient to give rise to a constitutional issue in the court of appeals. State v. Newman, 83 N.M. 165, 489 P.2d 673 (Ct. App. 1971).

Determination of unitary nature of conduct. — Where a defendant convicted of multiple offenses claims double jeopardy, a reviewing court first determines whether defendant's conduct was unitary in nature so that the same acts were used to prove a violation of both statutes; and where the conduct is unitary, the court must then examine the statutes in question to determine whether the legislature intended that multiple punishments could be imposed for different criminal offenses resulting from the same conduct. State v. Duran, 1998-NMCA-153, 126 N.M. 60, 966 P.2d 768, cert. denied, 126 N.M. 533, 972 P.2d 352 (1998), overruled on other grounds, State v. Laguna, 1999-NMCA-152, 128 N.M. 345, 992 P.2d 896.

One offense cannot be split up into multiple prosecutions. — The same "offense" cannot be split into many parts and made the subject of innumerable prosecutions. The prosecution cannot split up into an indefinite number of charges what was in fact but one act and one offense. State v. Maestas, 87 N.M. 6, 528 P.2d 650 (Ct. App.), cert. denied, 87 N.M. 5, 528 P.2d 649 (1974), overruled on other grounds, State v. Tanton, 88 N.M. 333, 540 P.2d 813 (1975).

When defendant placed in jeopardy. — A defendant is placed in jeopardy when, after issue joined upon a valid indictment before a competent court, the jury is impaneled and sworn to try his case; territorial statute providing that nolle prosequi could not be entered after any testimony had been introduced for defendant would be violative of fundamental law and void if such law assumed to give the right to dismiss at any time before the defendant offered proof. United States v. Aurandt, 15 N.M. 292, 107 P. 1064, 27 L.R.A. (n.s.) 1181 (1910).

Assuming the court has jurisdiction, and prior proceedings are valid, jeopardy attaches when issue is joined upon an indictment or information, and the jury is impaneled and sworn to try the cause. Ex parte Williams, 58 N.M. 37, 265 P.2d 359 (1954).

Both a sufficient legal charge and a sufficient jurisdiction to try the charge must exist for jeopardy to attach. State v. Goodson, 54 N.M. 184, 217 P.2d 262 (1950).

Where defendant was charged with both aggravated battery and attempt, and where the lesser charge of attempt was dismissed prior to trial, it was not "double jeopardy" to proceed to try defendant on the charge of aggravated battery, because defendant was

not tried on the attempt charge and the attempt charge was dismissed before any evidence was presented. State v. Hibbs, 82 N.M. 722, 487 P.2d 150 (Ct. App. 1971).

The factors to be taken into consideration in determining whether a defendant's retrial will place him in double jeopardy after a prior trial has been aborted by the declaration of a mistrial not at his request include: (1) defendant's interest in having his fate determined by the jury first impaneled, which encompasses not only his right to have his trial completed by a particular panel, but also his interest in ending the dispute then and there with an acquittal, and would weigh heavily against retrial in all situations where jeopardy has attached (i.e., after the jury is sworn to try the case), and (2) the factor of avoiding giving the state a second bite of the apple in order to either strengthen its case or to alter its trial strategy to obtain a conviction. State v. De Baca, 88 N.M. 454, 541 P.2d 634 (Ct. App.), cert. denied, 89 N.M. 6, 546 P.2d 71 (1975).

Jeopardy attaches when issue is joined upon an indictment or information, and the jury is impaneled and sworn to try the cause, or, in nonjury cases, the presentation of at least some evidence on behalf of the state. State v. Rhodes, 76 N.M. 177, 413 P.2d 214 (1966); State v. Mares, 92 N.M. 687, 594 P.2d 347 (Ct. App.), cert. denied, 92 N.M. 675, 593 P.2d 1078 (1979).

Jeopardy attaches upon a court’s entry of a default judgment. State v. Esparza, 2003-NMCA-075, 133 N.M. 772, 70 P.3d 762.

New adjudication of delinquency held double jeopardy. — It was error to rely solely on a predisposition report submitted after trial to support the finding that a child was in need of care and rehabilitation. Since jeopardy attached at the first hearing where the issue of delinquency was tried, it would violate the constitutional prohibition against double jeopardy to remand case for a new adjudication of delinquency. John Doe v. State, 92 N.M. 74, 582 P.2d 1287 (1978).

Revocation of juvenile probation after adult offenses. — The order of the children's court revoking the defendant's probation based on offenses committed by the defendant after he became an adult for which he was convicted and fined did not violate his constitutional rights guaranteeing protection against double jeopardy; with respect to adult offenders, any punishment resulting from revocation of a defendant's probation is punishment that relates to the person's original offense; therefore, an individual's subsequent prosecution for the same conduct in a new proceeding does not violate double jeopardy principles. Although certain distinctions exist between proceedings to revoke the probation of a child and those involving adults, the proceedings that resulted in the revocation of the defendant's probation did not amount to a new or separate punishment. In re Lucio F.T., 119 N.M. 76, 888 P.2d 958 (Ct. App. 1994).

Failure to allow good time credit for presentence confinement does not subject a prisoner to double jeopardy. Enright v. State, 104 N.M. 672, 726 P.2d 349 (1986).

Administrative plus statutory punishment for prison escape. — Even if administrative sanctions have been levied against defendant for his escape from prison, conviction under 30-22-9 NMSA 1978 did not constitute double jeopardy. State v. Budau, 86 N.M. 21, 518 P.2d 1225 (Ct. App. 1973), cert. denied, 86 N.M. 5, 518 P.2d 1209 (1974).

Administrative discipline of an escapee does not prohibit criminal prosecution for the escape nor do the two punishments constitute double jeopardy. State v. Millican, 84 N.M. 256, 501 P.2d 1076 (Ct. App. 1972).

Increased sentence resulting from Habitual Criminal Act. — Where defendant's first conviction, standing alone, was not the cause of an enhanced sentence, but rather the enhancement was due to the Habitual Criminal Act, defendant's enhanced punishment was not prohibited as double jeopardy. State v. Gonzales, 84 N.M. 275, 502 P.2d 300 (Ct. App.), cert. denied, 84 N.M. 271, 502 P.2d 296 (1972).

Double jeopardy generally does not attach in habitual offender sentencing proceedings especially where the state committed only procedural error. State v. Aragon, 116 N.M. 267, 861 P.2d 948 (1993).

Habitual offender enhancement of an escape conviction does not constitute double jeopardy. State v. Najar, 118 N.M. 230, 880 P.2d 327 (Ct. App. 1994).

For purposes of double jeopardy, when a defendant is proven to be a habitual offender, enhancement is authorized, and the defendant's expectation of finality in the underlying sentence as the only sentence he may receive is destroyed; the enhanced sentence then supplants the original sentence and results in one, single, longer sentence for the crime. State v. Porras, 1999-NMCA-016, 126 N.M. 628, 973 P.2d 880.

Trial court acted illegally when it increased defendant's sentence from ninety days to three years on the underlying felony charges; once he began serving the original sentence, double jeopardy principles precluded increasing the sentence on the underlying charges, regardless of whether the sentence could be increased based upon his habitual offender status. State v. Porras, 1999-NMCA-016, 126 N.M. 628, 973 P.2d 880.

Defendant, a three-time felony offender, had no reasonable expectation of finality in a three-year probationary sentence for a larceny conviction; therefore, it was not a violation of his double jeopardy rights for the state to seek a subsequent conviction of defendant, during the probationary period, under the habitual offender laws. State v. Villalobos, 1998-NMSC-036, 126 N.M. 255, 968 P.2d 766.

Double use of conditional discharge. — Use of the defendant's prior conditional discharge to prove that he was a felon in order to convict him of the crime of felon in possession of a firearm and to enhance his sentence for underlying assault convictions

did not violate his double jeopardy rights. State v. Handa, 120 N.M. 38, 897 P.2d 225 (Ct. App. 1995).

Increased sentence after original sentence set aside. — Where, at the defendant's behest, his sentence is set aside on appeal or by collateral attack, the imposition of a greater sentence does not violate federal or state double jeopardy principles. Tipton v. Baker, 432 F.2d 245 (10th Cir. 1970).

Increased sentence after trial de novo. — A greater sentence imposed by the district court for violation of certain municipal ordinances after a trial de novo does not deprive defendant of due process, nor does it amount to double jeopardy. City of Farmington v. Sandoval, 90 N.M. 246, 561 P.2d 945 (Ct. App. 1977).

Increase of punishment after defendant committed. — A trial court is without power to set aside a valid sentence after the defendant has been committed thereunder, and impose a new or different sentence increasing the punishment. A judgment which attempts to do so is void, and the original judgment remains in force. State v. Allen, 82 N.M. 373, 482 P.2d 237 (1971); State v. Cheadle, 106 N.M. 391, 744 P.2d 166 (1987).

Increasing a sentence, after a defendant has commenced to serve it, is a violation of the constitutional guarantee against double jeopardy. State v. Allen, 82 N.M. 373, 482 P.2d 237 (1971); State v. Cheadle, 106 N.M. 391, 744 P.2d 166 (1987).

Amended judgment adding term of probation. — Trial court's filing of an amended judgment increasing defendant's sentence by adding a three-year term of probation violated the prohibition against double jeopardy. State v. Charlton, 115 N.M. 35, 846 P.2d 341 (Ct. App. 1992).

Additional evaluation of sentence raises no double jeopardy issue. — An order deferring sentence in no way represents a suspension or a final sentence, at least for purposes of jurisdiction. Where deferral is ordered for the purpose of additional evaluation as recommended by department of corrections, a statutory sentence subsequently imposed is not a second sentence, but the first sentence imposed in the case. Accordingly, there is no second sentence raising a double jeopardy issue and no absence of authority in the trial court to impose the statutory sentence. State v. Wood, 86 N.M. 731, 527 P.2d 494 (Ct. App.), cert. denied, 86 N.M. 730, 527 P.2d 493 (1974).

Consecutive sentences for crimes arising out of the same event do not constitute double jeopardy unless there has been a merger. State v. Deats, 82 N.M. 711, 487 P.2d 139 (Ct. App. 1971).

All consecutive sentences for different offenses arising out of the same event do not necessarily violate the double jeopardy prohibition of the United States and New Mexico constitutions. State v. Deats, 82 N.M. 711, 487 P.2d 139 (Ct. App. 1971).

Separate, successive contempts are punishable as separate offenses, but where the supreme court cannot be sure from the judgment of conviction that defendant was not convicted of contempt by one judge for the same misconduct for which he was summarily convicted and sentenced by another judge, it cannot be sure that his rights against double jeopardy have not been violated. Consequently, the proper procedure to be followed to protect against this possible violation of his rights, and to protect the rights of the public to have contempts of court punished, is to reverse the decision of the court of appeals affirming the conviction, reverse the judgment and sentence of the district court, and remand the cause to the district court for further proceedings. State v. Driscoll, 89 N.M. 541, 555 P.2d 136 (1976).

Increasing sentence based on consideration of element of offense. — Where defendant noted that physical injury is an element of the crime of second degree criminal sexual penetration under 30-9-11B(2) NMSA 1978, and he contended the trial court's consideration of physical injury suffered by the victim in increasing the basic sentence pursuant to 31-18-15.1 NMSA 1978 exposed him to double jeopardy, it was held that the court's consideration of circumstances surrounding an element of the offense did not expose defendant to double jeopardy. State v. Bernal, 106 N.M. 117, 739 P.2d 986 (Ct. App. 1987).

Remand by children's court judge to special master. — As long as the special master's recommendations are not binding on the children's court judge, a special master is considered a ministerial rather than a judicial officer, and is without powers of adjudication. Under Rule 10-111 F NMRA, the children's court is not bound by the special master's findings and conclusions. Thus, there is no violation of the double jeopardy clause when the children's court judge remands to the special master prior to entering its findings and conclusions. State v. Billy M., 106 N.M. 123, 739 P.2d 992 (Ct. App. 1987).

Where petitioner's claim of double jeopardy went outside the record and thus the "files and records of the case" did not conclusively show petitioner was not entitled to relief under that claim, he was entitled to an evidentiary hearing on that claim where the burden would be on him to prove a factual basis showing double jeopardy. Woods v. State, 84 N.M. 248, 501 P.2d 692 (Ct. App. 1972).

Forfeiture. — The city ordinance that allowed city to enact civil forfeiture proceedings against drivers who continued to drive with revoked licenses served the remedial purpose of protecting the public and that the forfeiture of a motor vehicle used by a repeat offender and was not punitive; therefore, the drivers were not subjected to double jeopardy. City of Albuquerque ex rel. Albuquerque Police Dep't v. One (1) 1984 White Chevy UT., 2002-NMSC-014, 132 N.M. 187, 46 P.3d 94.

Double jeopardy found. — Conviction for embezzling a sum as county clerk and ex officio clerk of the district court bars further prosecution for embezzling another sum as county clerk and ex officio probate clerk, where state is unable to show the conversion

of any particular sum at any particular time. State v. Romero, 33 N.M. 314, 267 P. 66 (1928).

Where defendants were charged with felony murder, aggravated burglary and attempted robbery, and the jury returned a verdict of guilty as to attempted robbery and not guilty as to burglary, but even though they received an instruction on felony murder, reached no verdict as to either first-degree or second-degree murder, having declared that they were deadlocked, the trial court could not order retrial of murder charges without violating double jeopardy clause, since it concluded the proceedings without declaring a mistrial and without reserving power to retry those issues upon which the jury could not agree. State v. Spillmon, 89 N.M. 406, 553 P.2d 686 (1976).

Double jeopardy not found. — Where defendant's motion to dismiss because of the vagueness of the "totaling" provision of 30-36-5 NMSA 1978 was sustained and the information was dismissed before a plea was entered, the proceeding did not consider the "merits" of the charge since it considered only whether the "totaling" provisions of 30-36-5 NMSA 1978 were void for vagueness. Therefore, since defendant had not yet been in jeopardy, reinstatement of the information by reviewing court did not subject him to double jeopardy. State v. Ferris, 80 N.M. 663, 459 P.2d 462 (Ct. App. 1969).

Defendant's conviction of two larcenies did not amount to double jeopardy where he stole money from separate cash registers of separately owned shops located in same room divided only by low walls, since proof of theft of money from one shop would not have proved theft of money from the other, and therefore the evidence was not the same. State v. Bolen, 88 N.M. 647, 545 P.2d 1025 (Ct. App.), cert. denied, 89 N.M. 5, 546 P.2d 70 (1976).

Evidence that a conspiracy to commit burglary was entered on the evening of November 16th, that the conspirators unsuccessfully attempted to carry out the conspiracy at 10:30 p.m. of that day, and that the burglary was performed between 9:00 and 9:30 a.m. of November 17th, showed two distinct crimes, and there was no factual basis for the contention that they were either the same or so similar that multiple convictions were prohibited. State v. Watkins, 88 N.M. 561, 543 P.2d 1189 (Ct. App.), cert. denied, 89 N.M. 6, 546 P.2d 71 (1975).

Since marijuana is not defined as a narcotic drug under the relevant statutes, a charge of violating 30-31-20 NMSA 1978 in the first proceeding brought against defendant for selling marijuana did not charge defendant with a public offense. Therefore, the court lacked jurisdiction in the first proceeding, and there was no basis for a claim of double jeopardy where defendant was later charged under the proper section. State v. Mabrey, 88 N.M. 227, 539 P.2d 617 (Ct. App. 1975).

Double jeopardy is a jurisdictional issue that can be raised on appeal even if not previously raised at trial. State v. Davis, 1998-NMCA-148, 126 N.M. 297, 968 P.2d 808.

B. TESTS.

Determination of whether same offense involved. — Various approaches have been used in determining whether the same offense is involved in a particular case and the result is that the prohibition against double jeopardy is not one rule, but several, each applying to a different situation, some of these being: (1) collateral estoppel which looks to all the relevant matters and determines whether or not the jury, in reaching its verdict in the first trial, necessarily or actually determined the same issues which the state attempts to raise in the second trial; (2) same evidence, where one determines whether the facts offered in support of one offense would sustain a conviction of a second offense, and if either charge requires the proof of facts to support a conviction which the other does not, the offenses are not the same; (3) lesser included offense, where conviction or acquittal of a lesser offense necessarily included in a greater offense bars prosecution for the greater offense; (4) merger of offenses, which requires determination of whether one criminal offense has merged in another and is not whether the two criminal acts are successive steps in the same transaction but whether one offense necessarily involves the other; and (5) same transaction which excuses whether the several offenses are the same, as where they arise out of the same transaction, and were committed at the same time, and were part of a continuous criminal act, and inspired by the same criminal intent, which is an essential element of each offense, they are susceptible of only one punishment. State v. Tanton, 88 N.M. 5, 536 P.2d 269 (Ct. App.), rev'd on other grounds, 88 N.M. 333, 540 P.2d 813 (1975).

There is a two-part test in the multi-punishment analysis for determining legislative intent to punish: (1) whether the conduct underlying the offenses is unitary, i.e., whether the same conduct violates both statutes, and (2) whether the legislature intended to create separately punishable offenses. Only if the first part of the test is answered in the affirmative, and the second in the negative, will the double jeopardy clause prohibit multiple punishment in the same trial. Swafford v. State, 112 N.M. 3, 810 P.2d 1223 (1991).

Factors considered. — In determining whether the defendant's acts constituted a single offense or multiple offenses for purposes of double jeopardy, factors considered include the time between the acts, the location of the victim at the time of each act, the existence of any intervening event, distinctions in the manner of committing the acts, the defendant's intent, and the number of victims. State v. Handa, 120 N.M. 38, 897 P.2d 225 (Ct. App. 1995).

Collateral estoppel. — Under the rule of collateral estoppel any right, fact or matter in issue, and directly adjudicated upon, or necessarily involved in, the determination of an action before a competent court in which a judgment or decree is rendered upon the merits is conclusively settled by the judgment therein and cannot again be litigated between the parties and privies whether the claim or demand, purpose or subject matter of the two suits is the same or not. State v. Nagel, 87 N.M. 434, 535 P.2d 641 (Ct. App.), cert. denied, 87 N.M. 450, 535 P.2d 657 (1975).

Where the issue of defendant's sanity was an issue of fact in the first trial, insanity having been raised as an affirmative defense, it was actually litigated, and it was

absolutely necessary to a decision in that trial, and the identical issue of fact, the sanity of the defendant, was raised in the second trial between the same parties (the state and the defendant) for offenses committed some 16 hours prior to the crime which was the subject of the first trial, it was held that the issue of insanity which was decided in defendant's favor at the first trial was the same issue of fact as the issue of insanity at the second trial and therefore collateral estoppel was a bar to the second trial. State v. Nagel, 87 N.M. 434, 535 P.2d 641 (Ct. App.), cert. denied, 87 N.M. 450, 535 P.2d 657 (1975).

The principle of collateral estoppel bars relitigation between the same parties of issues actually determined at a previous trial; in a criminal trial context collateral estoppel is a constitutional defense raised by the defendant in a second trial after an acquittal in the first trial on the same issue. Where the defendant was convicted in municipal court of violation of certain traffic ordinances, he had no acquittal to raise in his defense in district court on charges of homicide by vehicle, and application of the principle of collateral estoppel was therefore inappropriate. State v. Tanton, 88 N.M. 333, 540 P.2d 813 (1975).

If the doctrine of collateral estoppel would bar New Mexico from prosecuting a defendant a second time, and the doctrine is inapplicable solely because of the concept of dual sovereignty, as a matter of judicial policy, the prosecution will not be permitted in New Mexico. State v. Rogers, 90 N.M. 673, 568 P.2d 199 (Ct. App.), aff 'd in part and rev'd in part, 90 N.M. 604, 566 P.2d 1142 (1977).

The same evidence test is whether the facts offered in support of one offense would sustain a conviction of the other offense. State v. Sandoval, 90 N.M. 260, 561 P.2d 1353 (Ct. App.), cert. denied, 90 N.M. 637, 567 P.2d 486 (1977).

If either information requires the proof of facts to support a conviction which the other does not, the offenses are not the same and a plea of double jeopardy is unavailing. State v. Sandoval, 90 N.M. 260, 561 P.2d 1353 (Ct. App.), cert. denied, 90 N.M. 637, 567 P.2d 486 (1977).

The test for determining whether two offenses are the same so as to bring into operation the prohibition against double jeopardy is the "same evidence" test which asks whether the facts offered in support of one offense would sustain a conviction of the other. State v. Tanton, 88 N.M. 333, 540 P.2d 813 (1975); State v. Smith, 94 N.M. 379, 610 P.2d 1208 (1980).

For double jeopardy, the test in determining whether the offenses charged are the same is whether the facts offered in support of one charge would sustain a conviction of the other. If either information requires the proof of facts to support a conviction which the other does not, the offenses are not the same and a plea of double jeopardy is unavailing. Owens v. Abram, 58 N.M. 682, 274 P.2d 630 (1954), cert. denied, 348 U.S. 917, 75 S. Ct. 300, 99 L. Ed. 2d 719 (1955).

Multiple acts may be divided into counts when not "one offense". — When multiple acts cannot be classified as "one offense" under the same evidence test, they may nevertheless be divided into multiple counts if some applicable policy so demands. State v. Smith, 94 N.M. 379, 610 P.2d 1208 (1980).

Same transaction test disapproved. — The "same transaction" test, which is concerned with whether offenses were committed at the same time, were part of a continuous criminal act and inspired by the same criminal intent, has not been imposed by the United States supreme court on the states in double jeopardy cases, and since its use is not mandated by this section, it is rejected and disapproved. State v. Tanton, 88 N.M. 333, 540 P.2d 813 (1975).

No double jeopardy where factual basis for two convictions differ. — If the factual basis for the alleged conviction for assault in municipal court and the factual basis for the aggravated assault conviction differed, then there would be no double jeopardy in conviction of defendant for both. Woods v. State, 84 N.M. 248, 501 P.2d 692 (Ct. App. 1972).

And burden on defendant to prove that factual basis the same. — If the factual basis for the alleged conviction for assault in municipal court and the factual basis for the aggravated assault conviction differ, then there would be no double jeopardy and the burden will be on defendant to prove a factual basis showing double jeopardy. State v. Woods, 85 N.M. 452, 513 P.2d 189 (Ct. App. 1973).

Offense must be same in law and in fact. — The plea of double jeopardy is unavailing, unless the offense to which it is interposed is the same in law and in fact as the prior one under which defendant was placed in jeopardy. State v. Mares, 79 N.M. 327, 442 P.2d 817 (Ct. App. 1968).

The test of merger is whether one crime necessarily involves the other. State v. Deats, 82 N.M. 711, 487 P.2d 139 (Ct. App. 1971).

The test of whether one criminal offense has merged in another is not whether the two criminal acts are successive steps in the same transaction, but whether one offense necessarily involves the other. State v. Eckles, 79 N.M. 138, 441 P.2d 36 (1968).

The true test of whether one criminal offense has merged in another is whether one crime necessarily involves another, as, for example, rape involves fornication, and robbery involves both assault and larceny. If a defendant commits a burglary and while in the burglarized dwelling he commits the crime of rape or kidnapping, his crimes do not merge for neither of them is necessarily involved in the other. When one of two criminal acts committed successively is not a necessary ingredient of the other, there may be a conviction and sentence for both. State v. Eckles, 79 N.M. 138, 441 P.2d 36 (1968).

Whether defendant may be sentenced for each of his five crimes depends upon whether any one of the crimes has merged with any other of the crimes. If there has been a merger, defendant may not be sentenced for the merged offense. The test of merger is whether one of his crimes necessarily involves another of his crimes. State v. Everitt, 80 N.M. 41, 450 P.2d 927 (Ct. App. 1969).

The test of whether one criminal offense has merged in another is not whether two criminal acts are successive steps in the same transaction (the rejected same transaction test), but whether one offense necessarily involves the other. State v. Sandoval, 90 N.M. 260, 561 P.2d 1353 (Ct. App.), cert. denied, 90 N.M. 637, 567 P.2d 486 (1977).

The merger concept has aspects of the included offense concept, and in determining whether one offense necessarily involves another offense so that merger applies, the decisions have looked to the definitions of the crimes to see whether the elements are the same; this approach is similar to the approach used in determining whether an offense is an included offense (a determination of whether the greater offense can be committed without also committing the lesser). State v. Sandoval, 90 N.M. 260, 561 P.2d 1353 (Ct. App.), cert. denied, 90 N.M. 637, 567 P.2d 486 (1977).

Whether defendant can be sentenced for two crimes depends upon whether one crime merges with the other. The test of merger is whether one crime necessarily involves the other. State v. Ranne, 80 N.M. 188, 453 P.2d 209 (Ct. App. 1969).

The true test of whether one criminal offense has merged in another is whether one crime necessarily involves another, as, for example, rape involves fornication, and robbery involves both assault and larceny. If a defendant commits a burglary and while in the burglarized dwelling he commits the crime of rape or kidnapping, his crimes do not merge, for neither of them is necessarily involved in the other. When one of two criminal acts committed successively is not a necessary ingredient of the other, there may be a conviction and sentence for both. State v. McAfee, 78 N.M. 108, 428 P.2d 647 (1967).

The merger concept has aspects of the same evidence test because merger and the same evidence test are both concerned with whether more than one offense has been committed. State v. Sandoval, 90 N.M. 260, 561 P.2d 1353 (Ct. App.), cert. denied, 90 N.M. 637, 567 P.2d 486 (1977).

Prosecution for greater offense after trial for lesser offense. — Acquittal or conviction of lesser offense at former trial does not bar subsequent prosecution for greater offense, unless accused could have been convicted of the greater offense at the former trial on the same evidence as was used against him at the subsequent trial. State v. Goodson, 54 N.M. 184, 217 P.2d 262 (1950).

Felony prosecution of defendant for possession of cocaine subsequent to his misdemeanor conviction and sentence in magistrate court on a plea of guilty to

possession of drug paraphernalia did not violate double jeopardy. State v. Darkis, 2000-NMCA-085, 129 N.M. 547, 10 P.3d 871.

Where court in which acquittal or conviction is had for lesser offense was without jurisdiction to try accused for the greater offense, a prosecution for the greater offense is not barred. State v. Goodson, 54 N.M. 184, 217 P.2d 262 (1950).

A conviction or acquittal of a lesser offense necessarily included in a greater offense bars a subsequent prosecution for the greater offense. State v. Sandoval, 90 N.M. 260, 561 P.2d 1353 (Ct. App.), cert. denied, 90 N.M. 637, 567 P.2d 486 (1977).

A conviction of a lesser offense bars a subsequent prosecution for a greater offense, in all those cases where the lesser offense is included in the greater offense, and vice versa. State v. Medina, 87 N.M. 394, 534 P.2d 486 (Ct. App. 1975).

An acquittal of a lesser offense bars a subsequent prosecution for a greater offense where the lesser offense is included in the greater. Ex parte Williams, 58 N.M. 37, 265 P.2d 359 (1954).

In order to protect the right to appeal, a defendant convicted of a lesser offense overturned on appeal may not be retried for any greater offense. A defendant would not always pursue valid grounds for appeal after conviction of a lesser charge if he knew we would face the possibility of a trial on greater charges after reversal. State v. Castrillo, 90 N.M. 608, 566 P.2d 1146 (1977).

The possession of marijuana is a lesser offense necessarily included in the greater offense of distribution of marijuana, and where defendant is convicted of the lesser offense, the principles of double jeopardy bar the subsequent prosecution of the greater offense. State v. Medina, 87 N.M. 394, 534 P.2d 486 (Ct. App. 1975).

Conviction of a lesser included offense bars prosecution of a greater offense, subject to one exception: if the court does not have jurisdiction to try the crime, double jeopardy cannot attach, since double jeopardy requires that a court have sufficient jurisdiction to try the charge. Where the magistrate court had no jurisdiction to try the charge of vehicular homicide while driving while intoxicated or recklessly driving, double jeopardy should not bar the vehicular homicide by driving while intoxicated charge. State v. Tanton, 88 N.M. 333, 540 P.2d 813 (1975).

A conviction or acquittal of a lesser offense necessarily included in a greater offense bars a subsequent prosecution for the greater offense. However, where the indictment against defendant was phrased in the alternative charging him with homicide by vehicle while violating either 66-8-102 NMSA 1978 or former 64-22-3, 1953 Comp., the prosecution was not barred by a conviction in a municipal court for driving under the influence since the lesser offense of driving while under the influence of intoxicating liquor is not necessarily included in the greater offense of homicide by vehicle. State v. Tanton, 88 N.M. 333, 540 P.2d 813 (1975).

For an offense to be included within another offense, the offense must be necessarily included in the offense charged in the indictment, and for an offense to be necessarily included, the greater offense cannot be committed without also committing the lesser. State v. Kraul, 90 N.M. 314, 563 P.2d 108 (Ct. App.), cert. denied, 90 N.M. 637, 567 P.2d 486 (1977).

For a lesser offense to be necessarily included, the greater offense cannot be committed without also committing the lesser, and in determining whether an offense is necessarily included, the court will look to the offense charged in the indictment. State v. Sandoval, 90 N.M. 260, 561 P.2d 1353 (Ct. App.), cert. denied, 90 N.M. 637, 567 P.2d 486 (1977).

The concept of lesser included offenses is not involved in a prosecution for armed robbery and aggravated battery because either offense can be committed without committing the other offense. State v. Sandoval, 90 N.M. 260, 561 P.2d 1353 (Ct. App.), cert. denied, 90 N.M. 637, 567 P.2d 486 (1977).

The jurisdictional exception to double jeopardy means that jeopardy cannot extend to an offense beyond the jurisdiction of the court in which the accused is tried. State v. Lujan, 103 N.M. 667, 712 P.2d 13 (Ct. App. 1985), cert. denied, 103 N.M. 740, 713 P.2d 556 (1986).

C. MISTRIAL, DISMISSAL, APPEAL AND RETRIAL.

Number of trials not, per se, barred. — The number of trials involving the same defendant upon the same charges does not, per se, set up a double jeopardy bar. State v. Day, 94 N.M. 753, 617 P.2d 142, cert. denied, 449 U.S. 860, 101 S. Ct. 163, 66 L. Ed. 2d 77 (1980).

Jeopardy may attach where prosecutor purposely precipitates mistrial. — Where the prosecutor engages in any misconduct for the purpose of precipitating a motion for a mistrial, gaining a better chance for conviction upon retrial, or subjecting the defendant to the harassment and inconvenience of successive trials, double jeopardy attaches. State v. Day, 94 N.M. 753, 617 P.2d 142, cert. denied, 449 U.S. 860, 101 S. Ct. 163, 66 L. Ed. 2d 77 (1980).

"Purposeful" misconduct does not always create double jeopardy bar. — Where, during rebuttal argument, the prosecutor told the jury that he had been accused of withholding evidence, but that counsel for the defendant objected to the question about a prior conviction and thus succeeded in withholding evidence, this was prejudicial and purposeful misconduct, but such "purposeful" misconduct did not create a double jeopardy bar to the retrial of the defendant. State v. Day, 94 N.M. 753, 617 P.2d 142, cert. denied, 449 U.S. 860, 101 S. Ct. 163, 66 L. Ed. 2d 77 (1980).

A defendant may be retried following a mistrial where defense counsel could have pursued various actions to prevent the admission of irrelevant and prejudicial testimony

or to mitigate the damage done by such testimony, once admitted, and the prosecutor's improper conduct was not so unfairly prejudicial that it could not be cured by any means short of a mistrial. State v. Huff, 1998-NMCA-075, 125 N.M. 254, 960 P.2d 342, cert. denied, 125 N.M. 146, 958 P.2d 104 (1998).

Prosecutorial comment not bar to retrial. — Prosecutor's comments on defendant's silence during the opening statement in the first trial, while sufficient to merit a mistrial, was not sufficiently egregious to bar retrial. State v. Foster, 1998-NMCA-163, 126 N.M. 177, 967 P.2d 852, cert. denied, 126 N.M. 533, 972 P.2d 352 (1998).

Double jeopardy did not bar reprosecution where a mistrial was declared on motion of defendants for the prosecutor's discovery abuses because the defendants failed to show why any prejudice resulting from the prosecutor's late disclosure could not have been cured by a remedy short of a mistrial. State v. Lucero, 1999-NMCA-102, 127 N.M. 672, 986 P.2d 468, cert. denied, 128 N.M. 149, 990 P.2d 823 (1999).

Prohibiting retrial following mistrial for prosecutorial misconduct. — Retrial is barred when improper official conduct is so unfairly prejudicial that it cannot be cured by means short of a mistrial or a motion for a new trial, and the official knows that the conduct is improper and prejudicial and the official either intends to provoke a mistrial or acts in willful disregard of the resulting mistrial, retrial, or reversal. State v. Breit, 1996-NMSC-06, 122 N.M. 655, 930 P.2d 792.

Statements not in "willful disregard" of mistrial. — Prosecutorial statements as to defendant's post-arrest silence, although they were improper and warranted mistrial and possibly other sanctions, did not rise to the level of "willful disregard" of the possibility of mistrial so as to justify dismissal on double jeopardy grounds. State v. Pacheco, 1998-NMCA-164, 126 N.M. 278, 968 P.2d 789, cert. denied, 126 N.M. 533, 972 P.2d 352 (1998).

Mistrial or new trial continues the jeopardy. — A mistrial or a new trial secured by plaintiff or defendant continues the jeopardy and does not renew it. State v. Spillmon, 89 N.M. 406, 553 P.2d 686 (1976).

Mistrial on one of joined charges. — After a jury found the defendant guilty of driving while intoxicated but was unable to reach a verdict on a vehicular homicide count, the subsequent retrial of vehicular homicide did not subject the defendant to double jeopardy, as such an action could be characterized as a continuing prosecution of the vehicular homicide charge. State v. O'Kelley, 113 N.M. 25, 822 P.2d 122 (Ct. App.), cert. quashed, 113 N.M. 24, 822 P.2d 121 (1992).

Mistrial based on manifest necessity. — A mistrial not moved for or consented to by the defendant must be based upon a manifest necessity or jeopardy attaches preventing retrial. The power to declare a mistrial must be exercised with the greatest caution, under urgent circumstances, and for very plain and obvious reasons. There is no plain and obvious reason to declare a mistrial as to any included offense upon which

the jury has reached a unanimous agreement of acquittal. State v. Castrillo, 90 N.M. 608, 566 P.2d 1146 (1977).

If defendant was put in jeopardy in an original proceeding, he cannot be again put in jeopardy in the absence of some compelling reason which requires a declaration of a mistrial. State v. Moreno, 69 N.M. 113, 364 P.2d 594 (1961).

Double jeopardy principles did not prevent state from retrying defendant for murder after the jury in his first trial could not reach a verdict and the judge granted a motion for a mistrial on the basis of manifest necessity. State v. Desnoyers, 2002-NMSC-031, 132 N.M. 756, 55 P.3d 968.

Upon appellate review of the declaration of a mistrial the question is whether the trial court exercised a sound discretion to ascertain that there was a manifest necessity for a mistrial. State v. De Baca, 88 N.M. 454, 541 P.2d 634 (Ct. App.), cert. denied, 89 N.M. 6, 546 P.2d 71 (1975).

The law has invested courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated; they are to exercise a sound discretion on the subject, and it is impossible to define all the circumstances which would render it proper to interfere, but the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes. State v. De Baca, 88 N.M. 454, 541 P.2d 634 (Ct. App.), cert. denied, 89 N.M. 6, 546 P.2d 71 (1975).

Where, after the second day of a trial, when jury instructions had already been settled, one of the jurors was frightened by a telephone call unrelated to the trial, and exploring her possible bias for use on voir dire in a future case, and the record did not show that the juror's fear involved either the state or the defendant, and showed that the juror understood that the phone call was not to influence her deliberations in the present case, it was held that the trial court failed to exercise that sound discretion required of it in determining whether a manifest necessity or proper judicial administration mandated a mistrial, and accordingly, the order of the trial court denying defendant's motion (on double jeopardy grounds) to dismiss and setting a date for retrial was reversed and defendant ordered discharged. State v. De Baca, 88 N.M. 454, 541 P.2d 634 (Ct. App.), cert. denied, 89 N.M. 6, 546 P.2d 71 (1975).

Where videotape of testimony of 11-year-old victim of alleged criminal sexual penetration was inaudible at trial and child was unavailable to testify in person because of illness and possible emotional harm, there existed a "manifest necessity" for declaring a mistrial so that double jeopardy did not bar defendant's retrial. State v. Messier, 101 N.M. 582, 686 P.2d 272 (Ct. App. 1984).

When retrial after declaration of a mistrial would not create unfairness to the accused, his interest against retrial may be subordinated to the public interest in substantive justice. State v. Saavedra, 108 N.M. 38, 766 P.2d 298 (1988).

The extended illness of one of the participants in a criminal proceeding justifies the declaration of a mistrial for reasons of manifest necessity. State v. Saavedra, 108 N.M. 38, 766 P.2d 298 (1988).

The standard for determining the existence of manifest necessity to declare a mistrial involves carefully weighing the defendant's right to have his trial completed against the public's interest in a fair trial and just judgment. State v. Callaway, 109 N.M. 564, 787 P.2d 1247 (Ct. App. 1989), rev'd on other grounds, 109 N.M. 416, 785 P.2d 1035, cert. denied, 496 U.S. 912, 110 S. Ct. 2603, 110 L. Ed. 2d 283 (1990).

Juror illness. — Evidence of a juror's disability caused by the onset of a migraine headache provided manifest necessity for a mistrial. State v. Salazar, 1997-NMCA-088, 124 N.M. 23, 946 P.2d 227.

Mistrial on basis of "ends of public justice" test. — Where the failure of defendant to file a timely motion to suppress his statement resulted in prejudice to the state, and in such circumstances it was contrary to the ends of public justice to carry the first trial to a final verdict, the trial court did not abuse its discretion in declaring a mistrial; there was no double jeopardy. State v. Aragon, 89 N.M. 91, 547 P.2d 574 (Ct. App.), cert. denied, 89 N.M. 206, 549 P.2d 284 (1976), overruled on other grounds State v. Rickerson, 95 N.M. 666, 625 P.2d 1183.

In determining whether a mistrial should be declared, the trial court must consider whether the ends of public justice would be defeated by carrying the first trial to a final verdict; this consideration for the ends of public justice is a concept separate from manifest necessity. State v. Aragon, 89 N.M. 91, 547 P.2d 574 (Ct. App.), cert. denied, 89 N.M. 206, 549 P.2d 284 (1976), overruled on other grounds State v. Rickerson, 95 N.M. 666, 625 P.2d 1183.

Retrial after a mistrial is not barred by double jeopardy unless the mistrial was caused by prosecutorial overreaching. State v. Mazurek, 88 N.M. 56, 537 P.2d 51 (Ct. App. 1975).

Contemporaneous written order declaring mistrial not required. — Defendant was not subjected to double jeopardy because of the failure of the trial judge to enter a contemporaneous written order declaring a mistrial and reserving the case for retrial. State v. Reyes-Arreola, 1999-NMCA-086, 127 N.M. 528, 984 P.2d 775, cert. denied, 127 N.M. 390, 981 P.2d 1208 (1999).

Where record is silent as to why first case ended in mistrial, an appellate court cannot say there was no compelling reason for the trial court granting a mistrial;

therefore, the court of appeals cannot say the trial court erred in denying the claim of double jeopardy. State v. Wesson, 83 N.M. 480, 493 P.2d 965 (Ct. App. 1972).

Alternatives to declaration of mistrial. — Where there is no manifest necessity for declaring a mistrial, the trial court has some duty to inquire as to possible alternatives thereto. Affecting the scope of inquiry required are the factors of magnitude of prejudice and the point at which the proceedings are terminated, and as the magnitude of possible prejudice increases, less effort need be expended in seeking alternative resolutions, while conversely, as the length of trial wears on, more effort should be expended. State v. De Baca, 88 N.M. 454, 541 P.2d 634 (Ct. App.), cert. denied, 89 N.M. 6, 546 P.2d 71 (1975).

A trial court has a duty to inquire into the alternatives before declaring a mistrial. The court, however, is not required to make a detailed record of each alternative considered before declaring a mistrial. State v. Callaway, 109 N.M. 564, 787 P.2d 1247 (Ct. App. 1989), rev'd on other grounds, 109 N.M. 416, 785 P.2d 1035, cert. denied, 496 U.S. 912, 110 S. Ct. 2603, 110 L. Ed. 2d 283 (1990).

Discharging hung jury. — The court in the trial of criminal cases is vested with a large discretion as to the time allowed to a jury to deliberate and as to the time to discharge a hung jury. There is no fixed rule laid down to control this discretion and unless it has been grossly abused, a plea of former jeopardy cannot be sustained. State v. Brooks, 59 N.M. 130, 279 P.2d 1048 (1955).

Retrial after mistrial which is not at defendant's request. — To be balanced against the weighty interests of the defendant against retrial after declaration of a mistrial not at his request are the two considerations: (1) that there is a manifest necessity for the discharge of the first jury or (2) that the ends of public justice would be defeated by carrying the first trial to final verdict. When the irregularity occurring at trial is of a procedural nature, not rising to the level of jurisdictional error, the necessity to discharge the jury has been held to be not manifest, but where the irregularity involves possible partiality within the jury, it has been more often held that the public interest in fair verdicts outweighs defendant's interest in obtaining a verdict by his first choice of jury. State v. De Baca, 88 N.M. 454, 541 P.2d 634 (Ct. App.), cert. denied, 89 N.M. 6, 546 P.2d 71 (1975).

Mistrial on one of two separate charges. — Since the defendant was charged with attempted murder and aggravated battery and was convicted of aggravated battery, and since the two offenses were in separate counts and the jury was not instructed that it could convict on only one offense, its inability to return a verdict on the attempted murder charge was not an implicit acquittal and the state was not barred from pursuing an attempted murder charge on remand. State v. Martinez, 120 N.M. 677, 905 P.2d 715 (1995).

Retrial due to error in proceedings. — The former jeopardy clause of the constitution does not preclude a retrial of a defendant whose sentence is set aside because of an

error in the proceedings leading to the sentence or conviction. State v. Herrera, 84 N.M. 365, 503 P.2d 648 (Ct. App. 1972); State v. Sneed, 78 N.M. 615, 435 P.2d 768 (1967).

The former jeopardy clause of the constitution does not preclude a retrial of a defendant whose sentence is set aside because of an error in the proceedings leading to the sentence or conviction. This is equally true where the conviction is overturned on collateral rather than direct attack, by petition for habeas corpus for example. State v. Nance, 77 N.M. 39, 419 P.2d 242 (1966), cert. denied, 386 U.S. 1039, 87 S. Ct. 1495, 18 L. Ed. 2d 605 (1967).

No jeopardy where case not tried on merits. — Where metropolitan court granted defendant's motion to dismiss charges of neglect on the grounds that defendant did not meet the statutory definition of a "care facility," but the case was not heard on its merits, jeopardy did not attach and the state could appeal without violating defendant's double jeopardy rights. State v. Davis, 1998-NMCA-148, 126 N.M. 297, 968 P.2d 808.

Retrial after nullification of former conviction. — Where former conviction of murder was nullified in a habeas corpus proceeding, effects of former proceeding were as if there had been no former trial and defendant could properly be tried again for murder without violating the double jeopardy provision of the constitution. Trujillo v. State, 79 N.M. 618, 447 P.2d 279 (1968).

Trial de novo after magistrate court conviction. — In a trial de novo resulting from a defendant’s appeal of a magistrate court conviction, the district court had jurisdiction as well as a constitutional and statutory obligation to consider the defendant’s pretrial double jeopardy claim. State v. Foster, 2003-NMCA-099, 134 N.M. 224, 75 P.3d 824.

Retrial after acquittal by court lacking jurisdiction. — After the defendant's acquittal in a court lacking proper jurisdiction, the constitutional prohibitions against double jeopardy would not be violated by a retrial. State v. Hamilton, 107 N.M. 186, 754 P.2d 857 (Ct. App.), cert. denied, 107 N.M. 132, 753 P.2d 1320 (1988).

Retrial after release for lack of jurisdiction. — Where defendant served more than a year for prior conviction of larceny before being released on habeas corpus due to lack of jurisdiction, subsequent trial for same offense did not constitute double jeopardy. State v. Paris, 76 N.M. 291, 414 P.2d 512 (1966).

New charges following discharge on habeas corpus. — Having pleaded guilty when first arraigned, and having been discharged on habeas corpus, defendant is not placed in jeopardy a second time, contrary to his rights under this section of the constitution, when he is returned and new charges are filed following transfer from juvenile court. Neller v. State, 79 N.M. 528, 445 P.2d 949 (1968).

Appeal by defendant. — The constitutional protection against double jeopardy does not prevent a second trial for the same offense when the defendant himself, by an

appeal, has invoked the action which resulted in the second trial. State v. Sneed, 78 N.M. 615, 435 P.2d 768 (1967).

Alternative charges do not involve concept of double jeopardy. — The concept of double jeopardy is not involved in charging defendant with fraud or in the alternative embezzlement since the charges are in the alternative, nor are the concepts of included offenses, same evidence or merger. State v. Ortiz, 90 N.M. 319, 563 P.2d 113 (Ct. App. 1977).

No implied acquittal of greater offense. — Where the state brought charges of vehicular homicide and driving while intoxicated as separate counts, as opposed to lesser-included offenses, the jury's conviction of the defendant for driving while intoxicated and deadlock on vehicular homicide did not constitute an implied acquittal of vehicular homicide. An implied acquittal generally occurs when the jury is instructed to choose between a greater and a lesser offense, and chooses the lesser. State v. O'Kelley, 113 N.M. 25, 822 P.2d 122 (Ct. App.), cert. quashed, 113 N.M. 24, 822 P.2d 121 (1992).

Jeopardy did not attach where indictment dismissed. — Double jeopardy had not attached so as to prevent reconsideration where the indictment was dismissed with prejudice due to preindictment delay, but the court subsequently set aside its dismissal order and reinstated the indictment. State v. Gonzales, 110 N.M. 218, 794 P.2d 361 (Ct. App. 1990), aff'd, 111 N.M. 363, 805 P.2d 630 (1991).

Dismissal of felony charge by magistrate does not result in an acquittal because the magistrate court has no jurisdiction to try felony charges. Consequently, a subsequent indictment is not barred even if the magistrate determines in a preliminary hearing that there is no probable cause to bind over for trial in the district court. Moreover, since the magistrate court has no such jurisdiction, no double jeopardy problem can arise. State v. Peavler, 88 N.M. 125, 537 P.2d 1387 (1975).

Dismissal of a charge by the district attorney in no way precludes the district attorney from subsequently informing against and prosecuting defendant for the same offense. State v. Mares, 79 N.M. 327, 442 P.2d 817 (Ct. App. 1968).

Consideration of double jeopardy claim following second appeal. — When the trial court's decision that double jeopardy barred reprosecution of the defendant was reversed by the Court of Appeals, the law of the case doctrine did not bar consideration of the double jeopardy issue on appeal of the defendant's conviction at the second trial. State v. Breit, 1996-NMSC-06, 122 N.M. 655, 930 P.2d 792.

D. SPECIFIC OFFENSES.

Prosecution and forfeiture generally. — State v. Nunez, 2000-NMSC-013, 129 N.M. 63, 2 P.3d 264, does not stand for the proposition that a criminal prosecution may never advance independently of a forfeiture proceeding. Rather, Nunez appears to mandate

only proper initiation of the dual penalty proceeding, meaning that the criminal charges and the forfeiture proceeding must be merged or consolidated prior to the occurrence of any event that signals the attachment of jeopardy. State v. Esparza, 2003-NMCA-075, 133 N.M. 772, 70 P.3d 762, cert. denied, 133 N.M. 771, 70 P.3d 761 (2003).

Attempted first degree murder and aggravated battery. — Defendant's convictions for both attempted first degree murder and aggravated battery did not constitute double jeopardy. State v. Vallejos, 2000-NMCA-075, 129 N.M. 424, 9 P.3d 668, cert. denied, 129 N.M. 385, 9 P.3d 68 (2000).

Attempted first-degree murder, aggravated battery with a deadly weapon, and criminal sexual penetration. — Defendant's right to freedom from double jeopardy was not violated by punishment for attempted first-degree murder, aggravated battery with a deadly weapon, and criminal sexual penetration. State v. Traeger, 2000-NMCA-015, 128 N.M. 668, 997 P.2d 142, aff'd in part, rev'd in part on other grounds, 2001-NMSC-022, 618 N.M. 130, 29 P.3d 518 (2001).

Second-degree murder and child abuse resulting in death. — Convictions of defendant for both second - degree murder and intentional child abuse resulting in death violated his right not to be placed in double jeopardy. State v. Mann, 2000-NMCA-088, 129 N.M. 600, 11 P.3d 564.

Vehicular homicide and child abuse resulting in death. — Defendant's conduct underlying both vehicular homicide and child abuse resulting in death charges was the same. Therefore, his convictions and sentences for both offenses violated his right to be free from double jeopardy. State v. Santillanes, 2000-NMCA-017, 128 N.M. 752, 998 P.2d 1203, cert. denied, 128 N.M. 689, 997 P.2d 821 (2000).

Second degree murder and shooting at or from motor vehicle. — There was no double jeopardy violation for convictions for second degree murder and shooting at or from a motor vehicle because the testimony at trial permitted the inference that each conviction was based on distinct conduct and because the two statutes evince legislative intent to impose separate punishments for each crime. State v. Mireles, 2004-NMCA-100, 136 N.M. 337, 98 P.3d 727, cert. denied, 2004-NMCERT-008, 136 N.M. 492, 100 P.3d 197.

Conspiracy and the completed offenses are separate offenses and conviction of both does not amount to double jeopardy. State v. Armijo, 90 N.M. 12, 558 P.2d 1151 (Ct. App. 1976).

Criminal solicitation and conspiracy to commit murder. — Even though, under Subsection D of 30-28-3 NMSA 1978, defendant could be convicted of criminal solicitation and conspiracy to commit murder, the trial court's merger of the two offenses for sentencing purposes violated his right to be protected from double jeopardy. State v. Vallejos, 2000-NMCA-075, 129 N.M. 424, 9 P.3d 668, cert. denied, 129 N.M. 385, 9 P.3d 68 (2000).

Felony murder and armed robbery. — Since the defendant's conduct in stabbing and robbing a cabdriver was unitary, the elements of armed robbery were subsumed by the elements of felony murder in the course of an armed robbery and conviction and sentencing of the defendant for both felony murder and the underlying felony of armed robbery violated double jeopardy. State v. Contreras, 120 N.M. 486, 903 P.2d 228 (1995).

Because convictions for felony murder and robbery arose out of unitary conduct, defendant's right to be free from double jeopardy was violated; as a result, the robbery conviction was vacated. State v. Duffy, 1998-NMSC-014, 126 N.M. 132, 967 P.2d 807.

Kidnapping and felony murder. — Sentences for both kidnapping and felony murder did not violate double jeopardy since the kidnapping was sufficiently separated in time and space from the murder to establish two distinct crimes. State v. Kersey, 120 N.M. 517, 903 P.2d 828 (1995).

Larceny and burglary. — Since stealing is a necessary element of larceny but is not a necessary element of burglary, larceny is not necessarily involved in a burglary. The elements of these two statutory crimes are not the same. They do not merge. Defendant could be convicted of and sentenced for both crimes. State v. McAfee, 78 N.M. 108, 428 P.2d 647 (1967).

Burglary and larceny arising out of the same event do not constitute double jeopardy since there is no merger when an accused is charged with both burglary and larceny though the charges stem from one transaction or event. State v. Deats, 82 N.M. 711, 487 P.2d 139 (Ct. App. 1971).

Larceny and armed robbery. — Larceny is necessary to, or incidental to the crime of armed robbery, is not a separate and distinct offense from that of armed robbery, and thus merges with the graver offense of armed robbery so as to prevent a double punishment by a sentence for each crime. State v. Eckles, 79 N.M. 138, 441 P.2d 36 (1968).

Aggravated battery and armed robbery. — Both under the elements test and the included offense approach, the offense of aggravated battery does not merge with the armed robbery. State v. Sandoval, 90 N.M. 260, 561 P.2d 1353 (Ct. App.), cert. denied, 90 N.M. 637, 567 P.2d 486 (1977).

Since taking the victim's purse is a fact required to be proved under the armed robbery charge, but not under the aggravated battery charge, and application of force is a fact required to be proved under the aggravated battery charge, while threatened use of force is acceptable proof under the armed robbery charge, the elements of the two crimes are not the same, and the "same evidence" test does not apply. State v. Sandoval, 90 N.M. 260, 561 P.2d 1353 (Ct. App.), cert. denied, 90 N.M. 637, 567 P.2d 486 (1977).

Battery and violation of domestic violence order. — Where provision in Order Prohibiting Domestic Violence (OPDV) prohibiting "battering in any manner" contained all elements of the statutorily defined offense of battery, a criminal prosecution for battery following a contempt proceeding for violating the OPDV violated prohibition against double jeopardy. State v. Powers, 1998-NMCA-133, 126 N.M. 114, 967 P.2d 454.

Child abuse and murder. — Where a defendant was charged with numerous counts of child abuse resulting in death or great bodily injury and with murder, but the state did not charge or offer proof that the acts of child abuse arose as separate and distinct episodes, the rule of merger precluded the defendant's conviction and sentence for a crime that is a lesser included offense of a greater charge upon which defendant has also been convicted. Although the state properly may charge in the alternative, where the defendant was convicted of one or more offenses which were merged into the greater offense he could be punished for only one. State v. Pierce, 110 N.M. 76, 792 P.2d 408 (1990)(events occurred prior to 1989 amendment to NMSA 30-6-1).

Rape and assault and battery. — Prosecution on charge of rape in district court was not barred although accused had pleaded guilty in justice court to charge of assault and battery based on same set of facts. State v. Goodson, 54 N.M. 184, 217 P.2d 262 (1950).

Assault. — An assault arising from a series of three successive shots fired at a single victim, not separated by a significant amount of time, and arising from a single, continuous intent constituted one offense, and conviction of the defendant on two counts of assault violated his double jeopardy rights. State v. Handa, 120 N.M. 38, 897 P.2d 225 (Ct. App. 1995).

Assault with intent to commit a violent felony and aggravated battery with a deadly weapon. — The double jeopardy clause does not prohibit sentencing for both assault with intent to commit a violent felony murder and for aggravated battery with a deadly weapon; one offense does not subsume the other and other indicia of legislative intent suggests an intent to punish separately. State v. Cowden, 1996-NMCA-051, 121 N.M. 703, 917 P.2d 972.

Accessory to assault, battery and false imprisonment. — Convictions for accessory to assault with intent to commit a violent felony, accessory to aggravated battery with great bodily harm, and accessory to false imprisonment did not violate double jeopardy. State v. Carrasco, 1997-NMSC-047, 124 N.M. 64, 946 P.2d 1075.

Assault with intent to commit rape and criminal sexual penetration. — There was no double jeopardy bar to punishment for the offenses of assault with intent to commit rape and criminal sexual penetration, where the victim testified at trial that defendant bound her to a bed, struck her several times, and threatened her verbally for a period of time before commencing the sexual assault. Swafford v. State, 112 N.M. 3, 810 P.2d 1223 (1991).

Incest and criminal sexual penetration. — There is no double jeopardy impediment to convicting and sentencing a defendant to consecutive terms for both incest and criminal sexual penetration arising out of the same act. Swafford v. State, 112 N.M. 3, 810 P.2d 1223 (1991).

Violation of domestic violence order, kidnapping and attempted criminal sexual penetration. — Because the crimes of kidnapping and attempted criminal sexual penetration contain elements not contained in the Order Prohibiting Domestic Violence (OPDV) obtained by victim against defendant, defendant's double jeopardy rights were not violated by his conviction for those crimes following his conviction for contempt for violating the OPDV. State v. Powers, 1998-NMCA-133, 126 N.M. 114, 967 P.2d 454.

Kidnapping and criminal sexual penetration. — Consecutive sentences for kidnapping and criminal sexual penetration did not violate the double jeopardy prohibition against multiple punishments for the same offense, where the evidence supported an inference that defendant intended to commit criminal sexual penetration from the moment of the abduction. State v. McGuire, 110 N.M. 304, 795 P.2d 996 (1990).

Where the defendant took control of the car at gunpoint and then drove the victims to a remote location before raping them, the crime of kidnaping was complete before the act of criminal sexual penetration began; because the two crimes did not constitute a "unitary act," imposition of consecutive sentences was not double jeopardy. State v. Andazola, 2003-NMCA-146, 134 N.M. 710, 82 P.3d 77.

The fact that a kidnapping charge was used to raise a charge of criminal sexual penetration to a second-degree felony does not pose a double jeopardy problem. Convictions normally are allowed for both predicate and compound offenses, and criminal sexual penetration statutes and kidnapping statutes protect different social norms. State v. McGuire, 110 N.M. 304, 795 P.2d 996 (1990).

Criminal sexual contact of a minor and attempted criminal sexual penetration. — The offenses of criminal sexual contact of a minor and attempted criminal sexual penetration of a minor cannot be characterized as lesser-included and greater-inclusive crimes because they each contain different elements and stand independently in relation to one another. State v. Mora, 2003-NMCA-072, 133 N.M. 746, 69 P.3d 256, cert. denied, 133 N.M. 727, 69 P.3d 237 (2003).

Controlled substances violations. — Because civil forfeiture under the Controlled Substances Act (See 30-31-1 NMSA 1978) is punishment, for double-jeopardy purposes, under the New Mexico Constitution, all forfeiture complaints and criminal charges for violations of the Controlled Substances Act may both be brought only in a single, bifurcated proceeding. State v. Nunez, 2000-NMSC-013, 129 N.M. 63, 2 P.3d 264.

This section does not prohibit the legislature from assessing both civil and criminal penalties for violations of the Controlled Substances Act, 30-31-1 to -41 NMSA 1978. State v. Esparza, 2003-NMCA-075, 133 N.M. 772, 70 P.3d 762, cert. denied, 133 N.M. 771, 70 P.3d 761 (2003).

Drug trafficking in samples. — The defendant's distribution of drug samples and subsequent distribution of larger quantities of the same drugs to the same persons constituted separate transaction under the statute criminalizing drug trafficking and convictions on distinct counts of trafficking a controlled substance did not violate double jeopardy. State v. Borja-Guzman, 1996-NMCA-025, 121 N.M. 401, 912 P.2d 277.

Transporting stolen livestock and larceny of livestock. — Defendant's conviction for transporting stolen livestock, when considered with his conviction for larceny of livestock, violated his constitutional right to be free of double jeopardy. State v. Clark, 2000-NMCA-052, 129 N.M. 194, 3 P.3d 689, cert. denied, 129 N.M. 207, 4 P.3d 35 (2000).

Larceny of cattle and failure to keep hide. — Where a person has been acquitted of larceny by the killing of cattle, a proceeding against him for failure to keep hide of animal killed for 30 days does not place him in double jeopardy. State v. Knight, 34 N.M. 217, 279 P. 947 (1929).

Armed robbery and receiving stolen property. — The fact that a defendant pleads guilty, or at least indicates his guilt and is thereupon convicted of receiving stolen property, which property later turns out to be a portion of the property taken by him in the armed robbery, in no way clothes him with immunity from being charged, tried and convicted of the far more serious offense of which he is guilty. State v. Mares, 79 N.M. 327, 442 P.2d 817 (Ct. App. 1968).

The offenses of receiving stolen property and armed robbery fail to fall within the prohibition against punishment for more than one offense because the criminal intent essential to the felony of armed robbery is not an essential element of the petty misdemeanor of receiving stolen property. The offense of receiving stolen property cannot be included within the offense of armed robbery. State v. Mares, 79 N.M. 327, 442 P.2d 817 (Ct. App. 1968).

The facts necessary to sustain a conviction of receiving stolen property could not possibly sustain a conviction of armed robbery, which is essential to make a prior conviction a bar to a subsequent prosecution and conviction for a greater offense. State v. Mares, 79 N.M. 327, 442 P.2d 817 (Ct. App. 1968).

Attempted robbery and conspiracy. — Convictions for attempted robbery and conspiracy to commit robbery did not violate double jeopardy. State v. Carrasco, 1997-NMSC-047, 124 N.M. 64, 946 P.2d 1075.

Implied Consent Act violation and driving while intoxicated. — An administrative driver's license revocation under the Implied Consent Act did not constitute "punishment" for purposes of the double jeopardy clause; thus, the state was not barred from prosecuting an individual for driving under the influence (DWI) even though the individual had been subjected to an administrative hearing for driver's license revocation based on the same offense. State ex rel. Schwartz v. Kennedy, 120 N.M. 619, 904 P.2d 1044 (1995).

Driving while under the influence and homicide by vehicle. — Where the facts offered in municipal court to support a conviction for driving while under the influence of intoxicating liquors would not necessarily sustain a conviction for homicide by vehicle in district court, under the same evidence test there was no double jeopardy when the state sought to prosecute the defendant for homicide by vehicle. State v. Tanton, 88 N.M. 333, 540 P.2d 813 (1975).

Where a defendant pleads guilty to the misdemeanor charges of driving while intoxicated and reckless driving in the magistrate court, he cannot then claim that a trial on the felony charge of homicide by vehicle while driving under the influence of intoxicating liquor in the district court is barred by the double jeopardy rule. Jeopardy cannot extend to an offense (i.e., homicide) beyond the jurisdiction of the magistrate court. State v. Manzanares, 100 N.M. 621, 674 P.2d 511 (1983), cert. denied, 471 U.S. 1057, 105 S. Ct. 2123, 85 L. Ed. 2d 487, rehearing denied, 472 U.S. 1013, 105 S. Ct. 2715, 86 L. Ed. 2d 729 (1985).

Burglary and possession of burglary tools. — The crime of possession of burglary tools does not merge with the crime of burglary. A defendant's sentence for each of these crimes does not constitute double punishment. State v. Everitt, 80 N.M. 41, 450 P.2d 927 (Ct. App. 1969).

Aggravated burglary and robbery. — Theft is a necessary element of robbery but it is not necessarily involved in aggravated burglary. Aggravated burglary requires only the element of intent to commit any felony or theft. One can commit a robbery without making an unauthorized entry, which is an element of aggravated burglary. The elements of the two crimes are not the same. The facts which prove the aggravated burglary are not the facts which prove the robbery. The crimes do not involve the same elements; therefore, a defendant can be sentenced for each of these crimes. State v. Ranne, 80 N.M. 188, 453 P.2d 209 (Ct. App. 1969).

Trafficking with intent to distribute drugs. — Where each of four counts of trafficking with intent to distribute narcotic drugs, arising from a sale to an informant, charged the defendant with selling a different drug, and double jeopardy did not bar separate prosecutions, public policy demanded that the charges be prosecuted separately. State v. Smith, 94 N.M. 379, 610 P.2d 1208 (1980).

Fraud and making false public voucher. — The double jeopardy clause does not prohibit the prosecution of an individual under both 30-16-6 NMSA 1978, fraud, and 30-

23-3 NMSA 1978, making a false public voucher. State v. Ellenberger, 96 N.M. 287, 629 P.2d 1216 (1981).

Charging defendant with three counts of assisting escape, in a prosecution arising out of the escape of three prison inmates, did not violate the constitutional prohibition against double jeopardy. State v. Martinez, 109 N.M. 34, 781 P.2d 306 (Ct. App. 1989).

Harassment and stalking. — Where the state relies on identical acts of an accused involving the same course of conduct to prove both the offenses of harassment and of stalking, double jeopardy provisions preclude multiple punishment, and the offense of harassment is subsumed into the offense of misdemeanor stalking. State v. Duran, 1998-NMCA-153, 126 N.M. 60, 966 P.2d 768, cert. denied, 126 N.M. 533, 972 P.2d 352 (1998), overruled on other grounds, State v. Laguna, 1999-NMCA-152, 128 N.M. 345, 992 P.2d 896.

Violating protective order and stalking. — When the defendant had been convicted of contempt, a misdemeanor, for violating a domestic violence protective order and sentenced to jail time, double jeopardy did not bar prosecution of the defendant for the offenses of stalking and harassment stemming from the same conduct that gave rise to the contempt adjudication. State v. Gonzales, 1997-NMCA-039, 123 N.M. 337, 940 P.2d 185.

Evading an officer in car and on foot. — Where defendant led police on a high-speed automobile chase and then got out of his car and fled on foot, his acts supported only one crime founded on resisting, evading or obstructing an officer, and vacation of his convictions for two counts of evading an officer was required. State v. Lefebre, 2001-NMCA-009, 130 N.M 130, 19 P.3d 825.

Securities violations. — Criminal prosecutions under the Securities Act, 58-13B-1 to -57 NMSA 1978, following administratively imposed civil penalties under that Act, do not place defendants in double jeopardy under this section or under 30-1-10 NMSA 1978. State v. Kirby, 2003-NMCA-074, 133 N.M. 782, 70 P.3d 772, cert. denied, 133 N.M. 771, 70 P.3d 761 (2003).

Sec. 16. [Treason.]

Treason against the state shall consist only in levying war against it, adhering to its enemies, or giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.

ANNOTATIONS

Comparable provisions. — Idaho Const., art. V, § 5.

Iowa Const., art. I, § 16.

Montana Const., art. II, § 30.

Utah Const., art. I, § 19.

Wyoming Const., art. I, § 26.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 70 Am. Jur. 2d Sedition, Subversive Activities and Treason §§ 80, 86, 93, 110.

87 C.J.S. Treason §§ 2 to 10, 13.

Sec. 17. [Freedom of speech and press; libel.]

Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press. In all criminal prosecutions for libels, the truth may be given in evidence to the jury; and if it shall appear to the jury that the matter charged as libelous is true and was published with good motives and for justifiable ends, the party shall be acquitted.

ANNOTATIONS

I. GENERAL CONSIDERATION.

Cross references. — For provision allowing a special motion to dismiss an unwarranted or specious lawsuit against a person for conduct or speech in a public setting, see 38-2-9.1 and 38-2-9.2 NMSA 1978.

See Kearny Bill of Rights, cl. 12.

Comparable provisions. — Idaho Const., art. I, § 9.

Iowa Const., art. I, § 7.

Montana Const., art. II, § 7.

Utah Const., art. I, § 15.

Wyoming Const., art. I, § 20.

Law reviews. — For article, "Love Lust in New Mexico and the Emerging Law of Obscenity," see 10 Nat. Resources J. 339 (1970).

For comment, "Official Symbols: Use and Abuse," see 1 N.M. L. Rev. 352 (1971).

For comment, "The Freedom of the Press vs. The Confidentiality Provisions in the New Mexico Children's Code," see 4 N.M. L. Rev. 119 (1973).

For note, "Constitutional Law - Regulating Nude Dancing in Liquor Establishments - The Preferred Position of the Twenty-First Amendment - Nall v. Baca," see 12 N.M.L. Rev. 611 (1982).

For article, "Survey of New Mexico Law, 1982-83: Constitutional Law," see 14 N.M.L. Rev. 77 (1984).

For article, "Defamation in New Mexico," see 14 N.M.L. Rev. 321 (1984).

For comment, "Procedural and Substantive Rights to the Media Govern Requests to Restrict News Coverage of Criminal Cases: State ex rel. New Mexico Press Ass'n v. Kaufman," see 14 N.M.L. Rev. 401 (1984).

For opinion, "The Development of Modern Libel Law: A Philosophic Analysis," see 16 N.M.L. Rev. 183 (1986).

For article, "University Anti-Discrimination Codes v. Free Speech," see 23 N.M.L. Rev. 169 (1993).

For note, "The Expansion of the Obscenity Doctrine in New Mexico; Is it Tolerable? *City of Farmington v. Fawcett*," see 24 N.M.L. Rev. 505 (1994).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 16A Am. Jur. 2d Constitutional Law §§ 496 to 525; 50 Am. Jur. 2d Libel and Slander § 532.

Legislation against political, social or industrial propaganda, 1 A.L.R. 336, 20 A.L.R. 1535, 73 A.L.R. 1494.

Statutes relating to picketing or boycotts as invasion of right of free speech, 6 A.L.R. 971, 16 A.L.R. 230, 27 A.L.R. 651, 32 A.L.R. 779, 116 A.L.R. 484.

Constitutionality of statute or ordinance prohibiting or regulating street meetings, 10 A.L.R. 1483, 25 A.L.R. 114.

Statutes prohibiting and penalizing blasphemy, 14 A.L.R. 883, 41 A.L.R.3d 519.

Statutes regulating newspapers and magazines, 35 A.L.R. 12, 110 A.L.R. 327.

Validity of statute or ordinance against picketing, 35 A.L.R. 1200, 108 A.L.R. 1119, 122 A.L.R. 1043, 125 A.L.R. 963, 130 A.L.R. 1303.

Validity of provisions forbidding or regulating publication of gambling odds or information, 47 A.L.R. 1135.

Statute relating to charges and attacks on candidates for nomination or election, 96 A.L.R. 582.

Constitutional guaranties of freedom of speech and of the press as applied to statutes and ordinances providing for licensing or otherwise regulating distribution of printed matter or solicitation of subscriptions therefor, 127 A.L.R. 962.

Validity, construction and application of statute or ordinance prohibiting solicitation of passers-by in street in front of place of business, 139 A.L.R. 1197.

Validity of statute or ordinance as to solicitation of persons to join an organization or society or to pay membership dues or fees, validity of statute or ordinance as to, 144 A.L.R. 1346, 167 A.L.R. 697.

Freedom of speech and press as limitation on power to punish for contempt, 159 A.L.R. 1376.

Freedom of speech and press as limitation on power to punish for contempt, 159 A.L.R. 1379.

Validity of municipal regulation of solicitation of magazine subscriptions, 9 A.L.R.2d 728.

Public regulation and prohibition of sound amplifiers or loudspeaker broadcasts in streets and other public places, 10 A.L.R.2d 627.

Validity of governmental requirement of oath of allegiance or loyalty, 18 A.L.R.2d 268.

Constitutional right to freedom of speech as violated by conviction for disorderly conduct based on failure or refusal to obey police officer's order to move on, on street, 65 A.L.R.2d 1152.

Use of school property for other than public school or religious purposes, 94 A.L.R.2d 1274.

Modern concept of obscenity, 5 A.L.R.3d 1158.

Participation of student in demonstration on or near campus as warranting imposition of criminal liability for breach of peace, disorderly conduct, trespass, unlawful assembly or similar offense, 32 A.L.R.3d 551.

Validity of blasphemy statutes or ordinances, 41 A.L.R.3d 519.

Peaceful picketing of private residence, 42 A.L.R.3d 1353.

Right of accused to have press or other media representatives excluded from criminal trial, 49 A.L.R.3d 1007.

Picketing court or judge as contempt, 58 A.L.R.3d 1297.

Consumer picketing to protest products, prices or services, 62 A.L.R.3d 227.

Validity, construction, and effect of statutes or ordinances prohibiting the sale of obscene materials to minors, 93 A.L.R.3d 297.

Actionability of false newspaper report that plaintiff has been arrested, 93 A.L.R.3d 625.

Libel by newspaper headlines, 95 A.L.R.3d 660.

Privilege of newsgatherer against disclosure of confidential sources or information, 99 A.L.R.3d 37.

Gesture as punishable obscenity, 99 A.L.R.3d 762.

Propriety of conditioning probation on defendant's not associating with particular person, 99 A.L.R.3d 967.

Rights of attorneys leaving firm with respect to firm clients, 1 A.L.R.4th 1164.

Validity of statutes or ordinances requiring sex-oriented businesses to obtain operating licenses, 8 A.L.R.4th 130.

Validity and construction of statutes or ordinances prohibiting or restricting distribution of commercial advertising to private residences - modern cases, 12 A.L.R.4th 851.

Validity, propriety, and effect of allowing or prohibiting media's broadcasting, recording, or photographing court proceedings, 14 A.L.R.4th 121.

Insulting words addressed directly to police officer as breach of peace or disorderly conduct, 14 A.L.R.4th 1252.

Liability of commercial printer for defamatory statement contained in matter printed for another, 16 A.L.R.4th 1372.

Liability for personal injury or death allegedly resulting from television or radio broadcast, 20 A.L.R.4th 327.

Libel and slander: reports of pleadings as within privilege for reports of judicial proceedings, 20 A.L.R.4th 576.

Validity, construction, and effect of statutes, ordinances, or regulations prohibiting or regulating advertising of intoxicating liquors, 20 A.L.R.4th 600.

Libel and slander: attorneys' statements, to parties other than alleged defamed party or its agents, in course of extrajudicial investigation or preparation relating to pending or anticipated civil litigation as privileged, 23 A.L.R.4th 932.

Defamation: loss of employer's qualified privilege to publish employee's work record or qualification, 24 A.L.R.4th 144.

Validity and application of statute authorizing forfeiture of use or closure of real property from which obscene materials have been disseminated or exhibited, 25 A.L.R.4th 395.

State constitutional protection of allegedly defamatory statements regarding private individual, 33 A.L.R.4th 212.

Libel and slander: privileged nature of statements or utterances by members of governing body of public institution of higher learning in course of official proceedings, 33 A.L.R.4th 632.

Validity and construction of terroristic threat statutes, 45 A.L.R.4th 949.

Defamation: who is "libel-proof," 50 A.L.R.4th 1257.

Validity and construction of state court's order precluding publicity or comment about pending civil case by counsel, parties, or witnesses, 56 A.L.R.4th 1214.

False light invasion of privacy - Cognizability and elements, 57 A.L.R.4th 22.

False light invasion of privacy - Defenses and remedies, 57 A.L.R.4th 244.

Imputation of criminal, abnormal, or otherwise offensive sexual attitude or behavior as defamation - post-New York Times cases, 57 A.L.R.4th 404.

Libel or slander: Defamation by statement made in jest, 57 A.L.R.4th 520.

Intrusion by news-gathering entity as invasion of right of privacy, 69 A.L.R.4th 1059.

Standing of media representatives or organizations to seek review of, or to intervene to oppose, order closing criminal proceedings to public, 74 A.L.R.4th 476.

Search and seizure of telephone company records pertaining to subscriber as violation of subscriber's constitutional rights, 76 A.L.R.4th 536.

Validity of ordinances restricting location of "adult entertainment" or sex-oriented businesses, 10 A.L.R.5th 538.

Validity and construction of statutes prohibiting harassment of hunters, fishermen, or trappers, 17 A.L.R.5th 837.

Who is "public figure" for purposes of defamation action, 19 A.L.R.5th 1.

Validity, construction, and effect of "hate crimes" statutes, "ethnic intimidation" statutes, or the like, 22 A.L.R.5th 261.

Propriety of exclusion of press or other media representatives from civil trial, 39 A.L.R.5th 103.

Propriety of publishing identity of sexual assault victim, 40 A.L.R.5th 787.

Validity, construction, and application of state statutes or ordinances regulating sexual performance by child, 42 A.L.R.5th 291.

Who is "public official" for purposes of defamation action, 44 A.L.R.5th 193.

Libel and slander: charging one with breach or nonperformance of contract, 45 A.L.R.5th 739.

Validity, under state constitutions, of private shopping center's prohibition or regulation of political, social, or religious expression or activity, 52 A.L.R. 5th 195.

Defamation: publication of letter to editor in newspaper as actionable, 54 A.L.R.5th 443.

Validity of regulation by public-school authorities as to clothes or personal appearance of pupils, 58 A.L.R.5th 1.

Admissibility of evidence of public-opinion polls or surveys in obscenity prosecutions on issue whether materials in question are obscene, 59 A.L.R.5th 749.

Search and seizure: reasonable expectation of privacy in driveways, 60 A.L.R.5th 1.

First Amendment protection afforded to commercial and home video games, 106 A.L.R.5th 337.

Defamation of member of clergy, 108 A.L.R.5th 495, §§ 8-10

Defamation of church member by church official, 109 A.L.R.5th 541.

Right of press, in criminal proceeding, to have access to exhibits, transcripts, testimony, and communications not admitted in evidence or made part of public record, 39 A.L.R. Fed. 871.

Validity, under First Amendment and 42 USC § 1983, of public college or university's refusal to grant formal recognition to, or permit meetings of, student homosexual organizations on campus, 50 A.L.R. Fed. 516.

Prohibition of federal agency's keeping of records on methods of individual exercise of First Amendment rights, under Privacy Act of 1974 (5 USC § 552a(e)(7)), 63 A.L.R. Fed. 674.

Access of public to broadcast facilities under first amendment, 66 A.L.R. Fed. 628.

Action under 42 USC § 1985(1) for conspiracy to defame or otherwise harm the reputation of federal official, 69 A.L.R. Fed. 913.

What oral statement of student is sufficiently disruptive so as to fall beyond protection of First Amendment, 76 A.L.R. Fed. 599.

Constitutionality of teaching or suppressing teaching of Biblical creationism or Darwinian evolution theory in public schools, 102 A.L.R. Fed. 537.

Constitutionality of teaching or otherwise promoting secular humanism in public schools, 103 A.L.R. Fed. 538.

First amendment protection for law enforcement employees subject to discharge, transfer, or discipline because of speech, 109 A.L.R. Fed. 9

What is "record" within meaning of Privacy Act of 1974 (5 USCS § 552a), 121 A.L.R. Fed. 465.

Protection of commercial speech under first amendment - Supreme Court cases, 164 A.L.R. Fed. 1

16B C.J.S. Constitutional Law §§§ 539 to 611; 53 C.J.S. Libel and Slander § 9.

II. FREEDOM OF SPEECH AND PRESS.

City of Albuquerque ordinance which prohibits public nudity does not make an invidious gender classification that operates to the disadvantage of women and does not violate the New Mexico equal rights amendment. City of Albuquerque v. Sachs, 2004-NMCA-065, 135 N.M. 578, 92 P.3d 24, cert. denied, 2004-NMCERT-006, 135 N.M. 789, 93 P.3d 1292.

City of Albuquerque ordinance which prohibits public nudity does not discriminate against women in violation of the equal rights amendment in the New Mexico Constitution because it prohibits a women from showing her breast in a public place without a fully opaque covering of her entire nipple when there is no such prohibition against men. City of Albuquerque v. Sachs, 2004-NMCA-065, 135 N.M. 578, 92 P.3d 24, cert. denied, 2004-NMCERT-006, 135 N.M. 789, 93 P.3d 1292.

Nonharmful publications are completely protected. — Constitutional liberty of speech and press gives complete immunity from legal censure and punishment for all

publications that are not harmful, as judged by standards of common law in force at time of adoption of parallel amendment to federal constitution. Curry v. Journal Publishing Co., 41 N.M. 318, 68 P.2d 168 (1937).

Thus, prohibiting any act designed to destroy government is unconstitutional. — Laws 1919, ch. 140, prohibiting performance of any act designed to destroy organized government and providing penalties for violation thereof, was unconstitutional as violative of constitutional right of free speech. State v. Diamond, 27 N.M. 477, 202 P. 988, 20 A.L.R. 1527 (1921).

And enjoining motion picture as nuisance would be censorship. — The injunction to abate a nuisance in former 40-34-1 to 40-34-21, 1953 Comp., now repealed, if applied to motion pictures, would be in the nature of censorship and prior restraint. State ex rel. Murphy v. Morley, 63 N.M. 267, 317 P.2d 317 (1957) (provision inapplicable to showing of motion pictures in regular business establishment).

But sit-in at university president's office may be punished. — Where defendants refused to honor the request of the university president to leave his office and refused to leave when he returned from lunch and had appointments to keep, they substantially interfered in the functioning of the president's business and 30-20-13 NMSA 1978, prior to the 1975 amendment thereof, was constitutionally applied to warrant their convictions. State v. Silva, 86 N.M. 543, 525 P.2d 903 (Ct. App.), cert. denied, 86 N.M. 528, 525 P.2d 888 (1974).

Where 30-20-13 NMSA 1978, prior to the 1975 amendment thereto, vindicated the significant government interest in the control of campus disturbances, reasonable "time, place and manner" regulations were valid even though they incidentally suppressed otherwise protected conduct. State v. Silva, 86 N.M. 543, 525 P.2d 903 (Ct. App.), cert. denied, 86 N.M. 528, 525 P.2d 888 (1974).

And conspiracy to boycott magazines is not protected. — Conspiracy to boycott or blacklist certain magazines by publications demanding that they be refused by newsdealers and readers is not protected by guarantee of free speech and press. Council of Defense v. International Magazine Co., 267 F. 390 (8th Cir. 1920).

The right of a teacher or school employee to express his views is protected by constitutional guarantee to the extent that such is not detrimental to the employing school system and is not an open, willful refusal of a teacher to obey the reasonable rules and regulations of his or her employing board of education. 1963-64 Op. Att'y Gen. No. 64-47.

Within limits. — A public school teacher has a constitutional right to publish his ideas or opinions, sign petitions or speak his views, and such does not constitute cause for dismissal, violation of contract or insubordination unless such conduct clearly is demonstrated and found to actually amount to a disobedience of reasonable school policies, regulations, orders or rules, or such conduct amounts in fact to a rebellious,

mutinous or disobedient action contrary to the best interests of the public school system. 1963-64 Op. Att'y Gen. No. 64-47.

Neither students nor teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate; school officials do not possess absolute authority over their students, and among the activities to which schools are dedicated is personal communication among students, which is an important part of the educational process. Futrell v. Ahrens, 88 N.M. 284, 540 P.2d 214 (1975).

But personal intercommunication is only part of education. — Although personal intercommunication among students at schools, including universities, is an important part of the educational process, it is not the only, or even the most important, part of that process. Futrell v. Ahrens, 88 N.M. 284, 540 P.2d 214 (1975).

And visitation in bedrooms by persons of opposite sex may be prohibited. — A regulation of the board of regents of the New Mexico state university which prohibited visitation by persons of the opposite sex in residence hall, or dormitory, bedrooms maintained by the regents on the university campus, except when moving into the residence halls and during annual homecoming celebrations, where the regents placed no restrictions on intervisitation between persons of the opposite sex in the lounges or lobbies of the residence halls, the student union building, library or other buildings, or at any other place on or off the campus, and no student was required to live in a residence hall, did not interfere appreciably, if at all, with the intercommunication important to the students of the university; the regulation was reasonable, served legitimate educational purposes and promoted the welfare of the students at the university. Futrell v. Ahrens, 88 N.M. 284, 540 P.2d 214 (1975).

"Fighting words," the use of which is not protected by this constitutional provision, are those which tend to incite an immediate breach of the peace. State v. Wade, 100 N.M. 152, 667 P.2d 459 (Ct. App. 1983).

Highway Beautification Act, 67-12-1 to 67-12-14 NMSA 1978, does not abridge freedom of speech in violation of the United States and New Mexico constitutions. Stuckey's Stores, Inc. v. O'Cheskey, 93 N.M. 312, 600 P.2d 258 (1979), appeal dismissed, 446 U.S. 930, 100 S. Ct. 2145, 64 L. Ed. 2d 783 (1980).

Outdoor advertising signs not protected. — Plaintiffs' outdoor advertising signs do not constitute the type of speech protected by the first and fourteenth amendments to the United States constitution and this section. Stuckey's Stores, Inc. v. O'Cheskey, 93 N.M. 312, 600 P.2d 258 (1979), appeal dismissed, 446 U.S. 930, 100 S. Ct. 2145, 64 L. Ed. 2d 783 (1980).

Test for constitutionality of sign ordinance. — Where a sign ordinance does not prohibit speech altogether, the precise issue is whether the sign ordinance is a legitimate time, place and manner restriction on speech. The criteria to be analyzed are threefold: (1) does the restriction serve a significant government interest? (2) is the

restriction justifiable without reference to the content of the regulated speech? and, (3) does the restriction leave open ample alternative channels of communication? Temple Baptist Church, Inc. v. City of Albuquerque, 98 N.M. 138, 646 P.2d 565 (1982).

Highway Beautification Act meets constitutionality test. — The Highway Beautification Act (67-12-1 to 67-12-14 NMSA 1978) meets the three-pronged test used to determine whether a time, place and manner restriction is valid; the act's restrictions on plaintiffs' exercise of their freedom of speech is justified without reference to the content of the regulated speech; its restrictions on plaintiffs' freedom of speech serve a significant governmental interest and the act leaves open ample alternative channels for communication of the information. Stuckey's Stores, Inc. v. O'Cheskey, 93 N.M. 312, 600 P.2d 258 (1979), appeal dismissed, 446 U.S. 930, 100 S. Ct. 2145, 64 L. Ed. 2d 783 (1980).

Limited restriction on political signs proper. — Where the only restriction on political signs is that campaign signs be a certain size, be erected earlier than 60 days prior to a primary or general election, and that the campaign signs be removed within 10 days after the election to which the sign pertains, clearly such a limited restriction on these types of political signs furthers a significant government interest in aesthetics. Temple Baptist Church, Inc. v. City of Albuquerque, 98 N.M. 138, 646 P.2d 565 (1982).

Sign ordinance held related to proper goals. — A sign ordinance regulating the size, height and number of signs is reasonably related to the proper goals of aesthetics and traffic safety. Temple Baptist Church, Inc. v. City of Albuquerque, 98 N.M. 138, 646 P.2d 565 (1982).

Plaintiffs failed to rebut act's presumption. — Where the plaintiffs introduced no evidence that any of their stores, which availed themselves of on-premise or unzoned commercial or industrial area signs, had suffered a great loss of business, they failed to rebut the presumption that the Highway Beautification Act provides adequate means for plaintiffs to exercise their freedom of speech. Stuckey's Stores, Inc. v. O'Cheskey, 93 N.M. 312, 600 P.2d 258 (1979), appeal dismissed, 446 U.S. 930, 100 S. Ct. 2145, 64 L. Ed. 2d 783 (1980).

Media's right to publish is not absolute. It may be limited to protect other interests, such as a defendant's right to a fair trial. State ex rel. New Mexico Press Ass'n v. Kaufman, 98 N.M. 261, 648 P.2d 300 (1982).

Prior restraint gag orders on trial participants. — To ensure that an appropriate balance is struck between rights of free speech and the interest in fair and impartial adjudication, any prior restraint on public comment by trial participants must be accompanied by specific factual findings supporting the conclusion that further extrajudicial statements would pose a clear and present danger to the administration of justice. Twohig v. Blackmer, 1996-NMSC-023, 121 N.M. 746, 918 P.2d 332.

Test for ban on media coverage of trial. — If a ban on media coverage of a trial is sought for the purpose of protecting a defendant's right to a fair trial, the evidence must demonstrate that there is a substantial likelihood that the presence of cameras will deny the defendant a fair trial. However, if a limitation is sought to protect other interests, which involve important constitutional rights, a higher test should be required. The proponent of a ban should in that case prove that a serious and imminent threat to some other important interest exists. State ex rel. New Mexico Press Ass'n v. Kaufman, 98 N.M. 261, 648 P.2d 300 (1982).

Procedure for determining media ban. — In deciding whether to exclude media coverage of a particular criminal participant, the trial judge should require evidence sufficient to support a finding that such coverage will have a substantial effect upon the particular individual which would be qualitatively different from the effect on members of the public in general and that such effect will be qualitatively different from coverage by other types of media. State ex rel. New Mexico Press Ass'n v. Kaufman, 98 N.M. 261, 648 P.2d 300 (1982).

Before a criminal court places restrictions on the media, some minimum form of notice should be given to the media and a hearing held. Anyone present should be given an opportunity to object. These proceedings should take place in advance of the date set for trial, if possible, to avoid delays and postponements. State ex rel. New Mexico Press Ass'n v. Kaufman, 98 N.M. 261, 648 P.2d 300 (1982).

A court should weigh the competing interests of a criminal defendant and the public and determine if any news limitation sought would be effective in protecting the interests threatened and if it would be the least restrictive means available. Its consideration of these issues should be articulated in oral or written findings and conclusions in the record, but formal findings and conclusions are not necessary. The order must be no broader in application or duration than necessary to serve its purpose. State ex rel. New Mexico Press Ass'n v. Kaufman, 98 N.M. 261, 648 P.2d 300 (1982).

"Intolerable" standard for obscene materials. — The New Mexico Constitution requires that the community must find allegedly obscene materials "intolerable" before they may be deemed as an "abuse" of the right to freely speak, write, and publish sentiments on all subjects. City of Farmington v. Fawcett, 114 N.M. 537, 843 P.2d 839 (Ct. App. 1992).

This section of the New Mexico Constitution requires that an "abuse" of free speech only occurs when the community cannot tolerate the matter. Thus, since a jury instruction based on acceptance was given, the defendant who was convicted of disseminating obscene material was entitled to a new trial so that the jury may be instructed on a community standard based on "tolerance." City of Farmington v. Fawcett, 114 N.M. 537, 843 P.2d 839 (Ct. App. 1992).

Contemporary community standards should be judged by whether the average person or community would be tolerant of the materials in the possession of another, even

though most members of the community might themselves be offended; community tolerance thus determines whether the material is patently offensive. State v. Rendleman, 2003-NMCA-150, 134 N.M. 744, 82 P.3d 554, cert. denied, 2003-NMCERT-003, 135 N.M. 51, 84 P.3d 668.

Although the state's interest in protecting innocent children from sexual exploitation is far more compelling than its interest in protecting consenting adults, what the community finds tolerable for adults will be a far cry from what it will tolerate when visual materials include children; thus, the intolerance standard provides a workable model for patent offensiveness under the Sexual Exploitation of Children Act, 30-6A-1 to -4 NMSA 1978. State v. Rendleman, 2003-NMCA-150, 134 N.M. 744, 82 P.3d 554, cert. denied, 2003-NMCERT-003, 135 N.M. 51, 84 P.3d 668.

Nude dancing in licensed liquor establishments not protected. — The state's power to regulate liquor under the Twenty-First Amendment outweighs any first amendment interest in nude dancing, and, therefore, 30-9-14.1 NMSA 1978 is constitutional insofar as it applies to the prohibition of indecent dancing in licensed liquor establishments. Nall v. Baca, 95 N.M. 783, 626 P.2d 1280 (1980).

Process of piercing female nipple is not sufficiently imbued with elements of communication, and exposing the female body this way for this purpose is not an artistic, dramatic, or educational form of expression entitled to free speech protection. City of Albuquerque v. Sachs, 2004-NMCA-065, 135 N.M. 578, 92 P.3d 24, cert. denied, 2004-NMCERT-006, 135 N.M. 789, 93 P.3d 1292.

Regulation of cost of utility's advertising charged to ratepayers not abridgement of free speech. — A Public Service Commission order which allowed utility companies to include in their cost of service, and pass on to their ratepayers, expenditures for "informational" advertising (e.g., safety, billing practices, etc.), but not expenditures for "institutional" advertising (e.g., enhancement of corporate image), and which required that a utility show by clear and convincing evidence that an advertising expense is allowable did not unconstitutionally abridge freedom of speech. El Paso Elec. Co. v. New Mexico Pub. Serv. Comm'n, 103 N.M. 300, 706 P.2d 511 (1985).

III. LIBEL.

A. IN GENERAL.

The invasion of an individual's right of privacy is a tort for which recovery may be granted, but it does not exist where a person has sought and achieved prominence. Blount v. TD Publishing Corp., 77 N.M. 384, 423 P.2d 421 (1966).

But right is subordinate to news dissemination. — The right of privacy is generally inferior and subordinate to the dissemination of news. Blount v. TD Publishing Corp., 77 N.M. 384, 423 P.2d 421 (1966).

Even though account affects persons not willingly participating in occurrence. — It is not an invasion of privacy to publish the account of an occurrence when it is of general interest even though the parties affected were not willing participants in the occurrence. Blount v. TD Publishing Corp., 77 N.M. 384, 423 P.2d 421 (1966).

The right of privacy is to be applied to the individual of ordinary sensibilities, not the supersensitive. Blount v. TD Publishing Corp., 77 N.M. 384, 423 P.2d 421 (1966).

Official record may give privilege. — A publication may be privileged as a matter of law where it is based on an official record. Blount v. TD Publishing Corp., 77 N.M. 384, 423 P.2d 421 (1966).

Ignorance of contents is defense to distributors, not publishers. — In libel actions publishers cannot escape liability on ground of ignorance of the defamatory content, but mere distributors may avoid liability by showing that they had no reason to believe the information to be libelous. Blount v. TD Publishing Corp., 77 N.M. 384, 423 P.2d 421 (1966).

News is question for trier of fact. — Where the individual's right of privacy is concerned and where the right of the public to be informed is involved, news is a question of fact that should be resolved by the trier of the facts. Blount v. TD Publishing Corp., 77 N.M. 384, 423 P.2d 421 (1966).

B. CRIMINAL LIBEL.

Criminal libel laws are valid. — New Mexico by this section extends broad protection to speech and press, but also reserves a responsibility for their abuse and recognizes validity of criminal libel laws. Beauharnais v. Illinois, 343 U.S. 250, 72 S. Ct. 725, 96 L. Ed. 919, reh'g denied, 343 U.S. 988, 72 S. Ct. 1070, 96 L. Ed. 1375 (1952).

Provided they do not limit use of truth as defense. — This section conflicted with former 40-27-22, 1953 Comp. (now repealed), stating cases in which truth was defense to charge of libel, and repealed the statute insofar as it limited pleading and giving in evidence of truth as defense in criminal libel suits. State v. Elder, 19 N.M. 393, 143 P. 482 (1914).

Criminal contempt during criminal libel case may be pardoned. — Criminal contempt perpetrated while criminal libel case is before court is subject to pardoning power of governor. State v. Magee Publishing Co., 29 N.M. 455, 224 P. 1028, 38 A.L.R. 142 (1924).

Sec. 18. [Due process; equal protection; sex discrimination.]

No person shall be deprived of life, liberty or property without due process of law; nor shall any person be denied equal protection of the laws. Equality of rights under law

shall not be denied on account of the sex of any person. The effective date of this amendment shall be July 1, 1973. (As amended November 7, 1972).

ANNOTATIONS

I. GENERAL CONSIDERATION.

Cross references. — See Kearny Bill of Rights, cl. 7. As to inherent rights to life, liberty and property, see N.M. Const., art. II, § 4. As to taking property without just compensation, see N.M. Const., art. II, § 20. As to enacting general rather than special laws, see N.M. Const., art. IV, § 24. As to taxes being equal and uniform, see N.M. Const., art. VIII, § 1. As to human rights, see Chapter 28 NMSA 1978. As to rights under Children's Code, see 32A-1-16 and 32A-2-14 NMSA 1978.

The 1972 amendment, adding the last two sentences, which was proposed by H.J.R. No. 2, § 1 (Laws 1972), was adopted at the general election held on November 7, 1972, by a vote of 155, 633 for and 64,823 against.

This section protects only the rights of "persons" and does not embrace the state. State ex rel. New Mexico State Hwy. Comm'n v. Taira, 78 N.M. 276, 430 P.2d 773 (1967).

Statutory construction upholding constitutionality adopted. — Where a statute is susceptible of two constructions, one supporting the act and giving it effect and the other rendering it unconstitutional and void, court must adopt that construction which will uphold statute's constitutionality. Abeytia v. Gibbons Garage, 26 N.M. 622, 195 P. 515 (1920); State ex rel. Clancy v. Hall, 23 N.M. 422, 168 P. 715 (1917).

And validity of legislation presumed. — The supreme court has repeatedly held that every presumption is to be indulged in favor of the validity and regularity of legislative enactments. A statute will not be declared unconstitutional unless the court is satisfied beyond all reasonable doubt that the legislature went outside the constitution in enacting the challenged legislation. McGeehan v. Bunch, 88 N.M. 308, 540 P.2d 238 (1975).

A statute is presumed to be constitutional unless it clearly violates some specific provision of the constitution. Likewise, an ordinance as well as a statute, is presumed to be valid, and the one who attacks it has the burden of establishing its invalidity. City of Albuquerque v. Jones, 87 N.M. 486, 535 P.2d 1337 (1975).

There is a presumption of the validity and regularity of legislative enactments. Courts must uphold the efficacy of statutes unless they are satisfied beyond all reasonable doubt that the legislature went outside the constitution in enacting the challenged legislation. Gallegos v. Homestake Mining Co., 97 N.M. 717, 643 P.2d 281 (Ct. App. 1982).

Every presumption is in favor of the validity of legislative enactments. Garcia v. Albuquerque Pub. Schools Bd. of Educ., 95 N.M. 391, 622 P.2d 699 (Ct. App. 1980).

Supreme court will not enquire into the wisdom, policy or justness of legislation. Garcia v. Albuquerque Pub. Schools Bd. of Educ., 95 N.M. 391, 622 P.2d 699 (Ct. App. 1980).

There is no absolute right of man and woman to associate. — The right of association has never been held to apply to the right of one individual to associate with another, and certainly it has never been construed as an absolute right of association between a man and woman at any all places and times. Futrell v. Ahrens, 88 N.M. 284, 540 P.2d 214 (1975). See notes to N.M. Const., art. II, § 17.

Lack of good-time credit for presentence confinement constitutional. — New Mexico's statutory scheme, which does not allow good-time credit for presentence confinement, does not offend the equal protection and due process guarantees of the New Mexico and United States constitutions. Enright v. State, 104 N.M. 672, 726 P.2d 349 (1986).

Comparable provisions. — Idaho Const., art. I, § 13.

Montana Const., art. II, §§ 4, 17.

Utah Const., art. I, § 7.

Wyoming Const., art. I, §§ 3, 6.

Law reviews. — For note, "Police Power and the Design of Buildings," see 5 Nat. Resources J. 122 (1965).

For article, " 'To Purify the Bar': A Constitutional Approach to Non-Professional Misconduct," see 5 Nat. Resources J. 299 (1965).

For comment, "Land Use Planning - New Mexico's Green Belt Law," see 8 Nat. Resources J. 190 (1968).

For note, "Student Discipline Cases at State Universities in New Mexico - Procedural Due Process," see 1 N.M. L. Rev. 231 (1971).

For note, "Due Process, Equal Protection and the New Mexico Parole System," see 2 N.M. L. Rev. 234 (1972).

For symposium, "The New Mexico Equal Rights Amendment: Introduction and Overview," see 3 N.M. L. Rev. 1 (1973).

For comment, "Criminal Procedure - Preventive Detention in New Mexico," see 4 N.M. L. Rev. 247 (1974).

For article, "The Community Property Act of 1973: A Commentary and Quasi-Legislative History," see 5 N.M. L. Rev. 1 (1974).

For survey, "The Statute of Limitations in Medical Malpractice Actions," see 6 N.M. L. Rev. 271 (1976).

For article, "Medical Malpractice Legislation in New Mexico," see 7 N.M. L. Rev. 5 (1976-77).

For note, "McGeehan v. Bunch - Invalidating Statutory Tort Immunity Through a New Approach to Equal Protection Analysis," see 7 N.M. L. Rev. 251 (1977).

For comment, "In-Migration of Couples from Common Law Jurisdictions: Protecting the Wife at the Dissolution of the Marriage," see 9 N.M.L. Rev. 113 (1978-79).

For note, "Conservation, Lifeline Rates and Public Utility Regulatory Commissions," see 19 Nat. Resources J. 411 (1979).

For comment, "Statutory Notice in Zoning Actions: Nesbit v. City of Albuquerque," see 10 N.M.L. Rev. 177 (1979-1980).

For note, "Contingent Remainders; Rule of Destructibility Abolished in New Mexico," see 10 N.M.L. Rev. 471 (1980).

For note, "Community Property - Transmutation of Community Property: A Preference for Joint Tenancy in New Mexico?" see 11 N.M.L. Rev. 421 (1981).

For note, "Criminal Procedure - Grand Jury - Inadmissible Evidence, Due Process," see 11 N.M.L. Rev. 451 (1981).

For article, "Sufficiency of Provocation for Voluntary Manslaughter in New Mexico: Problems in Theory and Practice," see 12 N.M.L. Rev. 747 (1982).

For article, "Sexual Equality, the ERA and the Court - A Tale of Two Failures," see 13 N.M.L. Rev. 53 (1983).

For comment, "Procedural and Substantive Rights to the Media Govern Requests to Restrict News Coverage of Criminal Cases: State ex rel. New Mexico Press Ass'n v. Kaufman," see 14 N.M.L. Rev. 401 (1984).

For comment, "Compulsory School Attendance - Who Directs the Education of a Child? State v. Edgington," see 14 N.M.L. Rev. 453 (1984).

For comment, "An Equal Protection Challenge to First Degree Depraved Mind Murder Under the New Mexico Constitution," see 19 N.M.L. Rev. 511 (1989).

For article, "Delinking Disproportionality From Discrimination: Procedural Burdens as Proxy for Substantive Visions," see 23 N.M.L. Rev. 87 (1993).

For note, "Family Law - New Mexico Expands Due Process Rights of Parents in Termination of Parental Rights: In Re Ruth Anne E.," see 31 N.M.L. Rev. 439 (2001).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 15 Am. Jur. 2d Civil Rights § 1 et seq.; 16A Am. Jur. 2d Constitutional Law §§ 552 to 600, 735 to 854; 45A Am. Jur. 2d Job Discrimination § 146 et seq.

Due process, and increasing penalties for second or subsequent offenses, 58 A.L.R. 26, 82 A.L.R. 345, 116 A.L.R. 209, 132 A.L.R. 91, 139 A.L.R. 673.

Failure of advertisement in judicial proceeding for sale of land for delinquent taxes or foreclosure of tax lien to prescribe lands affected as contrary to due process of law or other constitutional objections, 107 A.L.R. 285.

Substituted service, service by publication or service out of the state, in action in personam against resident or domestic corporation, as contrary to due process of law, 126 A.L.R. 1474, 132 A.L.R. 1361.

Exclusion from place of public entertainment or amusement, for reason other than color, as violation of equal protection clause, 1 A.L.R.2d 1165.

Restrictive covenants, conditions or agreements in respect of real property discriminating against persons on account of race, color or religion, 3 A.L.R.2d 466.

Failure to advise accused as to right to assistance of counsel as denial of due process, 3 A.L.R.2d 1003.

Right of owner of housing development or apartment house to restrict canvassing, peddling, solicitation or contributions, etc., 3 A.L.R.2d 1431.

Sentencing of accused when voluntarily absent as denial of due process of law, 6 A.L.R.2d 997.

Validity of building height regulations, 8 A.L.R.2d 963.

Exclusion of women from grand jury panel in criminal case as violation of constitutional rights of accused, 9 A.L.R.2d 661.

Constitutionality of statutes respecting preparation of tax returns for others by accountants, 10 A.L.R.2d 1443.

Municipal ordinance imposing requirements on outside producers of milk to be sold in city, 14 A.L.R.2d 103.

Race or religion as permissible consideration in choosing tenants or purchasers of real estate, 14 A.L.R.2d 153.

Due process clause as affecting foreign attachment or garnishment in action by nonresident against nonresident or foreign corporation upon a foreign cause of action, 14 A.L.R.2d 420.

Validity of governmental requirement of oath of allegiance or loyalty, 18 A.L.R.2d 268.

Constitutionality, under due process clause, of statute authorizing constructive or substituted service of process on foreign representative of deceased nonresident driver of motor vehicle, arising out of accident occurring in state, 18 A.L.R.2d 544.

Admissibility of confession as affected by delay in arraignment of prisoner, under due process clause, 19 A.L.R.2d 1346.

Constitutionality and construction of statutes or regulations prohibiting one who has no license to practice dentistry or medicine from owning, maintaining or operating an office therefor, 20 A.L.R.2d 808.

Due process and equal protection of the laws clauses as protecting applicant for unemployment compensation in mode and manner of computing benefits in effect at final discharge or loss of employment, 20 A.L.R.2d 963.

Validity of zoning ordinance or similar public regulation requiring consent of neighboring property owners to permit or sanction specified uses or construction of buildings, 21 A.L.R.2d 551.

Due process and equal protection of law in governmental regulation of optometry, 22 A.L.R.2d 939.

Statutes relating to sexual psychopaths, 24 A.L.R.2d 350.

Due process clause as affecting power of state to subject foreign corporation to jurisdiction of its courts on sole ground that corporation committed tort within state, 25 A.L.R.2d 1202.

Requiring submission to physical examination or test as violation of constitutional rights, 25 A.L.R.2d 1407.

Validity of legislation relating to publication of legal notices, 26 A.L.R.2d 655.

Retrospective operation of legislation affecting estates by entireties, 27 A.L.R.2d 868.

Due process as affecting power of administrative agency, in investigation of nonjudicial nature, to issue subpoenas against persons not subject to agency's regulatory jurisdiction, 27 A.L.R.2d 1208.

Regulation and licensing of privately owned parking places, 29 A.L.R.2d 856.

Validity and construction of statutes providing for psychiatric examination of accused to determine mental condition, 32 A.L.R.2d 434.

Equal protection as denied by exclusion of attorneys from jury lists in criminal cases, 32 A.L.R.2d 890.

Validity of municipal ordinance prohibiting house-to-house soliciting and peddling without invitation, 35 A.L.R.2d 355.

Consideration of investigation by welfare agency or the like in making or modifying award as between parents of custody of children, 35 A.L.R.2d 629.

Validity of compulsory pooling or unitization statute or ordinance requiring owners or lessees of oil and gas lands to develop their holdings as a single drilling unit and the like, 37 A.L.R.2d 434.

Due process under minimum wage statutes relating to private employment, 39 A.L.R.2d 740.

Necessity of affidavit or sworn statement as foundation for constructive contempt, 41 A.L.R.2d 1263.

Validity, under due process provision, of statute, ordinance or other measure involving chemical treatment of public water supply, 43 A.L.R.2d 453.

Foreign insurance company as subject to service of process in action on policy, 44 A.L.R.2d 416.

Assertion of immunity as ground for removing or discharging public officer or employee, 44 A.L.R.2d 789.

Fair employment statutes designed to eliminate racial, religious or national discrimination in private employment, 37 A.L.R.5th 349.

Constitutionality of regulation of junk dealers, 45 A.L.R.2d 1391.

Blood grouping tests, 46 A.L.R.2d 1000, 43 A.L.R.4th 579.

Due process under statute as to bribery in athletic contests, 49 A.L.R.2d 1234.

Public prohibition or regulation of location of cemetery as violation of due process or equal protection of the laws, 50 A.L.R.2d 905.

Due process in regulation of jewelry auctions, 53 A.L.R.2d 1433.

Violation of due process or equal protection of the laws by arbitration statutes, 55 A.L.R.2d 432.

Right of indigent defendant in criminal case to aid of state as regards appeal, 55 A.L.R.2d 1072.

Validity of statute or ordinance providing for destruction of dogs, 56 A.L.R.2d 1024.

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Municipal regulations of billboards and outdoor advertising as taking of property without due process of law, 58 A.L.R.2d 1314.

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Consolidated trial upon several indictments or informations against same accused, over his objection, 59 A.L.R.2d 841.

Validity of statute making private property owner liable to contractor's laborers, materialmen, or subcontractors where owner fails to exact bond or employ other means of securing their payment, 59 A.L.R.2d 885.

Validity, under state constitutions, of nonsigner provisions of Fair Trade Laws, 60 A.L.R.2d 420.

Right to and appointment of counsel in juvenile court proceedings, 60 A.L.R.2d 691, 25 A.L.R.4th 1072.

Necessity of personal service within state upon nonresident spouse as prerequisite of court's power to modify its decree as to alimony or child support in matrimonial action, 62 A.L.R.2d 544.

Due process and equal protection of the laws clauses as violated by statute regulating pre-need contracts for the sale or furnishing of burial services and merchandise, 68 A.L.R.2d 1251.

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Zoning regulations as affecting churches, 74 A.L.R.2d 377, 62 A.L.R.3d 197.

Incompetency of counsel chosen by accused as affecting validity of conviction, 74 A.L.R.2d 1390, 34 A.L.R.3d 470, 2 A.L.R.4th 27, 2 A.L.R.4th 807, 13 A.L.R.4th 533, 15 A.L.R.4th 582, 18 A.L.R.4th 360, 26 A.L.R. Fed. 218, 53 A.L.R. Fed. 140.

Denial of due process by zoning regulations as to gasoline filling stations, 75 A.L.R.2d 168.

Due process restrictions as affecting state's power to subject nonresident individual other than a motorist to jurisdiction of its courts in action for tort committed within state, 78 A.L.R.2d 397.

Use of public school premises for religious purposes during nonschool time, 79 A.L.R.2d 1148.

Due process in criminal trial of deaf, mute or blind person, 80 A.L.R.2d 1084.

Conviction of criminal offense without evidence as denial of due process of law, 80 A.L.R.2d 1362.

Rules as to burden of proof in criminal case as affected by rule regarding conviction without evidence as denial of due process of law, 80 A.L.R.2d 1369.

Due process with respect to legislation regulating, licensing or prescribing for certification of psychologists, 81 A.L.R.2d 791.

Due process as violated by statute or ordinance requiring persons previously convicted of crime to register with designated officials, 82 A.L.R.2d 398, 36 A.L.R.5th 161.

Admission of evidence obtained by illegal search and seizure as violation of due process, 84 A.L.R.2d 959.

Due process of law as violated by use tax exemption having no complementary exemption under sales tax, 85 A.L.R.2d 1043.

Right to counsel in insanity or incompetency adjudication proceedings, 87 A.L.R.2d 950.

Suspension or revocation of driver's license for refusal to take sobriety test, 88 A.L.R.2d 1064.

Violation of due process of law by antigambling laws applicable to coin-operated pinball machines or similar devices, played for amusement only or confining award to privilege of free replays, 89 A.L.R.2d 815.

Validity and construction of statute or ordinance requiring or prohibiting posting or other publication of price of commodity or services, 89 A.L.R.2d 901.

Due process of law equal protection guaranties under statute or ordinance regulating or licensing radio and television repairmen or servicemen, 89 A.L.R.2d 1010.

Due process under statute, ordinance or other regulation in relation to funeral directors and embalmers, 89 A.L.R.2d 1338.

Statute, ordinance or regulation relating to private residential swimming pools as violating requirements of due process, 92 A.L.R.2d 1283.

Validity and construction of statutory notice requirements prerequisite to adoption or amendment of zoning ordinance or regulation, 96 A.L.R.2d 449.

Validity of regulations as to contraceptives or the dissemination of birth control information, 96 A.L.R.2d 955.

Annulment of marriage against party mentally incompetent at time of action as denial of due process, 97 A.L.R.2d 483.

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Procedural due process requirements in proceedings involving applications for admission to bar, 2 A.L.R.3d 1266.

Preconviction procedure for raising contention that enforcement of penal statute or law is unconstitutionally discriminatory, 4 A.L.R.3d 404.

Validity, as a matter of due process, of state statutes or rules of court conferring in personam jurisdiction over nonresidents or foreign corporations on the basis of isolated business transactions, 20 A.L.R.3d 1201.

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Violation of due process or equal protection of law by exclusion of or discrimination against physician or surgeon by hospital authorities, 37 A.L.R.3d 645.

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Validity of statute imposing durational residency requirements for divorce applicants, 57 A.L.R.3d 221.

Necessity of notice and hearing before revocation or suspension of motor vehicle driver's license, 60 A.L.R.3d 361.

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Validity of exception for specific kind of tort action in survival statute, 77 A.L.R.3d 1349.

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Validity of statutory classifications based on population - zoning, building, and land use statutes, 98 A.L.R.3d 679.

Validity, construction, and effect of state statutes affording preferential property tax treatment to land used for agricultural purposes, 98 A.L.R.3d 916.

Validity of statutory classifications based on population - tax statutes, 98 A.L.R.3d 1083.

Constitutionality of rape laws limited to protection of females only, 99 A.L.R.3d 129.

Validity of statutes or rule providing that marriage or remarriage of woman operates as revocation of will previously executed by her, 99 A.L.R.3d 1020.

Constitutionality of assault and battery laws limited to protection of females or which provide greater penalties for males than for females, 5 A.L.R.4th 708.

Validity of statutes or ordinances requiring sex-oriented businesses to obtain operating licenses, 8 A.L.R.4th 130.

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Constitutionality of gender-based classifications in criminal laws proscribing nonsupport of spouse or child, 14 A.L.R.4th 717.

Statutes limiting time for commencement of action to establish paternity of illegitimate child as violating child's constitutional rights, 16 A.L.R.4th 926.

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Validity of state statutes and regulations limiting or restricting public funding for abortions sought by indigent women, 20 A.L.R.4th 1166.

Sufficiency of access to legal research facilities afforded defendant confined in state prison or local jail, 23 A.L.R.4th 590.

Right of accused to be present at suppression hearing or other hearings between court and attorneys concerning evidentiary questions, 23 A.L.R.4th 955.

Validity of statutes or regulations denying welfare benefits to claimants who transfer property for less than its full value, 24 A.L.R.4th 215.

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Admissibility in criminal case of evidence that accused refused to take test of intoxication, 26 A.L.R.4th 1112.

Refusal to rent residential premises to persons with children as unlawful discrimination, 30 A.L.R.4th 1187.

Enforceability of agreement by law enforcement officials not to prosecute if accused would help in criminal investigation or would become witness against others, 32 A.L.R.4th 990.

Applicability and application of zoning regulations to single residences employed for group living of mentally retarded persons, 32 A.L.R.4th 1018.

Propriety of automobile insurer's policy of refusing insurance, or requiring advanced rates, because of age, sex, residence, or handicap, 33 A.L.R.4th 523.

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Propriety and prejudicial effect of comments by counsel vouching for credibility of witness - state cases, 45 A.L.R.4th 602.

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Automobiles: validity and construction of legislation authorizing revocation or suspension of operator's license for "habitual," "persistent," or "frequent" violations of traffic regulations, 48 A.L.R.4th 367.

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Local government tort liability: minority as affecting notice of claim requirement, 58 A.L.R.4th 402.

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Nonconsensual treatment of involuntarily committed mentally ill persons with neuroleptic or antipsychotic drugs as violative of state constitutional guaranty, 74 A.L.R.4th 1099.

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Validity, construction, application, and effect of statute requiring conditions, in addition to expiration of time, for reinstatement of suspended or revoked driver's license, 2 A.L.R.5th 725.

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Validity and application of statute or regulation authorizing revocation or suspension of driver's license for reason unrelated to use of, or ability to operate, motor vehicle, 18 A.L.R.5th 542.

Sufficiency, as to content, of notice of garnishment required to be served upon garnishee, 20 A.L.R.5th 229.

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Application of statute denying access to courts or invalidating contracts where corporation fails to comply with regulatory statute as affected by compliance after commencement of action, 23 A.L.R.5th 744.

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Voir dire exclusions of men from state trial jury or jury panel - *post-J.E.B. v. Alabama ex rel T.B.*, 511 U.S. 127, cases, 88 A.L.R.5th 67.

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Effect of customer's interest or preference on establishing bona fide occupational qualification under Title VII of Civil Rights Act of 1964 (42 USC § 2000e-2(e)), 63 A.L.R. Fed. 402.

Constitutionality of provision, in Rule B, Supplemental Rules for Certain Admiralty and Maritime Claims, allowing attachment of goods and chattels without prior notice, 63 A.L.R. Fed. 651.

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Disparate impact test for sex discrimination in employment under Title VII of Civil Rights Act of 1964 (42 USC § 2000e et seq.), 68 A.L.R. Fed. 19.

Propriety of federal court's ordering state or local tax increase to effectuate civil rights decree, 76 A.L.R. Fed. 504.

What constitutes violation of 18 U.S.C. § 245(b), prohibiting interferences with civil rights, 76 A.L.R. Fed. 816.

Eligibility of illegitimate child for survivor's benefits under Social Security Act, pursuant to § 216(h)(2)(A) of act (42 USCS § 416(h)(2)(A)), where state intestacy law denying inheritance right, or application of that state law to § 216(h)(2)(A), may violate child's right to equal protection of laws, 116 A.L.R. Fed. 121.

When may person not named as respondent in charge filed with Equal Employment Opportunity Commission (EEOC) be sued under Title VII of Civil Rights Act of 1964 (42 USCS §§ 2000e et seq.), 121 A.L.R. Fed. 1

Validity, construction, and application of 18 USCS § 1956, which criminalizes money laundering, 121 A.L.R. Fed. 525.

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Stranger's alleged communication with juror, other than threat of violence, as prejudicial in federal criminal prosecution, 131 A.L.R. Fed. 465.

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What constitutes reverse sex or gender discrimination against males violative of federal constitution or statutes - nonemployment cases, 166 A.L.R. Fed. 1

What constitutes reverse or majority race or national origin discrimination violative of federal constitution or statutes - public employment cases, 168 A.L.R. Fed. 1

Equal protection and due process clause challenges based on racial discrimination - supreme court cases, 172 A.L.R. Fed. 1

Equal protection and due process clause challenges based on sex discrimination - Supreme Court cases, 178 A.L.R. Fed. 25.

14 C.J.S. Supp. Civil Rights § 1 et seq.; 16B C.J.S. Constitutional Law §§ 700 to 870; 16C C.J.S. Constitutional Law §§ 871 to 1138; 16D C.J.S. Constitutional Law §§ 1139 to 1427.

II. DUE PROCESS.

A. GENERALLY.

Due process is a rather malleable principle which must be molded to the particular situation, considering both the rights of the parties and governmental interests involved. In re Valdez, 88 N.M. 338, 540 P.2d 818 (1975).

It requires that enactment be within legislative competency. — "Due process," by which only the individual may be deprived of his liberty, does not have regard merely to enforcement of the law, but searches also the authority for making the law. By judicial decision, the first and fundamental step in the due process or procedure of depriving the individual of liberty is the enactment of a statute within legislative competency. State v. Henry, 37 N.M. 536, 25 P.2d 204 (1933).

And that it be applied for purpose consonant with legislative purpose. — Substantive due process of law may be roughly defined as the constitutional guaranty that no person will be deprived of his life, liberty or property for arbitrary reasons. Such a deprivation is constitutionally supportable only if the conduct from which the deprivation flows is proscribed by reasonable legislation (that is, legislation the enactment of which is within the scope of legislative authority), reasonably applied (that is, applied for a purpose consonant with the purpose of the legislation itself). Schware v. Board of Bar Exmrs., 60 N.M. 304, 291 P.2d 607 (1955), rev'd on other grounds, 353 U.S. 232, 77 S. Ct. 752, 1 L. Ed. 2d. 796 (1957).

It has no application to public rights. — Laws 1919, ch. 83 (now repealed), regarding school budgets, did not violate this section, for the due process clause of this section has no application to public rights. McKinley County Bd. of Educ. v. State Tax Comm'n, 28 N.M. 221, 210 P. 565 (1922).

"Liberty" embraces right to contract hours of employment. — "Liberty" embraces a man's right to contract as he will or can regarding his hours of employment. He, not the government, is to determine the matter. State v. Henry, 37 N.M. 536, 25 P.2d 204 (1933).

Hence, statute fixing maximum hours may be unconstitutional. — Portion of Laws 1933, ch. 149, which prohibited labor by male employees in mercantile establishments for more than eight hours in a day or 48 hours in a week of six days was unconstitutional as violating liberty guaranteed by this provision. State v. Henry, 37 N.M. 536, 25 P.2d 204, 90 A.L.R. 805 (1933). But see 50-4-13 to 50-4-18 NMSA 1978 and notes thereto.

But allowing reclamation district to contract does not deprive members of liberty. — A provision of a reclamation contract allowing a reclamation district to enter into a lawful contract with the United States for the improvement of the district and the increase of its water supply does not violate N.M. Const., art. II, § 4, and the due process clause of this section by depriving association members of the liberty to contract. Middle Rio Grande Water Users Ass'n v. Middle Rio Grande Conservancy Dist., 57 N.M. 287, 258 P.2d 391 (1953).

United States supreme court decisions are applicable to due process matters. — In view of the fact that the provisions of this section concerning due process and N.M. Const., art. II, § 20, concerning the taking of private property without just compensation, are worded exactly as those contained in U.S. Const., amend. V, the holdings of the

United States supreme court are applicable to the issues presented in determining whether the graduated income tax provided for under the statutes, 7-2-1 NMSA 1978 et seq., does not violate either the due process clause or art. II, § 20. 1968 Op. Att'y Gen. No. 68-9 (tax not unconstitutional).

Specific lack of due process must be alleged. — In attacking constitutionality of statute on due process grounds, it must be alleged in what respect it lacks due process. Hutchens v. Jackson, 37 N.M. 325, 23 P.2d 355 (1933).

And impairment of complainer's rights shown. — Violation of due process can be urged only by those who can show an impairment of their rights thereby. Straus v. Foxworth, 231 U.S. 162, 34 S. Ct. 42, 58 L. Ed. 168 (1913); State v. Hines, 78 N.M. 471, 432 P.2d 827 (1967).

Legislative enactments may be declared void for uncertainty if their meaning is so uncertain that the court is unable, by the application of known and accepted rules of construction, to determine what the legislature intended with any reasonable degree of certainty. New Mexico Mun. League, Inc. v. New Mexico Environmental Imp. Bd., 88 N.M. 201, 539 P.2d 221 (Ct. App.), cert. denied, 88 N.M. 318, 540 P.2d 248 (1975).

Statute may violate due process if it is so vague that persons of common intelligence must necessarily guess at its meaning. State ex rel. Health & Social Servs. Dep't v. Natural Father, 93 N.M. 222, 598 P.2d 1182 (Ct. App. 1979).

It is not a violation of due process for the prosecutor to withhold circumstantial exculpatory evidence from the grand jury; he is obligated to present only direct exculpatory evidence. Buzbee v. Donnelly, 96 N.M. 692, 634 P.2d 1244 (1981).

As to where terms "reasonable" or "unreasonable" are used. — The use of such terms as "reasonable" or "unreasonable" in defining standards of conduct or in prescribing charges, allowances and the like have been held not to render a statute invalid for uncertainty and indefiniteness. New Mexico Mun. League, Inc. v. New Mexico Environmental Imp. Bd., 88 N.M. 201, 539 P.2d 221 (Ct. App.), cert. denied, 88 N.M. 318, 540 P.2d 248 (1975).

But absolute or mathematical certainty is not required in the framing of a statute. New Mexico Mun. League, Inc. v. New Mexico Environmental Imp. Bd., 88 N.M. 201, 539 P.2d 221 (Ct. App.), cert. denied, 88 N.M. 318, 540 P.2d 248 (1975).

Section 61-6-15 D(27) NMSA 1978, defining "unprofessional or dishonorable conduct" to include "conduct unbecoming in a person licensed to practice medicine, or detrimental to the best interests of the public" is not void for vagueness. McDaniel v. New Mexico Bd. of Medical Exmrs., 86 N.M. 447, 525 P.2d 374 (1974).

Former 73-12-13, 1953 Comp., relating to teachers' contracts, was held not to violate the constitution as being vague, indefinite or uncertain. McCormick v. Board of Educ., 58 N.M. 648, 274 P.2d 299 (1954).

And regulations likewise may be flexible without being overbroad. — Regulations adopted under the Environmental Improvement Act, 74-1-1 NMSA 1978 et seq., legislative justification for which is found in such broadly applied terms as public interest, social well-being, environmental degradation and the like, were required to hold the difficult line between overbreadth or vagueness on the one hand and inflexibility and unworkable restriction on the other, and where the difficulty with rigid standards in the field of environmental regulation was readily apparent, it was held that the terms complained of were capable of reasonable application and were sufficient to limit and define the duties of the individuals and entities which would be governed by them. New Mexico Mun. League, Inc. v. New Mexico Environmental Imp. Bd., 88 N.M. 201, 539 P.2d 221 (Ct. App.), cert. denied, 88 N.M. 318, 540 P.2d 248 (1975).

Regulations adopted pursuant to the Environmental Improvement Act (74-1-1 NMSA 1978 et seq.) requiring that storage facilities shall be fly proof, rodent proof and leak proof were neither unconstitutionally vague nor impossible of accomplishment. New Mexico Mun. League, Inc. v. New Mexico Environmental Imp. Bd., 88 N.M. 201, 539 P.2d 221 (Ct. App.), cert. denied, 88 N.M. 318, 540 P.2d 248 (1975).

Regulations adopted under the Environmental Improvement Act (74-1-1 NMSA 1978 et seq.) requiring that any vehicle employed in collection or transportation of waste and refuse be cleaned at such times and in such manner as to prevent offensive odors and unsightliness were not constitutionally repugnant for vagueness. The question to be asked is: what might a reasonable person of average sensibilities consider to be an offensive odor or unsightly condition, and the answer is capable of common understanding. New Mexico Mun. League, Inc. v. New Mexico Environmental Imp. Bd., 88 N.M. 201, 539 P.2d 221 (Ct. App.), cert. denied, 88 N.M. 318, 540 P.2d 248 (1975).

Regulation adopted pursuant to the Environmental Improvement Act (74-1-1 NMSA 1978 et seq.) which provides that prior to the creation or modification of a system for the collection, transportation or disposal of solid waste the person who is operating or will operate the system shall obtain a registration certificate from the agency, where "modification" is defined as any significant change in the physical characteristics or method of operation of a system for the collection, transportation or disposal of solid waste, was not unconstitutionally vague. New Mexico Mun. League, Inc. v. New Mexico Environmental Imp. Bd., 88 N.M. 201, 539 P.2d 221 (Ct. App.), cert. denied, 88 N.M. 318, 540 P.2d 248 (1975).

Requirements of adequate means to prevent and extinguish fires at sanitary landfill sites and of one or more sanitary landfills or other disposal facilities, except modified landfills, for populations exceeding 3,000 and one or more sanitary landfills or other disposal facilities, not excluding modified landfills for populations under 3,000 and of those responsible for disposal of waste collected from parks, recreational areas and

highway rest areas, "as necessary," found in regulations adopted under the Environmental Improvement Act, were not unconstitutionally vague. New Mexico Mun. League, Inc. v. New Mexico Environmental Imp. Bd., 88 N.M. 201, 539 P.2d 221 (Ct. App.), cert. denied, 88 N.M. 318, 540 P.2d 248 (1975).

Statute, not vague, may be overbroad. — Although a statute may pass a vagueness challenge, it may nonetheless be held unconstitutional under overbreadth considerations. State v. Ramos, 116 N.M. 123, 860 P.2d 765 (Ct. App. 1993).

No constitutional liberty interest in prisoner's good-time credits. – The unilateral revocation of a prisoner's erroneously granted good-time credits did not violate the due process clause of the constitution; because the granting of those credits was error in the first place, the petitioner did not have a liberty interest in them. Compton v. Lytle, 2003-NMSC-031, 134 N.M. 586, 81 P.3d 39 (decided under federal constitution).

Ninety-day torts claim notice provision constitutional. — The 90-day notice provision of the Tort Claims Act does not violate the constitutional right of access to the courts. Fulfilling the legislative purpose requires timely and reasonable notice to a governmental entity of potential claims which are rationally related to legitimate governmental interests in order to: (1) allow investigation of a matter while the evidence is fresh; (2) allow questioning of witnesses; (3) protect against stimulated or aggravated claims; and (4) allow consideration of whether a claim should be paid or not. Powell v. New Mexico State Hwy. & Transp. Dep't, 117 N.M. 415, 872 P.2d 388 (Ct. App. 1994).

Terms of probation imposed on physician held not vague. — One of the terms of probation imposed by the board on a physician found guilty of unprofessional conduct for falsely prescribing demerol for the alleged use of another when in fact the drug was for his own use was that he not take or have in his possession "any dangerous drugs" without the consent of his psychiatrist. The physician thereafter prescribed the drug ritalin for a patient and diverted some of it for his own use. It was held that when the board revoked the physician's license for violating his probation, and that under the facts the terms thereof were not unconstitutionally vague. McDaniel v. New Mexico Bd. of Medical Exmrs., 86 N.M. 447, 525 P.2d 374 (1974).

The police power of the state is paramount, and in the proper exercise thereof there may be a limitation in the use of or complete destruction of private property in order to advance public welfare without the necessity of compensation to the owner. Therefore, although utilities are permitted to locate their facilities within the public way and thereby obtain certain rights for limited purposes, these rights are subordinate to the rights of the traveling public and are subject to a reasonable exercise of the police power. State ex rel. State Hwy. Comm'n v. Town of Grants, 66 N.M. 355, 348 P.2d 274 (1960).

Salus populi est suprema lex represents the highest power possessed by the state. When properly invoked, all other guaranties, public or private, must yield. Gomez v. City of Las Vegas, 61 N.M. 27, 293 P.2d 984 (1956) (garbage collection ordinance upheld).

If exercised reasonably and not arbitrarily. — Former statutes dealing with licensing of contractors (Laws 1939, ch. 197, §§ 1, 3, 14 and 17, now repealed) were not unconstitutional under this section, since legislature may enact laws in exercise of its police powers which are not so unreasonable or arbitrary as to amount to confiscation of property or denial of right to engage in a particular trade, occupation or profession. Kaiser v. Thomson, 55 N.M. 270, 232 P.2d 142 (1951).

All property and property rights are held subject to the fair exercise of the police power of a municipality, and a reasonable regulation enacted for the benefit of public health, convenience, safety or general welfare is not an unconstitutional taking of property. Green v. Town of Gallup, 46 N.M. 71, 120 P.2d 619 (1941) ("Green River" ordinance held valid); Mitchell v. City of Roswell, 45 N.M. 92, 111 P.2d 41 (1941) (prohibiting keeping animals in restricted district held valid).

Section 77-17-12 NMSA 1978, requiring one killing a bovine to preserve its hide unmutilated for 30 days, is a reasonable police regulation and not a deprivation of property without due process. State v. Walker, 34 N.M. 405, 281 P. 481 (1929).

Adoption of child conceived as result of rape. — Man convicted of criminal sexual penetration of a child had no constitutional right under the due process or equal protections clauses of the United States or New Mexico Constitutions to withhold consent to adoption of the child conceived and born as a result of that act. Christian Child Placement Serv. of the N.M. Christian Children's Home v. Vestal, 1998-NMCA-098, 125 N.M. 426, 962 P.2d 1261.

And relation to such matters as health is direct. — Statute authorizing fixing minimum prices for barber work (former 61-17-37 NMSA 1978) had a direct relation to fulfillment of sanitary conditions required in barbershops for health of public, and did not violate due process. Arnold v. Board of Barber Exmrs., 45 N.M. 57, 109 P.2d 779 (1941).

As in imposing assessments for garbage collection. — Defendant was not deprived of his property without due process by being required to pay the assessments where he received benefits in the collection and disposal of garbage from other premises in the community. The problem involved being a health problem, its solution bound defendant as well as other members of the community. Under 3-48-3 NMSA 1978, plaintiff can enforce the general system. City of Hobbs v. Chesport, Ltd., 76 N.M. 609, 417 P.2d 210 (1966).

Or authorizing contract for garbage disposal. — The ordinance under which a city acted by resolution to authorize a contract for garbage disposal with a sanitation company was a police measure involving the health and welfare of all members of the community and not a violation of due process or equal protection as to persons engaged in the business of hauling garbage. Gomez v. City of Las Vegas, 61 N.M. 27, 293 P.2d 984 (1956).

Public nuisance may be enjoined. — Equity has power to enjoin a public nuisance, even though in doing so it may incidentally restrain the violation of a penal provision, and the constitutional guarantees are not violated thereby. State ex rel. Marron v. Compere, 44 N.M. 414, 103 P.2d 273 (1940) (unlawful practice of medicine).

Serious problems may justify restrictions. — If a police measure is directed to a public interest of minor concern, while imposing serious restrictions in regulation or law of guaranteed rights to accomplish the interest, it tends to show it is unreasonable. On the other hand, the more insistent the public need, the more may private rights be restricted. 1961-62 Op. Att'y Gen. No. 61-13.

Keeping citizens out of hospitals and off relief is proper. — Both hospitals and relief rolls are crowded, and it is a proper exercise of police power for the legislature to enact statutes which would tend to keep citizens out of the one and off of the other. City of Albuquerque v. Jones, 87 N.M. 486, 535 P.2d 1337 (1975).

And justifies requiring motorcycle helmets. — A city ordinance which requires the operator of a motorcycle to wear an approved safety helmet is an appropriate exercise of the city's police power and therefore is constitutional. City of Albuquerque v. Jones, 87 N.M. 486, 535 P.2d 1337 (1975).

Power to select type of helmet may be delegated. — The delegation to the commissioner of motor vehicles of the power to determine what type of helmet should be worn under an ordinance mandating the wearing of approved safety helmets by motorcycle operators did not deprive the appellee of due process, nor did the fact that the state commissioner of motor vehicles adopted the standards determined by the testing of a third person make such testing unreasonable. City of Albuquerque v. Jones, 87 N.M. 486, 535 P.2d 1337 (1975).

Nondiscriminatory economic policy may be enforced. — A state is free to adopt an economic policy that may reasonably be deemed to promote the public welfare and may enforce that policy by appropriate legislation without violation of the due process clause so long as such legislation has a reasonable relation to a proper legislative purpose and is neither arbitrary nor discriminatory. Rocky Mt. Whsle. Co. v. Ponca Whsle. Mercantile Co., 68 N.M. 228, 360 P.2d 643, appeal dismissed, 368 U.S. 31, 82 S. Ct. 145, 7 L. Ed. 2d 90 (1961).

There was nothing arbitrary or discriminatory in the Cigarette Fair Trade Practice Act, former 57-2-1 NMSA 1978 et seq., denying a wholesaler the right to sell below cost to a direct buying retailer but permitting such wholesaler the right to sell below cost to another wholesaler. Rocky Mt. Whsle. Co. v. Ponca Whsle. Mercantile Co., 68 N.M. 228, 360 P.2d 643, appeal dismissed, 368 U.S. 31, 82 S. Ct. 145, 7 L. Ed. 2d 90 (1961).

The Cigarette Fair Trade Practice Act (former 57-2-1 NMSA 1978 et seq.) constituted a reasonable attempt by the state, in the interest of the general welfare, to protect free competition and bore a reasonable relation to the legislative purpose. Rocky Mt. Whsle.

Co. v. Ponca Whsle. Mercantile Co., 68 N.M. 228, 360 P.2d 643 (1961), appeal dismissed, 368 U.S. 31, 82 S. Ct. 145, 7 L. Ed. 2d 90 (1961).

The right to practice a profession or vocation is a property right. Roberts v. State Bd. of Embalmers & Funeral Dirs., 78 N.M. 536, 434 P.2d 61 (1967).

But business or profession affecting welfare and health may be regulated. — The question of monopoly and restraint of trade must yield to a more important consideration, that of reasonably exercising the police power over a business or profession having a vital relationship to public welfare and health. State v. Collins, 61 N.M. 184, 297 P.2d 325 (1956).

Professional license application procedures. – A constitutional due process analysis under 61-1-3 NMSA 1978, governing application for a professional or occupational license, must consider and balance three factors: (1) the private interest affected, (2) the risk of an erroneous deprivation of the interest with the procedures used, and (3) the government's interest, including the fiscal and administrative burdens of providing additional procedures. Rex, Inc. v. N.M. Mfg. Housing Committee, 2003-NMCA-134, 134 N.M. 533, 81 P.3d 470.

However, unreasonable regulation violates due process. — An act which, under guise of regulation, constitutes an unreasonable exercise of police power violates due process. State ex rel. New Mexico Dry Cleaning Bd. v. Cauthen, 48 N.M. 436, 152 P.2d 255 (1944).

Malicious abuse of process. — The tort of malicious abuse of process must be construed narrowly in order to protect the right of access to the courts. Devaney v. Thriftway Mktg. Corp., 1998-NMSC-001, 124 N.M. 512, 953 P.2d 277, cert. denied, 524 U.S. 915, 118 S. Ct. 2296, 141 L. Ed. 2d 157 (1998).

Prohibiting banking by those not organized under law is constitutional. — Former State Banking Act (Laws 1915, ch. 67, now repealed) did not violate due process of law where it prohibited engaging in banking business to all except those organized under its provisions. First Thrift & Loan Ass'n v. State ex rel. Robinson, 62 N.M. 61, 304 P.2d 582 (1956).

But limiting number of insurance agents in town violates due process. — Statute (Laws 1925, ch. 135, § 69) prohibiting more than one agent of fire insurance company in each town offended against due process and special privileges clauses of the constitution. Franklin Fire Ins. Co. v. Montoya, 32 N.M. 88, 251 P. 390 (1926).

Right to practice law is not absolute. — Granting that membership in the legal profession is a species of property, as that word is employed in the constitution, the right to its enjoyment is not absolute and unfettered by any mode of regulation. Schware v. Board of Bar Exmrs., 60 N.M. 304, 291 P.2d 607 (1955), rev'd on other grounds, 353 U.S. 232, 77 S. Ct. 752, 1 L. Ed. 2d 796 (1957).

Educational qualifications may be imposed on bar applicants. — The educational qualifications required of applicants before they are permitted to practice law in New Mexico do not violate the fourteenth amendment or this section, either in regard to the clause requiring due process of law or that providing for equal protection of the laws. Henington v. State Bd. of Bar Exmrs., 60 N.M. 393, 291 P.2d 1108 (1956).

And failure to pass examination justifies denying admission to bar. — When one fails to pass an appropriate and properly administered bar examination, it is not unreasonable to say that he has demonstrated his lack of proficiency in law so as to justify denying him the right to be admitted to the bar. Accordingly, there has been no denial of due process or equal protection. In re Pacheco, 85 N.M. 600, 514 P.2d 1297 (1973).

Without full hearing. — There is a rational basis for according an applicant a full due process hearing in the area of character determinations, and denying such full hearing on the matter of the validity of determinations as to intellectual and learning qualifications arrived at by examination or testing in accordance with recognized procedures and, therefore, petitioner was not denied due process or equal protection of the law by the lack of a full hearing concerning his failure of the bar examination. In re Pacheco, 85 N.M. 600, 514 P.2d 1297 (1973).

Right to take bar examination may be denied for lack of good character. — The requirement of former Rule III of the Rules Governing Admission to the Bar of New Mexico, which provided "that the board of bar examiners may decline to permit any such applicant to take the [bar] examination when not satisfied of his good moral character," which in the same or similar language is universal in this country, could not seriously be challenged as unreasonable. Schware v. Board of Bar Exmrs., 60 N.M. 304, 291 P.2d 607 (1955), rev'd on other grounds, 353 U.S. 232, 77 S. Ct. 752, 1 L. Ed. 2d 796 (1957). See now Rules 15-103 and 15-302 NMRA.

Applicant may be required to furnish character affidavit. — Applicant to take the New Mexico bar examination had to be shown to be a person of good moral character before he was eligible to take the bar examination, and requiring him to submit an affidavit of an attorney of New Mexico to that effect did not violate this section. Henington v. State Bd. of Bar Exmrs., 60 N.M. 393, 291 P.2d 1108 (1956). See now Rules 15-103 and 15-302 NMRA.

But qualifications required must be connected with fitness to practice. — Petitioner was refused admission to the New Mexico bar examination by the board of bar examiners. He later requested a formal hearing on the denial of his application. At the hearing, the board told him for the first time why it had refused permission. Its reasons were: (1) use of aliases by the applicant; (2) former connection with subversive organizations; and (3) his record of arrests, thus failing to satisfy the board as to the requisite moral character for admission to the bar of New Mexico. He appealed to the New Mexico supreme court; the denial was upheld. However, the United States supreme court reversed, holding that a state cannot exclude a person from the practice

of law or from any other occupation in a manner or for reasons that contravene the due process or equal protection clause of the fourteenth amendment. A state can require high standards of qualification, such as good moral character or proficiency in its law, before it admits an applicant to the bar, but any qualification must have a rational connection with the applicant's fitness or capacity to practice law. Schware v. Board of Bar Exmrs., 353 U.S. 232, 77 S. Ct. 752, 1 L. Ed. 2d 796, 64 A.L.R.2d 288 (1957).

Activity as attorney may be reviewed. — Respondent's contentions that, in some way, he had been denied procedural and substantive due process of law and equal protection of the law has no validity where the conduct charged against him is wholly and entirely concerned with his activity as an attorney. In re Nelson, 79 N.M. 779, 450 P.2d 188 (1969).

A public office is not property, and the right to hold it is not a vested one. State ex rel. Ulrick v. Sanchez, 32 N.M. 265, 255 P. 1077 (1926).

Ordering performance of public duty does not injure personal or property right. — A public officer who is commanded to perform an official duty suffers neither in his personal nor his property rights, and these rights alone are safeguarded by the constitution. Board of Comm'rs v. District Court, 29 N.M. 244, 223 P. 516 (1924).

Jockey's license is not vested right. — The license granted a jockey is a privilege similar to that granted to owners and trainers; it is not a vested right within the meaning of the due process clause of the state and federal constitutions. State Racing Comm'n v. McManus, 82 N.M. 108, 476 P.2d 767 (1970).

Nor is liquor license. — A liquor license is a privilege and not property within the meaning of the due process and contract clauses of the constitutions of New Mexico and the nation, and in them licensees have no vested property rights. Baca v. Grisolano, 57 N.M. 176, 256 P.2d 792 (1953).

Natural parents have no property right in their children, and the paramount issue in an adoption proceeding is the welfare of the child. Gutierrez v. New Mexico Dep't of Pub. Welfare, 74 N.M. 273, 393 P.2d 12 (1964).

And guardian may be appointed without notice to parent. — Appointment of a guardian of a minor without giving notice to parent does not violate the due process clause. State ex rel. Hockenhull v. Marshall, 58 N.M. 286, 270 P.2d 702 (1954).

Allowance of alimony is not a denial of due process. Bardin v. Bardin, 51 N.M. 2, 177 P.2d 167 (1947).

Navy retirement pay is earned property right. — Retirement plans and retirement pay are a mode of employee compensation and an earned property right which accrues by reason of an individual's years of service in the navy. LeClert v. LeClert, 80 N.M. 235, 453 P.2d 755 (1969).

A license to operate a motor vehicle is a mere privilege and not a property right and is subject to reasonable regulation under the police power in the interest of public safety and welfare. Johnson v. Sanchez, 67 N.M. 41, 351 P.2d 449 (1960) (suspension on showing of habitual recklessness held valid).

But license may not be taken without sufficient proof of fault. — See note under same catchline under analysis line III A below.

Conservation laws may not deprive property owners of constitutional rights. — The legislature may provide by law for the conservation of game animals and birds, but only so long as such laws do not deny to one having rights in privately owned land the due process or equal protection of the laws that the constitution guarantees to all persons. Allen v. McClellan, 75 N.M. 400, 405 P.2d 405 (1965).

The state game commission may not create a game refuge or migratory bird resting ground on private land without consent, or without acquiring the necessary interest in the land by eminent domain or in such other manner as is authorized by law. Were it otherwise, the owner would be deprived of the right, enjoyed by others in the vicinity but outside the refuge, to hunt game on his own property and thereby be in violation of the due process and equal protection clauses of the constitution. Allen v. McClellan, 75 N.M. 400, 405 P.2d 405 (1965).

Notice of wrongful death claim against governmental entities. — Section 41-4-6 NMSA 1978, which requires those asserting a wrongful death claim against state or local public bodies to provide notice of the claim within six months, does not violate a claimant's equal protection or due process rights. Marrujo v. New Mexico State Hwy. Transp. Dep't, 118 N.M. 753, 887 P.2d 747 (1994).

Notice of proceeding on oil well spacing increase application. — A proceeding on an oil and gas estate lessee's application for an increase in oil well spacing was adjudicatory, and the lessor was entitled to actual notice under the due process requirements of the New Mexico and United States Constitutions. Uhden v. New Mexico Oil Conservation Comm'n, 112 N.M. 528, 817 P.2d 721 (1991).

Notice as to the amount of taxation is an essential due process requirement in the collection of property taxes. In re Miller, 88 N.M. 492, 542 P.2d 1182 (Ct. App.), cert. denied, 89 N.M. 5, 546 P.2d 70 (1975).

The guarantee against the taking of property without due process of law, in taxation proceedings, has to do with the essentials of taxation only. All other matters are for the legislature, subject only to the principle that the taxpayer must have notice and opportunity to be heard as to the amount of the charge, either before or after the tax lien is fixed. Maxwell v. Page, 23 N.M. 356, 168 P. 492, 5 A.L.R. 155 (1917).

But due process does not require regulations listing procedures and methods of valuation. — Taxpayer was not denied due process because the former property tax

department did not adopt regulations that listed the procedures to be followed and identified the methods of valuation in general use by the department and the applicable factors to be included in determining the value of property, since the amended statute did not require regulations, and taxpayer had the right of discovery by deposition of all the facts necessary to defend the assessed valuation of its property. Peterson Properties v. Valencia County Valuation Protests Bd., 89 N.M. 239, 549 P.2d 1074 (Ct. App. 1976).

And evidence as to one of two valuations methods may be excluded. — Where former 72-29-5 B, 1953 Comp., fixed two methods of determining market value, namely sales of comparable property and the application of generally accepted appraisal techniques, taxpayer's offer of evidence of a valuation of comparable property was not relevant and exclusion of such evidence did not deny taxpayer of due process. Peterson Properties v. Valencia County Valuation Protests Bd., 89 N.M. 239, 549 P.2d 1074 (Ct. App. 1976).

Distinction may be made in assessing subdivided and unsubdivided agricultural land. — Distinction drawn by former 72-2-14.1, 1953 Comp., between subdivided and unsubdivided agricultural land, for tax valuation purposes, did not offend N.M. Const., art. VIII, § 1, and did not violate due process. Property Appraisal Dep't v. Ransom, 84 N.M. 637, 506 P.2d 794 (Ct. App. 1973).

Due process not violated by tax officials. — Taxation and revenue department did not violate taxpayer's right to due process by: (1) making an assessment before the taxpayer provided pertinent records; (2) targeting the taxpayer because it had no history of reporting compensating taxes; and (3) delaying 18 months from the time of an audit notice to the time of the field audit. Vivigen, Inc. v. Minzner, 117 N.M. 224, 870 P.2d 1382 (Ct. App. 1994).

Reasonable classifications in imposing privilege or excise taxes are permissible. — Reasonable classifications allowing the imposition of privilege taxes by the legislature does not deny equal protection or due process. Sunset Package Store, Inc. v. City of Carlsbad, 79 N.M. 260, 442 P.2d 572 (1968) (municipal license tax on sellers of alcoholic liquors).

It is for the legislature to adopt classifications for the imposition of excise taxes as it may deem proper, and any reasonable classification cannot be held to deny equal protection or due process. Edmunds v. Bureau of Revenue, 64 N.M. 454, 330 P.2d 131 (1958).

Taxes on gasoline sales by both city and state are constitutional. — Former Municipal Code sections (Laws 1931, ch. 159) authorizing municipalities to levy tax on gasoline sales in addition to the state excise tax were not obnoxious to due process or equal protection or any other provision of the constitution as double taxation. Continental Oil Co. v. City of Santa Fe, 36 N.M. 343, 15 P.2d 667 (1932).

Taxation of dividends from foreign subsidiaries. — As relevant to the right of a state to tax dividends from foreign subsidiaries, due process requires that the income attributed to a state for tax purposes be rationally related to values connected with the taxing state. F.W. Woolworth Co. v. Taxation & Revenue Dep't, 458 U.S. 354, 102 S. Ct. 3128, 73 L. Ed. 2d 819, rehearing denied, 459 U.S. 354, 103 S. Ct. 274, 74 L. Ed. 2d 213 (1982).

Treatment of electric utility's interest in generating facility. — Exclusion of an electric utility's interest in a generating facility from its rate base, coupled with the public service commission's refusal to decertify the facility, did not violate the due process provisions or the takings clauses of the New Mexico and United States Constitutions. Public Serv. Co. v. Public Serv. Comm'n, 112 N.M. 379, 815 P.2d 1169 (1991).

State may take property for failure to pay taxes. — When the requirements of notice and hearing have been met, there is no denial of due process where the title to property is taken by the state for failure of the taxpayer to pay taxes, and this is particularly true when there has been a failure to redeem within the period of grace allowed therefor. State v. Thomson, 79 N.M. 748, 449 P.2d 656 (1969).

It is not a taking of property without due process to deed property to state after a delinquent tax sale. Yates v. Hawkins, 46 N.M. 249, 126 P.2d 476 (1942).

Notice of tax sale. — When the state taxation and revenue division holds a tax sale, that is a taking of property by the government, and the notice of such taking must comply with minimum due process standards under the United States and New Mexico Constitutions. Patrick v. Rice, 112 N.M. 285, 814 P.2d 463 (Ct. App. 1991).

Notice of tax sale was constitutionally inadequate where, although the state taxation and revenue division complied with statutory notice requirements, it failed to conduct a diligent search for the taxpayers' reasonably ascertainable new address. Patrick v. Rice, 112 N.M. 285, 814 P.2d 463 (Ct. App. 1991).

The notice of a tax sale was constitutionally inadequate under both the United States and New Mexico Constitutions, since the notice was mailed only to the taxpayer's old address, the notice was returned with a stamp indicating that the forwarding address had expired, and the new location of the taxpayer was reasonably ascertainable since she had submitted a change of address to the county assessor. Hoffman v. State, Taxation & Revenue Dep't, 117 N.M. 263, 871 P.2d 27 (Ct. App. 1994).

Door-to-door solicitation may be prohibited. — Frequent ringing of door bells of private residences by itinerant solicitors may in fact be a nuisance, and a local ordinance prohibiting such activity is not an unconstitutional taking of property. Green v. Town of Gallup, 46 N.M. 71, 120 P.2d 619 (1941).

Corporate charter may be amended although character is changed. — Argument that a statute which attempted to change character of a legal entity from that of a

corporation for the management of a community land grant to that of a domestic stock corporation was in violation of this section, in that it was an attempt by the legislature to divest the town of its vested rights without due process of law, was without merit since a state, through its police power, could make reasonable regulations of corporations, including alteration or amendment of corporate charters if that power had been duly reserved by the state, as was done in New Mexico. Westland Dev. Co. v. Saavedra, 80 N.M. 615, 459 P.2d 141 (1969).

Whatever is meant by "sale" and "conveyance" in 49-2-7 NMSA 1978, the section does not include the procedure enacted to change the character of the corporation itself. To hold otherwise would produce the absurd implication that a land grant corporation could have been converted into a domestic stock corporation by 49-2-7 NMSA 1978 even before the enactment of 49-2-18 NMSA 1978. It would also produce a rather unexplainable conflict between the two provisions. Therefore, due process was not denied for failure to follow 49-2-7 NMSA 1978, since 49-2-18 NMSA 1978 was applicable statute. Westland Dev. Co. v. Saavedra, 80 N.M. 615, 459 P.2d 141 (1969).

Without providing for personal service or absentee voting. — Argument that 49-2-18 NMSA 1978 lacks due process, because of its failure to require personal service or mailing of written notice of the meeting and its failure to provide for absentee voting, was without merit since there is no inherent right in a stockholder of a corporation to vote by proxy, and since reasonable notice and a fair opportunity are given to the "owners and proprietors" of the grant to attend the meeting at which the proposed corporation is considered. Westland Dev. Co. v. Saavedra, 80 N.M. 615, 459 P.2d 141 (1969).

Compulsory arbitration is constitutional. — The procedures used in judicial tribunals need not be used in compulsory arbitration, so long as the arbitration procedures are sufficient to guarantee a fair proceeding. Therefore, the provisions of 22-10-17.1 NMSA 1978 mandating compulsory arbitration of the grievances of discharged school employees do not violate an employee's right of access to the courts, or right to jury trial; nor do these provisions unconstitutionally delegate power to a nonjudicial tribunal. Board of Educ. v. Harrell, 118 N.M. 470, 882 P.2d 511 (1994).

As to vested rights, there are none in a particular remedy or procedure. Gray v. Armijo, 70 N.M. 245, 372 P.2d 821 (1962).

Service of process statute may be applied retroactively. — Service of process statute is procedural in nature, and retrospective application does not affect substantial rights in violation of the constitution. Gray v. Armijo, 70 N.M. 245, 372 P.2d 821 (1962).

Erroneous decision does not alone violate due process. — State cannot be deemed to have violated due process simply because one of its courts, while acting within its jurisdiction, has made an erroneous decision. State v. Orfanakis, 22 N.M. 107, 159 P. 674 (1916).

But all affected by decree must have notice and hearing. — Due process requires that all who may be bound or affected by a decree are entitled to notice and hearing, so that they may have their day in court. State ex rel. Reynolds v. Lewis, 84 N.M. 768, 508 P.2d 577 (1973); State ex rel. Reynolds v. Allman, 78 N.M. 1, 427 P.2d 886 (1967); City of Albuquerque v. Reynolds, 71 N.M. 428, 379 P.2d 73 (1963).

Lack of notice or hearing denies due process. — Court denied attorney due process of law by entering the judgment of contempt 26 days after the events involved, without notice or hearing. Wollen v. State, 86 N.M. 1, 518 P.2d 960 (1974).

Under former juvenile code father ordered to attend daughter's delinquency hearing as a witness was denied due process when he was ordered at that hearing to pay support, since he had neither been advised that a judgment might be rendered against him, nor given opportunity to be heard. In re Downs, 82 N.M. 319, 481 P.2d 107 (1971).

The right to enjoin a party from seeking equitable relief in another court may be exercised in a proper case by a court having jurisdiction in order that its processes not be frustrated and to give complete relief, but it was error for the court in the instant case, without application or hearing, to restrain the appellant from proceeding in any other action in any other court as he may be advised under the circumstances disclosed by the record. Porter v. Robert Porter & Sons, 68 N.M. 97, 359 P.2d 134 (1961) (not deciding whether any other circumstances would make injunction proper).

A proposed plan of distribution of community grant land disclosed a pronounced absence of primary and elemental concepts of due process and equal protection of the laws, in violation of constitutional guaranties existing in favor of owners of the beneficial interest in the common lands of the grant, where no appearance was entered by anyone representing absent "heirs," there was no authorization of the published notice nor compliance with the Rules of Civil Procedure as to publication and no provision was made for determining who were the true owners or their "heirs." Armijo v. Town of Atrisco, 62 N.M. 440, 312 P.2d 91 (1957).

Failure to give notice pursuant to Rule 55(b), N.M.R. Civ. P., (see now Rule 1-055 B NMRA) providing for entry of a default judgment, coupled with the giving of a default judgment without hearing or notice of hearing, when matters stood at issue, constitutes a violation of the due process clause of this section. Adams & McGahey v. Neill, 58 N.M. 782, 276 P.2d 913 (1954).

Including person affected by class action. — Due process under both state and federal constitutions requires that a person affected by a class action be given notice of the action, and the absence of such notice requires a dismissal of the complaint. Eastham v. Public Employees' Retirement Ass'n Bd., 89 N.M. 399, 553 P.2d 679 (1976).

Since liberty or property may not be taken unfairly. — Under due process every citizen is guaranteed that his liberty or property will not be taken from him unfairly. It

also insures that he will be informed of any claim against him and will have a chance to present his side of the case. In re Downs, 82 N.M. 319, 481 P.2d 107 (1971).

Imposition of sanctions for failure to comply with discovery orders. — Where a party has been warned that failure to comply with the court's discovery orders may result in the imposition of sanctions under Rule 1-037B, N.M.R. Civ. P., and where the court, pursuant to Rule 1-043C, N.M.R. Civ. P., has determined that an evidentiary hearing under the circumstances is not necessary before ruling on a motion to impose sanctions, the imposition of such sanctions does not amount to a denial of due process. United Nuclear Corp. v. General Atomic Co., 96 N.M. 155, 629 P.2d 231 (1980), appeal dismissed, 451 U.S. 901, 101 S. Ct. 1966, 68 L. Ed. 2d 289 (1981).

It is only where the sanction invoked is more stern than reasonably necessary, so as to rise to the level of a reprisal, that a denial of due process results. United Nuclear Corp. v. General Atomic Co., 96 N.M. 155, 629 P.2d 231 (1980), appeal dismissed, 451 U.S. 901, 101 S. Ct. 1966, 68 L. Ed. 2d 289 (1981).

Opportunity to present proof on motion to reopen water rights adjudication is necessary. — Unless it can be said that appellants had an opportunity to present proof and failed to do so, or that their motions to reopen the adjudication of their water rights showed a lack of any possible merit on its face, there can be no question that hearing and overruling appellants' motions does not amount to a complete determination of the issues between the parties so as to satisfy the requirements of due process. State ex rel. Reynolds v. Lewis, 84 N.M. 768, 508 P.2d 577 (1973); State v. Allman, 78 N.M. 1, 427 P.2d 886 (1967).

Lack of notice of default judgment. — A district court is not required by Rule 1-055(B), or by due process of law to set aside for lack of notice default judgments entered against a defendant who failed to appear in the action after being personally served with process. Rodriguez v. Conant, 105 N.M. 746, 737 P.2d 527 (1987).

Notice of damages hearing. — Having failed to appear and to put matters in issue, defendant was not entitled to notice of the damages hearing on constitutional grounds. Rodriguez v. Conant, 105 N.M. 746, 737 P.2d 527 (1987).

Notice to parties affected by tax sale. — Due process requires that the state must provide notice of sale to parties whose interest in property would be affected by a tax sale, as long as that information is reasonably ascertainable. Brown v. Greig, 106 N.M. 202, 740 P.2d 1186 (Ct. App. 1987).

Where county tax officials and the property tax division were placed on notice that notices to a taxpayer were returned as undeliverable, but they did not check the estate tax records on file in the division's office, which would have indicated that the taxpayer had died and that a personal representative of the decedent's estate had been appointed, along with sufficient information whereby the name and address of the representative was readily ascertainable, the failure of the division to notify the

representative invalidated the subsequent tax sale. Fulton v. Cornelius, 107 N.M. 362, 758 P.2d 312 (Ct. App. 1988).

Prejudgment taking of property without notice and hearing is unconstitutional. — Former New Mexico replevin statutes, insofar as they provided for a prejudgment taking of property without notice and hearing, were unconstitutional as a violation of the constitutional prohibition of taking property without due process of law. Montoya v. Blackhurst, 84 N.M. 91, 500 P.2d 176 (1972).

As is modification of judgment not sought or consented to. — Notice and a fair hearing must be afforded both parties to meet the requirements of due process, and therefore a court cannot modify a judgment when neither party has sought such relief and the issue has not been implicitly or explicitly consented to by the parties. Where the husband did not seek a modification of alimony, and neither party consented to a modification, the trial court's improper modification of future alimony was reversible error. Corliss v. Corliss, 89 N.M. 235, 549 P.2d 1070 (1976).

But seeking change of custody implicitly involves change of support. — The husband's action for a change of custody implicitly involved the consideration of future child support if a change of custody were made, and although it would have been better practice to plead for modification of child support when seeking a change of custody, failure to do so did not preclude consideration of the issue on due process grounds, since the questions of change of custody and child support are so inextricably related. Corliss v. Corliss, 89 N.M. 235, 549 P.2d 1070 (1976).

There was no violation of due process at a change of custody hearing where the trial court first heard the husband's evidence regarding custody, including the testimony of the wife as a hostile witness, the wife's attorney extensively cross-examined the husband, and although the wife's attorney had waived his right to cross-examine the wife when she was called as a hostile witness by the husband, her testimony as to custody surfaced in her counterclaim for contempt; a full and fair opportunity to be heard was afforded both parties in this case. Corliss v. Corliss, 89 N.M. 235, 549 P.2d 1070 (1976).

Workers' Compensation Act provision requiring use of the American Medical Association's guide to evaluate impairment is not violative of due process since it is not arbitrary and ensures a fair and impartial determination of disability. Madrid v. St. Joseph Hosp., 1996-NMSC-064, 122 N.M. 524, 928 P.2d 250.

Appointment of counsel not always required. — Due process does not require the appointment of counsel in every case where an indigent faces the possibility of imprisonment if found to be in civil contempt for failure to comply with an order of support. State ex rel. Department of Human Servs. v. Rael, 97 N.M. 640, 642 P.2d 1099 (1982).

State-created procedure cannot vitiate right of access to courts. — When a plaintiff is required to resort to a state-created procedure, the procedure must not vitiate his right of access to the courts. Jiron v. Mahlab, 99 N.M. 425, 659 P.2d 311 (1983).

Failure to follow state statutory procedure does not necessarily amount to a violation of due process. Bird v. Lankford, 116 N.M. 408, 862 P.2d 1267 (Ct. App. 1993).

Administrative proceedings must conform to fundamental principles of justice and the requirements of due process of law; a litigant must be given a full opportunity to be heard with all rights related thereto. In re Miller, 88 N.M. 492, 542 P.2d 1182 (Ct. App.), cert. denied, 89 N.M. 5, 546 P.2d 70 (1975).

The essence of justice is largely procedural. Procedural fairness and regularity are the indispensable essence of liberty. In re Miller, 88 N.M. 492, 542 P.2d 1182 (Ct. App.), cert. denied, 89 N.M. 5, 546 P.2d 70 (1975).

Principles of fair and impartial tribunal apply to administrative proceedings as well as to trials; in fact, the rigidity of the requirement that the trier be impartial and unconcerned in the result applies more strictly to an administrative adjudication, where many of the customary safeguards affiliated with court proceedings have been relaxed in the interest of expedition and a supposed administrative efficiency. Reid v. New Mexico Bd. of Exmrs. in Optometry, 92 N.M. 414, 589 P.2d 198 (1979).

And require at minimum that trier of fact be disinterested. — At a minimum, a fair and impartial tribunal requires that the trier of fact be disinterested and free from any form of bias or predisposition regarding the outcome of the case, and the inquiry is not whether he is actually biased or prejudiced but whether, in the natural course of events, there is an indication of a possible temptation to an average man sitting as a judge to try the case with bias for or against any issue presented to him. Reid v. New Mexico Bd. of Exmrs. in Optometry, 92 N.M. 414, 589 P.2d 198 (1979).

Failure to disqualify biased trier of fact denies due process of law. Reid v. New Mexico Bd. of Exmrs. in Optometry, 92 N.M. 414, 589 P.2d 198 (1979).

Any utilization of 61-1-7 NMSA 1978 which has the effect of allowing an administrative hearing, punitive in nature, to be conducted by a patently prejudiced tribunal must necessarily violate due process. Reid v. New Mexico Bd. of Exmrs. in Optometry, 92 N.M. 414, 589 P.2d 198 (1979).

Disqualification of jurors on basis of gender prohibited. — New Mexico Const., art. II, §§ 14 and 18 preclude the state from using its peremptory challenges to strike jurors because of gender in a criminal case. State v. Gonzales, 111 N.M. 590, 808 P.2d 40 (Ct. App. 1991).

To raise and resolve allegations of intentional discrimination on the basis of gender, a defendant must make a prima facie showing that the prosecution has used its

peremptory challenges to purposefully discriminate against an excluded group. This prima facie showing may be made by showing 1) that the state has exercised its peremptory challenges to remove members of a cognizable group from the jury panel, and 2) that these facts and any other relevant circumstances raise an inference that the state used its challenges to exclude members of the panel solely on account of their membership in the excluded group. State v. Gonzales, 111 N.M. 590, 808 P.2d 40 (Ct. App. 1991).

Embodied in the term "procedural due process" is the opportunity to be heard and to present any defense. In re Miller, 88 N.M. 492, 542 P.2d 1182 (Ct. App.), cert. denied, 89 N.M. 5, 546 P.2d 70 (1975).

And to present witnesses. — A notion of fairness is included within the concept of procedural due process, and accordingly in a hearing before an administrative agency, the agency must examine both sides of the controversy taking and weighing the evidence that is offered and finding facts based on a consideration of the evidence, in order to fairly protect the interests and rights of all who are involved; a refusal to allow witnesses to be called is a denial of procedural due process. In re Miller, 88 N.M. 492, 542 P.2d 1182 (Ct. App.), cert. denied, 89 N.M. 5, 546 P.2d 70 (1975).

Where by unlawfully excluding evidence and denying the right to discovery, the county valuation protests boards curtail taxpayers' right to be heard and to present any defense, and in so doing, they deprive appellants of their constitutionally guaranteed right to procedural due process, taxpayers are entitled to new hearings, at which evidence of valuation of comparable properties or other properties of the same class may be admissible in evidence and are to be weighed by the boards in arriving at their decisions. In re Miller, 88 N.M. 492, 542 P.2d 1182 (Ct. App.), cert. denied, 89 N.M. 5, 546 P.2d 70 (1975).

Published procedures must be followed. — By failing to comply with its own published procedures, specifically by failing to give reasons for the proposed change, the environmental planning commission deprived petitioner of notice and the opportunity to prepare an adequate defense to the proposed downzoning, and this was a denial of procedural due process. Miller v. City of Albuquerque, 89 N.M. 503, 554 P.2d 665 (1976).

The environmental planning commission deprived petitioner of his right to a meaningful and impartial decision-maker by hearing its own application without providing him with the protection of the procedural safeguards implicit in compliance with existing standards, and this was a denial of procedural due process. Miller v. City of Albuquerque, 89 N.M. 503, 554 P.2d 665 (1976).

The city's environmental planning commission acted beyond its authority in initiating the zone change request, contrary to its own established procedures for accepting zone change applications, and as a consequence, denied petitioner, in violation of the requirements of due process, a meaningful and impartial hearing on his properly

submitted zone change application; the same result is required even if the city planning department initiated the zone change application, since the planning department acted at the express direction of the planning commission, and, in any event, the application was made without the concurrence of any of the landowners whose interests were involved. Miller v. City of Albuquerque, 89 N.M. 503, 554 P.2d 665 (1976).

Even though a landowner has no vested right in a particular zoning classification for his property and his property is subject to rezoning, he still has a right to rely on the requirement that anyone seeking to rezone his property to a more restrictive zoning must show that either there was a mistake in the original zoning or that a substantial change has occurred in the character of the neighborhood since the original zoning to such an extent that the reclassification or change ought to be made, and before a piecemeal zoning change is sought, these principles must be taken into account, particularly when the zoning change of a piece of property is sought by the zoning authority instead of by the owner of the property affected. Miller v. City of Albuquerque, 89 N.M. 503, 554 P.2d 665 (1976).

Notice and hearing must be provided. — Laws relating to community ditches (Laws 1915 §§ 5739 to 5743) were unconstitutional in that they made no provision for notice to owner of meeting of appraisers for purpose of fixing damages, nor for opportunity to be heard thereon. Janes v. West Puerto de Luna Community Ditch, 23 N.M. 495, 169 P. 309 (1917).

But statute may give adequate constructive notice. — A statute (Laws 1913, ch. 84, § 13) which fixed the time at which the state board of equalization should meet and which gave it power to increase or decrease values without giving actual notice to the persons affected thereby was constructive notice of legal or lawful action taken. W.S. Land & Cattle Co. v. McBridge, 28 N.M. 437, 214 P. 576 (1923).

And nonparticipation by commissioner does not violate due process. — If an order of the corporation commission (now public regulation commission) is reasonable and based upon evidence adduced at public hearing, there is little merit to contention that the utility affected by the order has been deprived of due process of law because of nonparticipation of any member of the commission at the hearing proper. 1951-52 Op. Att'y Gen. No. 5473.

Temporary restraint of apparently dangerous and insane person is proper. — Temporary restraint of an apparently insane person, without legal process, prior to institution of proceedings to determine his mental condition, is not improper if his being at large appears dangerous to himself or others. Ex parte Romero, 51 N.M. 201, 181 P.2d 811 (1947).

But statute requiring or authorizing detention may violate due process. — Statute which provided that a person received at a hospital for voluntary commitment because of some mental disorder shall be held for not more than 10 days after he gives notice in writing of his desire to leave (Laws 1939, ch. 43, § 1, now repealed) violated due

process, as did provision that a person may be committed for up to 30 days on the certificate of a physician (Laws 1939, ch. 44, § 2, impliedly repealed by Laws 1941, ch. 75, § 3). Ex parte Romero, 51 N.M. 201, 181 P.2d 811 (1947).

Effective treatment, not just custodial care, must be furnished. — Mental illness is not a crime, and thus patients must be afforded some type of effective treatment since their liberty is abridged; mere custodial care is not sufficient. In re Valdez, 88 N.M. 338, 540 P.2d 818 (1975).

Some rights in criminal cases apply to civil commitments. — The civil commitment process, though technically a civil proceeding, has elements of both criminal and civil proceedings, a hybrid procedure, with some of the rights guaranteed to criminal defendants applicable to defendants in commitment hearings; thus, compliance with the due process requirements, as far as the burden of proof in commitment proceedings for the mentally ill is concerned, is mandated. In re Valdez, 88 N.M. 338, 540 P.2d 818 (1975).

So preponderance of evidence standard is unacceptable. — A preponderance of the evidence is definitely constitutionally unacceptable for civil commitment hearings, in view of the fact that fundamental liberties of the patient are so often at stake. In re Valdez, 88 N.M. 338, 540 P.2d 818 (1975).

But clear and convincing proof, not beyond reasonable doubt, suffices. — In the civil commitment situation the interests of the state are pitted against restrictions on the liberty of the individual, in considering whether there exists sufficient state interests to counterbalance the loss of individual liberty; the language of former 34-2-5, 1953 Comp., indicated that the aim of the state is to first protect society from the mentally ill, a manifestation of the state's police power, and also protect the mentally ill from themselves, while at the same time providing care and treatment, as parens patriae. The state's interests are sufficient and the realities of treatment, though not ideal, are adequate to justify subjecting individuals to possible commitment based on a "clear and convincing" standard of proof. In re Valdez, 88 N.M. 338, 540 P.2d 818 (1975). See 43-1-2 NMSA 1978 et seq.

Although the highest standard of proof would be desirable, in the civil commitment process, proof beyond a reasonable doubt is too stringent a standard to be applied; proof that is clear, cogent and convincing is the highest standard of proof possible at the current state of the medical arts. For evidence to be clear and convincing, it must instantly tilt the scales in the affirmative when weighed against the evidence in opposition and the fact finder's mind is left with an abiding conviction that the evidence is true. In re Valdez, 88 N.M. 338, 540 P.2d 818 (1975).

Constitutional regulations and legislation. — Where the former health and social services department determined that plaintiff 's household was ineligible for food stamps, on the grounds that his "net food stamp income" exceeded the maximum allowable and in computing plaintiff 's income the department took into account certain

disability insurance benefits which were being paid by the insurer directly to a finance company with whom plaintiff had two loans in accordance with a department regulation defining income to include payments made on behalf of the household by another, it was held that this regulation, as applied, did not deprive plaintiff of due process of law. Huerta v. Health & Social Servs. Dep't, 86 N.M. 480, 525 P.2d 407 (Ct. App. 1974).

The Horse Racing Act, Chapter 60, Article 1 NMSA 1978, and the regulations issued thereunder allowing suspension of a licensed jockey prior to a hearing provide constitutionally adequate due process of law. State Racing Comm'n v. McManus, 82 N.M. 108, 476 P.2d 767 (1970).

Laws 1939, ch. 197, denying an unlicensed contractor redress in the courts of the state for the collection of compensation due under contract, did not contravene the due process clause or deny equal protection of law as guaranteed by this section. Fischer v. Rakagis, 59 N.M. 463, 286 P.2d 312 (1955). See 60-13-30 NMSA 1978.

Laws 1931, ch. 131, § 1 (72-12-1 NMSA 1978), which declares ownership of underground waters to be in the public, does not violate N.M. Const., art. II, §§ 18 and 20, because patents from the United States issued after 1866, and particularly those issued after Desert Land Act of 1877, conveyed no interest in, or right to, the use of surface or underlying water with which lands could be irrigated, except such portions thereof as were used to reclaim the particular land applied for under the act. State ex rel. Bliss v. Dority, 55 N.M. 12, 225 P.2d 1007 (1950), appeal dismissed, 341 U.S. 924, 71 S. Ct. 798, 95 L. Ed. 1356 (1951).

Tax upon gasoline and motor fuel, authorized under portion of repealed Municipal Code (Laws 1947, ch. 122) to pay for special street improvement bonds, was not a taking without due process or a denial of equal protection of the laws. Stone v. City of Hobbs, 54 N.M. 237, 220 P.2d 704 (1950).

Former 2% privilege tax (1937 amendment to 59-26-31 NMSA 1978) from which certain qualified benefit societies were exempted did not violate the due process and equal protection clauses of this section. Sovereign Camp, W.O.W. v. Casados, 21 F. Supp. 989 (D.N.M.), aff'd, 305 U.S. 558, 59 S. Ct. 79, 83 L. Ed. 352 (1938).

Laws 1937, ch. 168 (former 13-3-1 to 13-3-5 NMSA 1978), which was commonly referred to as the Public Printing Bill, was constitutional. 1937-38 Op. Att'y Gen. 136.

The clause of the Workmen's Compensation Act, 52-1-54 NMSA 1978, making provision for allowance of reasonable attorney's fees, is not unconstitutional as repugnant to the due process and equal protection clauses of the federal constitution or this section. New Mexico State Hwy. Dep't v. Bible, 38 N.M. 372, 34 P.2d 295 (1934).

Laws 1933, ch. 184 (38-3-9, 38-3-10 NMSA 1978), as to disqualification of judges, does not deny due process of law or violate this provision. State ex rel. Hannah v. Armijo, 38 N.M. 73, 28 P.2d 511 (1933).

Sections 73-14-1 to 73-17-24 NMSA 1978, relating to conservancy districts, do not violate the due process clause of this section. Gutierrez v. Middle Rio Grande Conservancy Dist., 34 N.M. 346, 282 P. 1, 70 A.L.R. 1261 (1929), cert. denied, 280 U.S. 610, 50 S. Ct. 158, 74 L. Ed. 653 (1930).

Laws 1903, ch. 42 (now repealed), the Provisional Order Improvement Law for the paving of streets and alleys, as amended, did not violate the due process clause of this section. Hodges v. City of Roswell, 31 N.M. 384, 247 P. 310 (1926).

Section 36-1-22 NMSA 1978, permitting attorney general and district attorneys to compromise civil actions in which state or county is party, does not violate the due process and equal protection clauses of this section. State v. State Inv. Co., 30 N.M. 491, 239 P. 741 (1925) (tax suits).

Laws relating to abatement of wasteful artesian wells as nuisances (Laws 1915, §§ 265 to 268) did not violate the due process clause of this section. Eccles v. Ditto, 23 N.M. 235, 167 P. 726, 1918B L.R.A. 126 (1917). See 72-13-7 NMSA 1978.

Considered together, the pre- and post-termination procedures of the School Personnel Act, 22-10A-27 and 22-10A-28 NMSA 1978, comport with due process requirements. West v. San Jon Board of Education, 2003-NMCA-130, 134 N.M. 498, 79 P.3d 842, cert. denied, 2003-NMCERT-002, 134 N.M. 723, 82 P.3d 533.

Unconstitutional legislation. — The portion of the 1972 general appropriation act, Laws 1972, ch. 98, § 4 K, providing that no person who was classified as a "nonresident" for tuition purposes upon his initial enrollment in a public institution of higher education in the state could have his status changed to that of a "resident" for tuition purposes unless he had maintained domicile in the state for a period of not less than one year during which entire period he had not been enrolled, for as many as six hours, in any quarter or semester, as a student in any such institution, was unreasonable, arbitrary and violated the due process and equal protection clauses of the fourteenth amendment to the federal constitution and of this section. Robertson v. Regents of Univ. of N.M., 350 F. Supp. 100 (D.N.M. 1972).

Section 40-4-33, 1953 Comp. (now repealed), concerning seizure and sale as estrays of calves or colts confined apart from their mothers and of confined freshly branded animals, was, prior to its amendment by Laws 1919, ch. 52, § 1, unconstitutional as authorizing the taking of private property without due process. Lacey v. Lemmons, 22 N.M. 54, 159 P. 949, 1917A L.R.A. 1185 (1916).

Durational limits on benefits upheld. — A regulation imposing a 12-month durational limitation on the receipt of general assistance benefits did not violate the due process clause of the New Mexico Constitution. Although the right to receive public assistance benefits is important, such right is a matter of statutory entitlement and is not explicitly or implicitly guaranteed by the New Mexico Constitution. Moreover, the durational limit was rationally related to the human services department's purpose of conserving limited

funds and was not retroactive merely because it utilized the characteristics of a defined group to describe the persons that the statute would affect, even though the defining characteristics arose before the regulation became effective. Howell v. Heim, 118 N.M. 500, 882 P.2d 541 (1994).

Ordinance banning Pit Bulls. — Village ordinance banning possession of American Pit Bull Terriers was reasonably related to protecting the health and safety of the residents of the village; thus, the ordinance did not violate substantive due process. Garcia v. Village of Tijeras, 108 N.M. 116, 767 P.2d 355 (Ct. App. 1988).

Village ordinance banning American Pit Bull Terriers, being a proper exercise of the village's police power was not a deprivation of property without due process even though it allowed for the destruction of private property. Garcia v. Village of Tijeras, 108 N.M. 116, 767 P.2d 355 (Ct. App. 1988).

B. CRIMINAL CASES.

Withdrawal of individual prison inmate's visitation privileges without affording that inmate certain procedural safeguards would violate due process. Cordova v. LeMaster, 2004-NMSC-026, 136 N.M. 217, 96 P.3d 778.

Sex Offender Registration and Notification Act does not violate either the federal or the state due process clause. State v. Druktenis, 2004-NMCA-032, 135 N.M. 223, 86 P.3d 1050.

Courts have power and duty to provide fair trial. — The courts of general jurisdiction have the inherent power to do whatever may be done under the general principles of jurisprudence to insure to the citizen a fair trial, whenever his life, liberty, property or character is at stake. The possession of such power involves its exercise as a duty whenever public or private interests require. State v. Valdez, 83 N.M. 632, 495 P.2d 1079 (Ct. App.), aff'd, 83 N.M. 720, 497 P.2d 231, cert. denied, 409 U.S. 1077, 93 S. Ct. 694, 34 L. Ed. 2d 666 (1972).

Preservation of constitutional claim. — By tendering a proposed jury instruction to the court, defendant adequately preserved his right to appeal on the grounds that the instructions used violated his right to due process under the state constitutional claim. State v. Sarracino, 1998-NMSC-022, 125 N.M. 511, 964 P.2d 72.

Mere conclusion that due process was denied is not sufficient basis for relief. State v. Crouch, 77 N.M. 657, 427 P.2d 19 (1967).

There must be showing of prejudice. — Where claims of deprivation of due process are asserted, there must be a showing of prejudice. Deats v. State, 80 N.M. 77, 451 P.2d 981 (1969).

Or injury. — Not only must there be shown an abuse of discretion, but it must also have been to the injury of the defendant. State v. Nieto, 78 N.M. 155, 429 P.2d 353 (1967).

Or impairment of rights. — A violation of due process can be urged only by those who can show an impairment of their rights in the application of the statute to them. State v. Hines, 78 N.M. 471, 432 P.2d 827 (1967).

If total result is fair, constitutional right has not been invaded. — In determining whether the deprivation of constitutional rights amounts to a denial of due process, the inquiry on habeas corpus is directed to a review of the entire proceedings, and if the total result was the granting to accused of a fair and deliberate trial, then no constitutional right has been invaded and the proceedings will not be disturbed. Johnson v. Cox, 72 N.M. 55, 380 P.2d 199, cert. denied, 375 U.S. 855, 84 S. Ct. 117, 11 L. Ed. 2d 82 (1963).

Nonenforcement of an inapplicable statute does not violate any right of defendant under the concept of due process. Defendant must show how he has been denied due process. State v. Lujan, 79 N.M. 525, 445 P.2d 749 (Ct. App. 1968).

And denial of a naked constitutional right does not invalidate all subsequent proceedings. State v. Selgado, 78 N.M. 165, 429 P.2d 363 (1967).

But unfairness at first trial is not cured by fair de novo trial. — If two trials are afforded a defendant, then due process requires that fairness and impartiality exist at both trials, and unfairness or partiality at the first trial is not cured if the second de novo trial is fair and impartial. Tsiosdia v. Rainaldi, 89 N.M. 70, 547 P.2d 553 (1976).

Only constitutionality of statute under which convicted may be challenged. — Where defendant was convicted of violating 30-22-25 NMSA 1978, which is a lesser included offense of 30-22-23 NMSA 1978, which was charged in the indictment, his rights under the latter statute were not at issue, and he had no standing to challenge its constitutionality. State v. Bojorquez, 88 N.M. 154, 538 P.2d 796 (Ct. App.), cert. denied, 88 N.M. 318, 540 P.2d 248 (1975).

If conviction was of lower crime, vagueness in distinguishing higher crime not considered. — Defendant's claims that definitional distinctions which go to the difference between first and second degree criminal sexual penetration are unconstitutionally vague were not considered by the court of appeals when defendant was convicted of second degree criminal sexual penetration. State v. Jiminez, 89 N.M. 652, 556 P.2d 60 (Ct. App. 1976).

Facts of prior convictions. — Defendant is not entitled to have a jury find the facts of his prior convictions beyond a reasonable doubt under this section. State v. Sandoval, 2004-NMCA-046, 135 N.M. 420, 89 P.3d 92, cert. denied, 2004-NMCERT-006, 135 N.M. 789, 93 P.3d 1292.

Due process of law does not prohibit classification for legislative purposes. State v. Thompson, 57 N.M. 459, 260 P.2d 370 (1953) (statute providing penalty for act but excepting railroad employees upheld).

But too vague statute violates due process. — The vagueness doctrine is based on notice and applies when a potential actor is exposed to criminal sanctions without a fair warning as to the nature of the proscribed activity, and therefore a statute violates due process if it is so vague that persons of common intelligence must necessarily guess at its meaning. State v. Najera, 89 N.M. 522, 554 P.2d 983 (Ct. App. 1976).

Any statute which forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates due process. State v. Silva, 86 N.M. 543, 525 P.2d 903 (Ct. App.), cert. denied, 86 N.M. 528, 525 P.2d 888 (1974); State v. Orzen, 83 N.M. 458, 493 P.2d 768 (Ct. App. 1972); State v. Ferris, 80 N.M. 663, 459 P.2d 462 (Ct. App. 1969); State v. Segotta, 100 N.M. 498, 672 P.2d 1129 (1983).

A reasonable degree of certainty in a criminal statute is an essential of due process of law, and a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law. State v. Minns, 80 N.M. 269, 454 P.2d 355 (Ct. App.), cert. denied, 80 N.M. 234, 453 P.2d 597 (1969); State v. Carr, 95 N.M. 755, 626 P.2d 292 (Ct. App. 1981), cert. denied, 95 N.M. 669, 625 P.2d 1186, 454 U.S. 853, 102 S. Ct. 298, 70 L. Ed. 2d 145 (1981), overruled on other grounds, State v. Olguin, 118 N.M. 91, 879 P.2d 92 (Ct. App. 1994).

Act constituting offense should be defined with certainty. — A penal statute should define the act necessary to constitute an offense with such certainty that a person who violates it must know that his act is criminal when he does it. State v. Carr, 95 N.M. 755, 626 P.2d 292 (Ct. App. 1981), cert. denied, 95 N.M. 669, 625 P.2d 1186, 454 U.S. 853, 102 S. Ct. 298, 70 L. Ed. 2d 145 (1981), overruled on other grounds, State v. Olguin, 118 N.M. 91, 879 P.2d 92 (Ct. App. 1994).

Whole statute must be considered. — In determining the question of vagueness, the court will consider a statute as a whole. State v. Najera, 89 N.M. 522, 554 P.2d 983 (Ct. App. 1976); State v. Orzen, 83 N.M. 458, 493 P.2d 768 (Ct. App. 1972); State v. Ferris, 80 N.M. 663, 459 P.2d 462 (Ct. App. 1969).

Phrase "use of force or coercion" is not unconstitutionally vague. — The language in 30-9-11 NMSA 1978, "perpetrated by the use of force or coercion," is not unconstitutionally vague, since the crime is defined in terms of a result that defendant causes, and if a defendant causes such a result by the use of force or coercion, force or coercion was the method which caused the result, that is, the crime. State v. Jiminez, 89 N.M. 652, 556 P.2d 60 (Ct. App. 1976).

Nor is determining degree of crime by amount of harm to victim. — Determining the degree of a crime by the amount of the harm done to the victim does not make the statute unconstitutionally vague. State v. Jiminez, 89 N.M. 652, 556 P.2d 60 (Ct. App. 1976).

Criminal sexual penetration could be committed by the use of force or coercion without the victim suffering personal injury as a result thereof, and the distinction between second and third degree criminal sexual penetration based on personal injury to the victim is not void for vagueness as a matter of law. State v. Jiminez, 89 N.M. 652, 556 P.2d 60 (Ct. App. 1976).

Legislation held too vague. — Portion of city vagrancy ordinance proscribing either loitering in, about or on any street, land, avenue, alley, any other public way, public place, at any public gathering or assembly or in or about any store, shop or business or commercial establishment, or on any private property or place without lawful business there; or loitering about or on any public, private or parochial school, college, seminary grounds or buildings, either on foot or in or on any vehicle, without lawful business there, was unconstitutional upon its face for vagueness and overbreadth, because it condemned acts as criminal to which no reasonable person would attribute wrongdoing or misconduct. Balizer v. Shaver, 82 N.M. 347, 481 P.2d 709 (Ct. App. 1971).

The provisions of 30-36-5 NMSA 1978, concerning the "totaling" of amounts of worthless checks, are so vague that they offend due process and are void. Not all of the section, however, is unconstitutional. Only the "totaling" provisions are void, and those provisions are severable. Severing the "totaling" provisions from the section leaves the remaining portion of that section consistent with 30-36-4 NMSA 1978, which makes an offense out of each worthless check issued. Where defendant was convicted of issuing four worthless checks, he could have been sentenced for each offense under the remaining portion of 30-36-5 NMSA 1978. Therefore, the trial court erred in dismissing the information. State v. Ferris, 80 N.M. 663, 459 P.2d 462 (Ct. App. 1969).

The term "lewdness" in 40-34-15, 1953 Comp., now repealed, if dissociated from "assignation or prostitution," would be too vague and indefinite to comply with the due process of law requirements. State ex rel. Murphy v. Morley, 63 N.M. 267, 317 P.2d 317 (1957) (holding term not intended to be dissociated).

Legislation held not too vague. — Section 30-6-2 NMSA 1978, making the abandonment of a dependent a criminal offense, is not unconstitutionally vague and does not violate due process, as the statute contains no requirement that affirmative action be taken to obtain public welfare benefits. State v. Villalpando, 86 N.M. 193, 521 P.2d 1034 (Ct. App.), cert. denied, 86 N.M. 189, 521 P.2d 1030 (1974).

Section 30-20-13C NMSA 1978, prior to the 1975 amendment thereof, allowed control of campus disturbances in terms marked by flexibility and reasonable breadth, rather than meticulous specificity, and was not void for vagueness. State v. Silva, 86 N.M. 543, 525 P.2d 903 (Ct. App.), cert. denied, 86 N.M. 528, 525 P.2d 888 (1974).

The term "constructive transfer" in the definition of "deliver" in the Controlled Substances Act, 30-31-2 G NMSA 1978, is not void under the due process clause on the grounds of vagueness. State v. McHorse, 85 N.M. 753, 517 P.2d 75 (Ct. App. 1973).

Defendant's argument as to unconstitutional vagueness of 30-31-23 B NMSA 1978 which makes possession of more than eight ounces of marijuana in the forms set out by statute a felony, was not well taken, since the language of definitional section 30-31-2 O NMSA 1978, coupled with 30-31-23 B(3) NMSA 1978, is not so indefinite that men of common intelligence have to guess at its meaning and scope. State v. Olive, 85 N.M. 664, 515 P.2d 668 (Ct. App.), cert. denied, 85 N.M. 639, 515 P.2d 643 (1973).

Sections 30-19-3F and 30-19-4 B NMSA 1978 are not void for vagueness because they provide different punishment for the same act, since the two statutes do not relate to the same activity. Section 30-19-3 F NMSA 1978 requires a positive act by an accused relating to commercial gambling, while 30-19-4 B NMSA 1978 connotes mere passive acquiescence in permitting a gambling device to be set up for use for the purpose of gambling in a place under his control. State v. Marchiondo, 85 N.M. 627, 515 P.2d 146 (Ct. App.), cert. denied, 85 N.M. 639, 515 P.2d 643 (1973).

Defendant's contention that the words "held to service against the victim's will" in 30-4-1 NMSA 1978 have no general meaning which the public can comprehend was not supported by argument or authority and cannot find support in reason, and therefore the statute is not so vague as to violate due process. State v. Aguirre, 84 N.M. 376, 503 P.2d 1154 (1972).

Section 30-16-32 NMSA 1978 is not unconstitutionally vague, the language "signs the name of another" (which defendant argued is vague and ambiguous because it can reasonably be interpreted in two distinct ways) has but one meaning, and that is that "another" means "other than oneself." State v. Sweat, 84 N.M. 416, 504 P.2d 24 (Ct. App. 1972).

Former 40A-9-9, 1953 Comp., defining sexual assault as the indecent handling of or indecent exposure in the presence of a person under the age of 16, when considered in light of statute as a whole, was sufficiently precise to meet due process standards. State v. Minns, 80 N.M. 269, 454 P.2d 355 (Ct. App.), cert. denied, 80 N.M. 234, 453 P.2d 597 (1969).

Since criminal intent is construed to be a necessary element of crime of possession of burglary tools, Laws 1925, ch. 63, § 1, was not void for indefiniteness and uncertainty under the constitution. State v. Lawson, 59 N.M. 482, 286 P.2d 1076 (1955). See 30-16-5 NMSA 1978.

Section 30-16-5 NMSA 1978, as to possession of burglary tools, gives notice that one is exposed to criminal sanctions if one: (1) possesses an instrument or device, (2) the instrument or device is designed or commonly used to commit burglary, and (3) the

instrument or device is possessed under circumstances evincing an intent to use the instrument or device in committing burglary, and thus the statute is not void for vagueness, since it gives fair warning that possession of the type of instrument described in the statute, and under the circumstances described in the statute, is a crime. State v. Najera, 89 N.M. 522, 554 P.2d 983 (Ct. App. 1976).

Neither 30-9-11 nor 30-9-13 NMSA 1978 is unconstitutionally vague or overbroad, nor do the statutes encourage arbitrary or discriminatory prosecution. State v. Pierce, 110 N.M. 76, 792 P.2d 408 (1990).

The terms "without good cause," "protracted period," "maliciously," "detaining," and "deprive permanently" as used in 30-4-4 NMSA 1978, the custodial interference statute, are of such well recognized meaning that individuals are placed on notice of the conduct sought to be proscribed and, therefore, the statute and indictments brought thereunder are not unconstitutionally vague. State v. Luckie, 120 N.M. 274, 901 P.2d 205 (Ct. App. 1995).

Implied consent to sobriety test is constitutional. — Implied Consent Law (see 66-8-105 to 66-8-112 NMSA 1978), framed upon the premise that when a person obtains a license to operate a motor vehicle, he impliedly consents to the sobriety test, violates neither due process nor equal protection. Commissioner of Motor Vehicles v. McCain, 84 N.M. 657, 506 P.2d 1204 (1973).

But abortion statute violates due process in part. — Portions of abortion statute, 30-5-1 NMSA 1978, which define "justified medical termination" (30-5-3 NMSA 1978 proscribes terminations that are not "justified medical terminations") as only existing where physician uses acceptable medical procedures in accredited hospitals upon certification by special hospital board that either continuation of pregnancy would result in death or grave injury to mother, child is likely to have grave physical or mental defects or pregnancy has resulted from rape or incest, are unconstitutional as violative of due process by virtue of holdings in Doe v. Bolton, 410 U.S. 179, 93 S. Ct. 739, 35 L. Ed. 2d 201, rehearing denied, 410 U.S. 959, 93 S. Ct. 1410, 35 L. Ed. 2d 694 (1973), and Roe v. Wade, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147, rehearing denied, 410 U.S. 959 93 S. Ct. 1410, 35 L. Ed. 2d 694 (1973). State v. Strance, 84 N.M. 670, 506 P.2d 1217 (Ct. App. 1973).

Return to state without warrant or waiver of extradition does not deny due process. — Defendants were not denied due process of law by their arrest in Arizona and return to New Mexico without warrant or waiver of extradition. The power of a court to try a person for a crime is not impaired by the manner with which he is brought within the court's jurisdiction. State v. Millican, 84 N.M. 256, 501 P.2d 1076 (Ct. App. 1972).

And valid arrest brings defendant properly before court. — Where appellant was arrested by drugstore owner who apprehended appellant outside his store in early morning, then appellant was properly arrested without warrant on probable cause, and appellant was properly before the justice of the peace (now magistrate) regardless of

validity of final complaint of the store owner. State v. Hudson, 78 N.M. 228, 430 P.2d 386 (1967).

Intrusion into spouse's home to effect arrest. — Chief of police's unlawful intrusion into spouse's home to effect husband's arrest conducted without her consent violated her right to be free from the deprivation of her property rights without due process of law. Montes v. Gallegos, 812 F. Supp. 1165 (D.N.M. 1992).

Evidence will be excluded for unfair conduct of police. — Where police conduct offends standards of fundamental fairness under the due process clause, the evidence is excluded. State v. Ramirez, 89 N.M. 635, 556 P.2d 43 (Ct. App. 1976), overruled on other grounds, City of Albuquerque v. Haywood, 1998-NMCA-029, 954 P.2d 93 (Ct. App. 1997).

But not evidence from search incident to lawful arrest. — The trial court properly denied defendant's motion to suppress evidence seized from his person, where defendant was arrested for public drunkenness (prior to repeal of the offense of drunkenness), and the police officer searched defendant finding a marijuana cigarette and a glasses case which contained heroin, since the full search of the person of the suspect made incident to a lawful custodial arrest does not violate the constitution, and having authority to search for the glasses case, the right to open it naturally followed. State v. Barela, 88 N.M. 446, 541 P.2d 435 (Ct. App. 1975).

There is no right to warning concerning consequences of refusing blood test. — Miranda-type warnings are necessary only in situations of either testimonial or communicative evidence, and New Mexico has consistently excluded physical evidence from the scope of the protection. It follows that an accused has no constitutional right to a warning concerning the consequences of refusing a blood test. State v. Myers, 88 N.M. 16, 536 P.2d 280 (Ct. App. 1975).

And failure to give warnings is not prejudicial if statement is not made. — Failure of the police to advise the petitioner of his right to counsel or of his right to remain silent prior to their interrogation of him has not been shown to have prejudiced him at the trial where no statement was in fact made nor was any testimony offered at the trial concerning any statement asserted to have been made by him and there is nothing showing that the officers may have obtained evidence of any nature as a result of petitioner's statements. State v. Selgado, 78 N.M. 165, 429 P.2d 363 (1967).

Admitting statement on form containing warnings is not prejudicial. — Where petitioner had no attorney when the statement was given and claims that he had not been advised that he did not have to make any statement at all, and that if he did make a statement, it could be used against him in a trial, no prejudice is shown where it was typed on the form that he did not have to make any statement and a codefendant who was at the time represented by counsel also gave a statement which was admitted in evidence by the trial court after a foundation as to its voluntary character had been ruled on by the judge. Pearce v. Cox, 74 N.M. 591, 396 P.2d 422 (1964).

But statements induced by promise not kept invalidate proceedings. — When after petitioners gave statements to police upon reliance of a police detective, who after consultation with an assistant district attorney represented to the petitioners that if they would give the signed statements to the police department setting forth the nature and extent of their involvement, knowledge and other activities in connection with the murder of decedent, they would not be charged with the murder if they did not actually kill her, if petitioners were charged with murder, such a proceeding was invalid as it denied defendants due process of law. State ex rel. Plant v. Sceresse, 84 N.M. 312, 502 P.2d 1002 (1972).

And confession not shown voluntary may not be used for impeachment. — Admission of evidence of prior confession to impeach a defendant represents a denial of due process where voluntariness of such confession has not been shown and defendant denies or claims inability to recall the statement. State v. Turnbow, 67 N.M. 241, 354 P.2d 533, 89 A.L.R.2d 461 (1960).

Minority alone is not enough to require a conclusion that confessions are involuntary and inadmissible, but rather the age of the defendants is a factor to be considered when appraising the character of the confessions as voluntary or not. State v. Ortega, 77 N.M. 7, 419 P.2d 219 (1966).

And failure to advise of juvenile rights with other warnings does not taint confessions. — Where juveniles were advised of their rights guaranteed in criminal proceedings without any qualifications concerning age or representations with regard to rights to be treated as juveniles, if any illegality was present because the confessions were taken while the defendants were technically in the custody of the juvenile court, such fact did not taint the confessions to such an extent as to make them involuntary or to make their use "fundamentally unfair." State v. Ortega, 77 N.M. 7, 419 P.2d 219 (1966).

Nor does failure to notify parents or provide counsel immediately to drunk juveniles. — That the parents of juvenile defendants were not advised of the juveniles' arrest, nor were the defendants immediately turned over to the juvenile authorities or provided legal counsel, and, furthermore, evidence of defendant's drinking and general physical conditions at the time of arrest did not necessitate a conclusion that defendant's confession was obtained by a denial of due process. State v. Ortega, 77 N.M. 7, 419 P.2d 219 (1966).

Admitting evidence of suggestive identification denies due process. — The manner of an extra-judicial identification affects the admissibility of identification evidence at trial. If the extra-judicial identification, such as a lineup, was unnecessarily suggestive and conducive to irreparable mistaken identification, a defendant would be denied due process if evidence concerning such an extra-judicial identification was admitted at his trial. State v. Torres, 81 N.M. 521, 469 P.2d 166 (Ct. App.), cert. denied, 81 N.M. 506, 469 P.2d 151 (1970).

All circumstances must be considered. — A claimed violation of due process of law in the conduct of a confrontation depends on the totality of the circumstances surrounding it. The fairness of the lineup requires consideration of the totality of the circumstances. State v. Torres, 81 N.M. 521, 469 P.2d 166 (Ct. App.), cert. denied, 81 N.M. 506, 469 P.2d 151 (1970).

And evidentiary hearing on fairness held. — Where there is an issue as to an "illegal taint," the issue is to be resolved by a consideration of the totality of the circumstances surrounding the out-of-court identification. This requires an evidentiary hearing. State v. Turner, 81 N.M. 571, 469 P.2d 720 (Ct. App. 1970).

Where defendant had informed the trial court that he would call additional witnesses concerning the fairness of a lineup procedure, but the trial court ruled without permitting the additional witnesses to testify, the trial court did not decide whether under all the circumstances the lineup procedure was so unfair that evidence as to the lineup identification should have been excluded. Accordingly, court of appeals vacated the conviction and sentence pending the trial court's determination. State v. Torres, 81 N.M. 521, 469 P.2d 166 (Ct. App.), cert. denied, 81 N.M. 506, 469 P.2d 151 (1970).

Unless it is clear no claim of unfairness could be made. — Where during preparations for a lineup, there was a confrontation between defendant and the victim, and the victim identified defendant as the perpetrator of the crime immediately after this confrontation, but where both parties agreed that the confrontation was inadvertent, defendant's claim that he was entitled to an evidentiary hearing to determine whether the victim's in-court identification of defendant was tainted by the identification made after the inadvertent confrontation was without merit, since, on the basis of defendant's own representations to the court, no claim could be made of the presence or the influence of any improper suggestion exerted by the police. State v. Turner, 81 N.M. 571, 469 P.2d 720 (Ct. App. 1970).

The one-to-one confrontation is not an unwarranted practice, because, under some circumstances, it may tend to insure accuracy in the identification, and there is no basis for a per se exclusionary rule because such confrontations are not per se violative of due process; absent special elements of unfairness, prompt on-the-scene confrontations do not violate due process. State v. Torres, 88 N.M. 574, 544 P.2d 289 (Ct. App. 1975).

And identification from driver's license photo may be shown. — Where victim's testimony was to the effect that intruder was in her presence for approximately an hour and 40 minutes and at the police station she described the intruder by height, style of haircut and "big lips," the fact that a policeman showed the victim a driver's license photograph when victim knew the driver's license came from the wallet she had taken from the rapist's pocket did not make it error to admit evidence of the out-of-court identification of defendant from the photographs, and the victim's in-court identification of the defendant was not inadmissible because of taint by an illegal pretrial identification. State v. Baldonado, 82 N.M. 581, 484 P.2d 1291 (Ct. App. 1971).

Improper extra-judicial identification does not require exclusion of untainted in-court identification. — Even where there has been an improper extra-judicial identification, this fact does not require the exclusion of an in-court identification which is independent of and not tainted by the extra-judicial identification. State v. Torres, 81 N.M. 521, 469 P.2d 166 (Ct. App.), cert. denied, 81 N.M. 506, 469 P.2d 151 (1970).

The right to counsel at a lineup is essential to due process. State v. Garcia, 80 N.M. 21, 450 P.2d 621 (1969) (rule not retroactive and so inapplicable).

For former rule, see State v. Tipton, 78 N.M. 600, 435 P.2d 430 (1967).

Showing counsel was present does not require mistrial. — Where the state elicited the fact that defendant engaged in constitutionally protected conduct (having a lawyer present at a lineup) only to show the fairness of the lineup procedure, defendant was not harmed by testimony that defendant had a right to counsel, and the trial court properly denied his motion for a mistrial. State v. McGill, 89 N.M. 631, 556 P.2d 39 (Ct. App. 1976).

Where defendant was not harmed by evidence. — Defendant's argument that if the exercise of defendant's right to counsel lacked significant probative value, any reference to the exercise of the right had an intolerable prejudicial impact requiring reversal, was without merit since the relevant question is whether the particular defendant has been harmed by the state's use of the fact that he engaged in constitutionally protected conduct, not whether, for the particular defendant or for persons generally, the state's reference to such activity has burdened or will burden the exercise of the constitutional right. State v. McGill, 89 N.M. 631, 556 P.2d 39 (Ct. App. 1976).

Preindictment delay is not grounds for dismissal unless prejudicial. — To obtain a dismissal for preindictment delay defendant must show that he has been substantially prejudiced. Here the contentions of prejudice in the trial court were (1) that a nine-month delay, between arrest and indictment, was a showing of prejudice and (2) that because defendant was intoxicated at the time of the offense he had a memory problem which had been compounded by the nine-month delay. Neither claim was a showing of substantial prejudice, and the delay was not a violation of due process. State v. Tafoya, 91 N.M. 121, 570 P.2d 1148 (Ct. App. 1977).

Delay of 40 days between the commission of the offense and the arrest of defendant was not in itself suggestive of prejudice. State v. Polsky, 82 N.M. 393, 482 P.2d 257 (Ct. App.), cert. denied, 82 N.M. 377, 482 P.2d 241 (1971), cert. denied, 404 U.S. 1015, 92 S. Ct. 688, 30 L. Ed. 2d 662 (1972).

Where there is nothing in the record indicating that appellant was prejudiced in the delay in arraignment, the delay in holding a preliminary hearing is not a denial of due process. State v. Olguin, 78 N.M. 661, 437 P.2d 122 (1968).

Unless the preliminary delay in some way deprives an accused of a fair trial, there is no denial of due process of law. This is the rule in the federal as well as in the state courts. State v. Henry, 78 N.M. 573, 434 P.2d 692 (1967).

Absent prejudice in the fact that 22 days elapsed from the time minor was arrested until he appeared before the juvenile court, when counsel was appointed for him, he has not been denied due process of law. State v. Henry, 78 N.M. 573, 434 P.2d 692 (1967).

Some personal discomfort, occasioned by being jailed for a few hours awaiting preliminary examination, does not constitute a denial of due process or equal protection, nor can it be said to constitute cruel and unusual punishment. Christie v. Ninth Judicial Dist., 78 N.M. 469, 432 P.2d 825 (1967).

Undeniably, delay in charging a person as a habitual criminal involves due process. State v. Santillanes, 98 N.M. 448, 649 P.2d 516 (Ct. App. 1982).

Where a defendant was arrested and released, and was indicted approximately 21 months later, and all of his alibi witnesses had died in the interim, any prejudice to the defendant was outweighed by the reasons for the delay. State v. Gonzales, 110 N.M. 218, 794 P.2d 361 (Ct. App. 1990), aff'd, 111 N.M. 363, 805 P.2d 630 (1991).

And same rule applies to delay in appointing counsel. — Where the record does not show any prejudice from delays in the appointment of counsel or in holding the preliminary examination, and no prejudice is claimed, there was no denial of due process. State v. Paul, 83 N.M. 527, 494 P.2d 189 (Ct. App. 1972).

The taking of handwriting exemplars is not a "critical" stage of the criminal proceedings entitling the accused to the assistance of counsel. State v. Sneed, 78 N.M. 615, 435 P.2d 768 (1967).

Infringement of right to counsel depends on circumstances of case. — The obligation of the state court trial judge to fully safeguard the right to counsel has been stated many times by the United States supreme court. That court has stated that no hard and fast rule may be promulgated whereby it can be determined that a defendant's constitutional right to due process of law has been infringed. Rather, this determination must turn on the particular facts of each case, the circumstances present which shall include consideration of the background, training, experience and conduct of the defendant. State v. Coates, 78 N.M. 366, 431 P.2d 744 (1967).

Limitation upon appointed counsel's fee is constitutional. — Defendant's argument that the statutory attorney fee limitation of $400 in defense of indigent criminal cases (31-16-8 NMSA 1978) was a denial of equal protection and due process was without merit where there was no claim that the defendant was poorly represented, nor were there any facts indicating how the statutory fee limitation so deprived the defendant. State v. Silver, 83 N.M. 1, 487 P.2d 910 (Ct. App. 1971).

Right only denied when trial becomes "sham" or "farce". — Mere improvident strategy, bad tactics, mistake, carelessness or inexperience do not amount to ineffective assistance of counsel, unless taken as a whole the trial was a "mockery of justice." Otherwise expressed, counsel is presumed competent, and a defendant is denied his right only when the trial becomes a "sham" or a "farce." State v. Walburt, 78 N.M. 605, 435 P.2d 435 (1967).

Advice to plead guilty and inexperience are not incompetence. — The constitutional guarantee of assistance of counsel in a criminal action implies the "effective assistance of counsel." The fact, however, that an attorney advises his client to plead guilty in the hope of obtaining a lighter sentence is not an indication of incompetence, nor can inexperience be treated as the equivalent of incompetence. State v. Walburt, 78 N.M. 605, 435 P.2d 435 (1967).

Adequacy of representation in prior trial is issue under habitual criminal statute. — Question of the adequacy of representation so as to meet the requirements of due process in a prior trial and conviction in another state may be raised as an issue under the habitual criminal statute. State v. Dalrymple, 75 N.M. 514, 407 P.2d 356 (1965).

Factors considered in time necessary to prepare defense. — The nature of the offense, the number of witnesses and the skill of the attorney are all variables to be taken into consideration in each case in considering the amount of time necessary to prepare a defense. State v. Nieto, 78 N.M. 155, 429 P.2d 353 (1967).

Police regulation prohibiting consulting attorney for four hours. — Where defendant, accused of driving while intoxicated, was refused permission to contact his attorney and personal physician following booking by reason of police regulation that would not permit person arrested for intoxication to consult an attorney for four hours after arrest, but was treated by physician at county hospital within 30 minutes after reaching police headquarters, constitutional right to due process was not denied. City of Albuquerque v. Patrick, 63 N.M. 227, 316 P.2d 243 (1957).

Withholding evidence from grand jury. — It is not a violation of due process for the prosecutor to withhold circumstantial exculpatory evidence from the grand jury; he is obligated to present only direct exculpatory evidence. Buzbee v. Donnelly, 96 N.M. 692, 634 P.2d 1244 (1981);.

Material false evidence in grand jury proceeding violates due process. — The knowing use of false evidence or the failure to correct false evidence at grand jury proceeding is a violation of due process where the evidence was material to the guilt or innocence of the accused. Where the only grand jury witness upon whose testimony the indictment was based gave false testimony, indictment based on such evidence violated defendant's right to due process. State v. Reese, 91 N.M. 76, 570 P.2d 614 (Ct. App. 1977).

And defendant could be denied due process by a prosecutor withholding exculpatory evidence from the jury, since the grand jury has a duty to protect a citizen against unfounded accusation, and only specified persons are authorized by statute to present matters to the grand jury. State v. McGill, 89 N.M. 631, 556 P.2d 39 (Ct. App. 1976).

But if circumstances show deprivation of fundamental fairness. — Failure to inform the grand jury that in two of the robberies of which defendant was accused, fingerprints were found which did not match defendant's fingerprints, where in connection with these robberies there was positive identification that defendant was the robber and testimony by a detective that a victim had identified defendant in a lineup where she had not done so and stated that she was not sure by the faces but was by the voices, did not amount to a deprivation of fundamental fairness on the basis of evidence withheld from the grand jury, and there was no denial of due process. State v. McGill, 89 N.M. 631, 556 P.2d 39 (Ct. App. 1976).

Information not stating date of offense may be void. — The information charging defendant with sodomy was void for failure to give him notice of the charges against him where it failed to state the date of the offense so as to specify which of three different acts subsequently testified to by the state's principal witness was charged, and defendant's conviction was reversed. State v. Foster, 87 N.M. 155, 530 P.2d 949 (Ct. App. 1974).

And using initials to identify offense denies due process. — The use of initials instead of words in a criminal complaint to identify the offense deprives defendant of due process of law. State v. Raley, 86 N.M. 190, 521 P.2d 1031 (Ct. App.), cert. denied, 86 N.M. 189, 521 P.2d 1030 (1974).

But stating common name of offense, date and place suffices. — Where defendant's indictment for criminal trespass charged him with violation of a specific statutory section, stating the common name of the offense, a specific date of the offense, and that the offense occurred in McKinley county, New Mexico, it sufficiently informed defendant of what he must be prepared to meet and did not deprive him of due process. State v. Cutnose, 87 N.M. 307, 532 P.2d 896 (Ct. App.), cert. denied, 87 N.M. 299, 532 P.2d 888 (1974).

Reference to repealed section where offense otherwise charged does not violate rights. — Defendant was not deprived of liberty without due process of law nor denied equal protection of the law under this section merely because the information charging him with embezzlement incorrectly referred to a repealed section, since the offense was otherwise sufficiently charged. Smith v. Abram, 58 N.M. 404, 271 P.2d 1010 (1954).

There is nothing unfair about charging the defendant in the alternative with fraud or embezzlement, particularly where the charges arose out of the same events and carry the same penalties, and defendant is furnished with a most detailed statement of fact, including the complete district attorney's file, police reports and a citation of

authorities the state is relying on in support of each of the alternative charges. State v. Ortiz, 90 N.M. 319, 563 P.2d 113 (Ct. App. 1977).

Multiplicity of counts held not unfair. — Where four of the eight counts against defendant were dismissed, and the jury acquitted on two counts and convicted on two counts, his argument that the multiplicity of counts and the evidence introduced in connection with those counts deprived him of a fair trial was not supported by the record. State v. Lucero, 90 N.M. 342, 563 P.2d 605 (Ct. App. 1977).

Due process requires notice and an opportunity to be heard before bond can be revoked and a defendant remanded to custody. Tijerina v. Baker, 78 N.M. 770, 438 P.2d 514 (1968).

Due process only requires fair and impartial tribunal. — When analyzed with respect to the tribunal hearing a case, due process generally only requires that the tribunal be fair and impartial. Tsiosdia v. Rainaldi, 89 N.M. 70, 547 P.2d 553 (1976).

Municipal judge need not be attorney. — Fairness is not so inextricably tied to the education of an attorney that without a legal education a municipal court judge cannot be fair. Tsiosdia v. Rainaldi, 89 N.M. 70, 547 P.2d 553 (1976).

Allowing nonattorney police court judges to preside over criminal cases arising from violations of municipal ordinances which are punishable by incarceration does not violate rights guaranteed by the state and federal constitutions. Tsiosdia v. Rainaldi, 89 N.M. 70, 547 P.2d 553 (1976).

Attorney, not judge, is chief guardian of defendant's rights. — The legal system is primarily of an adversary nature, the guardianship of the defendant's rights lying chiefly with his attorney, not the judge, and rights not asserted by the defendant's attorney generally are waived. Tsiosdia v. Rainaldi, 89 N.M. 70, 547 P.2d 553 (1976).

Voluntary guilty plea on advice of counsel is binding. — An involuntary plea of guilty is inconsistent with the constitutional guarantee of due process, but when a plea of guilty is made voluntarily after proper advice of counsel and with a full understanding of the consequences, the plea is binding. State v. Robbins, 77 N.M. 644, 427 P.2d 10, cert. denied, 389 U.S. 865, 88 S. Ct. 130, 19 L. Ed. 2d 137 (1967).

The trial court is not obligated to explain the effect of a guilty plea entered by a defendant represented by counsel. State v. Tipton, 78 N.M. 600, 435 P.2d 430 (1967).

Counsel may be waived without deprivation of due process. — In case where sentencing court repeatedly cautioned appellant concerning gravity of habitual criminal charge, and where appellant's answers to questions by the court were by his own admission voluntarily given and where each of the prior convictions was freely acknowledged, the waiver of counsel was intelligently made, the appellant was not deprived of due process and, therefore, the district court's denial of the motion to vacate

sentence made under Rule 93, N.M.R. Civ. P. (see now Rule 5-802 NMRA) (which only applies to post-conviction motions made prior to September 1, 1975), was correct. State v. Coates, 78 N.M. 366, 431 P.2d 744 (1967).

Waiver of rights in Spanish may satisfy due process. — Where the record reflected defendant's waiver in Spanish of his constitutional rights, the court of appeals took judicial notice of its English interpretation, and agreed with the trial court that the language of the waiver satisfied the requirements of due process. State v. Ramirez, 89 N.M. 635, 556 P.2d 43 (Ct. App. 1976), overruled on other grounds, City of Albuquerque v. Haywood, 1998-NMCA-029, 954 P.2d 93 (Ct. App. 1997).

Waiving jury trial by voluntary guilty plea does not deny rights. — Where the record showed that defendant acknowledged his guilt and the trial court accepted his guilty plea, the court held defendant had waived his right to a jury trial and the execution of that waiver did not deny defendant due process or equal protection. State v. Brill, 81 N.M. 785, 474 P.2d 77 (Ct. App.), cert. denied, 81 N.M. 784, 474 P.2d 76 (1970).

But involuntary guilty plea is void. — A judgment and sentence cannot stand if based upon an involuntary plea of guilty induced by an unkept promise of leniency. A guilty plea induced by either promises or threats which deprive it of the character of a voluntary act is void and subject to collateral attack. To withhold the privilege of withdrawing a guilty plea in order to reassume the position occupied prior to its entry would constitute a denial of due process of law. State v. Ortiz, 77 N.M. 751, 427 P.2d 264 (1967).

Same rule applies to plea of nolo contendere. — If a plea of nolo contendere is entered under circumstances which render its acceptance fundamentally unfair or shocking to a sense of justice, the resulting conviction violates the due process clause. State v. Raburn, 76 N.M. 681, 417 P.2d 813 (1966).

Peremptory challenges by multiple defendants. — In a prosecution for first degree murder, the defendant was not denied due process of law because the trial court failed to permit him to exercise 12 peremptory challenges for himself, but instead allowed the defendant and codefendant a total of 14 challenges. Multiple defendants have no constitutional right to more peremptory challenges than given them by rule, provided they are given a fair trial by an impartial jury. State v. Sutphin, 107 N.M. 126, 753 P.2d 1314 (1988).

Conviction of an accused while he is legally incompetent violates due process of law. State v. Guy, 79 N.M. 128, 440 P.2d 803 (Ct. App. 1968).

But the presumption of sanity does not deny a defendant due process of law. It merely gives the defendant the burden of going forward with evidence of insanity; if he meets this burden, his sanity must be proved by the state beyond a reasonable doubt; if he fails to meet this burden, by introducing no evidence of insanity, by offering evidence disbelieved by the jury, or by offering evidence insufficient to rebut the presumption, the

presumption of sanity decides the issue. State v. Lujan, 87 N.M. 400, 534 P.2d 1112, cert. denied, 423 U.S. 1025, 96 S. Ct. 469, 46 L. Ed. 2d 400 (1975).

Examination by defendant's psychiatrist suffices, and under such circumstances, the state has no duty by constitutional mandate to furnish additional mental examinations. State v. Walburt, 78 N.M. 605, 435 P.2d 435 (1967).

Alibi rule does not violate due process. — Since New Mexico's alibi rule, Rule 32, N.M.R. Crim. P. (see now Rule 5-508 NMRA), provides for reciprocal discovery rights and provides ample opportunity for an investigation of the facts, it does not violate due process. State v. Smith, 88 N.M. 541, 543 P.2d 834 (Ct. App. 1975).

Nor does holding wrongful administrative action. — There is no violation of due process if a state court interpreting a state statute holds that a wrongful administrative action is no defense to a criminal prosecution and requires the defendant to seek correction of the wrongful action in civil proceedings; assuming the curtailment of inspections at defendant's plant was unauthorized, defendant had the choice of complying with the curtailment and thus not slaughtering and selling contrary to the statute, or petitioning the district court to require the inspections to continue, and when he did neither, but proceeded to violate the law, his violation would not be excused on the basis that an administrative official proceeded improperly. State v. Pina, 90 N.M. 181, 561 P.2d 43 (Ct. App. 1977).

Entrapment involves due process. — Entrapment, whether subjective or objective, involves matters of due process under this section. State v. Vallejos, 1997-NMSC-040, 123 N.M. 739, 945 P.2d 957.

Entrapment is not a defense of constitutional dimension, and New Mexico is not therefore bound to apply the law as announced by the United States supreme court. State v. Fiechter, 89 N.M. 74, 547 P.2d 557 (1976).

And justifies inquiry into defendant's predisposition. — In entrapment cases, the focal issue is the intent or predisposition of the defendant to commit the crime, and if the defendant seeks acquittal by reason of entrapment, he cannot complain of an appropriate and searching inquiry into his own conduct and predisposition as bearing upon that issue. State v. Fiechter, 89 N.M. 74, 547 P.2d 557 (1976).

Trickery and subornation of perjury by state denies due process. — In a criminal trial denial of due process is the failure to observe the fundamental fairness essential to the very concept of justice, and in order to declare a denial of it there must be found that the absence of that fairness fatally infected the trial; if, by fraud, collusion, trickery and subornation of perjury on the part of those representing the state, the trial of an accused person results in his conviction, he has been denied due process of law. State v. Morris, 69 N.M. 244, 365 P.2d 668 (1961).

As does personal projection of prosecutor into case. — Where the prosecuting attorney repeatedly projected himself personally into the trial events and upon one occasion the trial court engaged in a colloquy with the defendant upon a personal basis, although appellant failed to make timely objection to the conduct of the prosecutor or to the remarks of the court, prejudice resulted and denied appellant his right to a fair and impartial trial. Edgington v. United States, 324 F.2d 491 (10th Cir. 1963).

Or deliberate use of material false evidence. — The deliberate use of false evidence knowingly by a prosecuting officer in a criminal case constitutes a denial of due process of law if such evidence is material to the guilt or innocence of the accused, and the same result obtains when the state, although not soliciting false evidence, allows it to go uncorrected when it appears. It was held that the state's failure to correct false evidence which it had elicited concerning alleged bribes, which the state acknowledged was material as it went to the defense of entrapment, required that defendant be granted a new trial. State v. Hogervorst, 87 N.M. 458, 535 P.2d 1084 (Ct. App.), cert. denied and quashed, 87 N.M. 457, 535 P.2d 1083 (1975).

Or suppression of requested favorable evidence. — Suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. State v. Turner, 81 N.M. 571, 469 P.2d 720 (Ct. App. 1970).

If evidence is material and defendant is prejudiced. — The deliberate suppression of evidence or the use of false evidence knowingly by a prosecuting officer in a criminal case constitutes a denial of due process of law if such evidence is material to the guilt or innocence of the accused, or to the penalty to be imposed, but the failure to show materiality of the suppressed evidence, that the prosecution's chief witness had married prior to trial but after preliminary hearing and had sworn and testified under maiden name, or prejudice resulting therefrom, renders the rule inapplicable. State v. Morris, 69 N.M. 244, 365 P.2d 668 (1961).

But negligent investigation does not amount to suppression. — That the sheriff and the other investigating officers negligently failed to properly investigate and to preserve evidence at the scene of the homicide, or to make certain tests and measurements, does not amount to suppression of evidence bearing on self-defense or justification and deny due process of law. State v. Rose, 79 N.M. 277, 442 P.2d 589 (1968), cert. denied, 393 U.S. 1028, 89 S. Ct. 626, 21 L. Ed. 2d 571 (1969).

State's failure to gather evidence. — Defendant's due process rights were not violated by the police only photographing the rock allegedly used to batter the defendant's girlfriend, rather than actual collecting it as physical evidence. State v. Ware, 118 N.M. 319, 881 P.2d 679 (1994).

Failure to introduce evidence referred to in opening statement. — Where prosecutor in his opening statement indicated the jury would hear testimony as to the blood type of defendant and of the victim of the assault, but where no attempt was

made to prove either of the blood types, this did not amount to misconduct on the part of the prosecutor requiring a reversal unless the prosecutor acted in bad faith. State v. Torres, 81 N.M. 521, 469 P.2d 166 (Ct. App.), cert. denied, 81 N.M. 506, 469 P.2d 151 (1970).

Due process requires proof beyond reasonable doubt. — Proof beyond a reasonable doubt is the traditional burden which our system of criminal justice deems essential, and the due process clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged; this standard applies not only to factual determinations of guilt, but also to the factual determination that a firearm was used, because that fact is a predicate for enhancing defendant's sentence. State v. Kendall, 90 N.M. 236, 561 P.2d 935 (Ct. App. 1977).

Lack of evidence on crucial element violates due process. — A conviction based on a record lacking any relevant evidence as to a crucial element of the offense charged violates due process. Smith v. State, 89 N.M. 770, 558 P.2d 39 (1976).

Where the record disclosed absolutely no evidence of knowledge by juvenile respondents, adjudged delinquent because of alleged possession of marijuana, of the character of the item they allegedly possessed, it was held that their fundamental rights were violated, in that serious questions as to their innocence were raised; consequently, the causes against the respondents were dismissed and all records thereof were ordered destroyed. Doe v. State, 88 N.M. 347, 540 P.2d 827 (Ct. App.), cert. denied, 88 N.M. 318, 540 P.2d 248 (1975).

It is a fundamental right of a party to be convicted of a crime, which is a necessary prerequisite to a determination of delinquency, based upon evidence of the elements of the crime, and in a prosecution for a violation of 30-31-23 NMSA 1978, the state must prove that the respondents had knowledge of the presence and character of the item possessed; a degree of furtiveness on the parts of juvenile respondents, in doing their smoking and passing a pipe around between buildings while changing classes, in light of a school regulation prohibiting the smoking of tobacco, was not conduct sufficient to imply that the smokers knew the character of the substance they were using. Doe v. State, 88 N.M. 347, 540 P.2d 827 (Ct. App.), cert. denied, 88 N.M. 318, 540 P.2d 248 (1975).

Generally, evidence of other crimes is prejudicial. — A person put on trial for an offense is to be convicted, if at all, on evidence showing he is guilty of that offense. The defendant is not to be convicted because, generally, he is a bad man, or has committed other crimes. Evidence of other offenses tends to prejudice the jury against the accused and predispose the jury to a belief in defendant's guilt. Thus, the established New Mexico procedure, with certain exceptions, is that proof of separate criminal offenses is not admissible, and it is prejudicial error to admit such proof. State v. Garcia, 83 N.M. 51, 487 P.2d 1356 (Ct. App. 1971).

But accused may be impeached by criminal record if he testifies. — An accused may hesitate to take the witness stand if his past criminal record is such that his credibility will probably be completely destroyed in the eyes of the jury if this record is made known to the jury. However, this in no way impairs his right against self-incrimination, his right not to be deprived of his life, liberty or property without due process of law, nor his right to a public trial by an impartial jury. State v. Duran, 83 N.M. 700, 496 P.2d 1096 (Ct. App.), cert. denied, 83 N.M. 699, 496 P.2d 1095 (1972).

And evidence of another crime is admissible to establish his identity. — Prior to enactment of the Rules of Evidence, evidence of other crimes was admissible if it served to establish the identity of the person charged. Therefore, evidence of defendant's fingerprint at scene of another crime was admissible for impeachment purposes on the issue of identity, since it tended to establish that identity by characteristic conduct. State v. Turner, 81 N.M. 571, 469 P.2d 720 (Ct. App. 1970).

And experts in lie detection may be asked about collateral offenses. — Prior to enactment of the Rules of Evidence, it was not error to allow prosecution to ask experts who administered certain deception tests (polygraph, hypnosis, sodium amytol) whether they had been informed of certain collateral offenses committed by defendant and how they had evaluated such information in reaching their conclusions concerning defendant's guilt or innocence. State v. Turner, 81 N.M. 571, 469 P.2d 720 (Ct. App. 1970).

Questioning witnesses, knowing they will invoke privilege not to answer. — Where the prosecutor knew that nondefendant witnesses would invoke their constitutional privilege when questioned as to their misconduct, and where the trial court in its discretion decided that the legitimate effect of such questioning - the attack on credibility - was not outweighed by prejudice to the defendant, the prosecutor's questioning was not improper and defendant was not denied due process. State v. McFerran, 80 N.M. 622, 459 P.2d 148 (Ct. App.), cert. denied, 80 N.M. 731, 460 P.2d 261 (1969).

Admitting polygraph tests is proper. — The rule that polygraph test results are inadmissible except when inter alia the tests are stipulated to by both parties to the case and no objection is offered at trial is: (1) mechanistic in nature; (2) inconsistent with the concept of due process; (3) repugnant to the announced purpose and construction of the New Mexico Rules of Evidence; and (4) particularly incompatible with the purposes and scope of Rules 401, 402, 702 and 703, N.M.R. Evid. (see now Rules 11-401, 11-402, 11-702 and 11-703 NMRA). State v. Dorsey, 88 N.M. 184, 539 P.2d 204 (1975).

Where the unchallenged findings of the trial court in a murder trial recognized that defendant's profferred polygraph results were attended by circumstances of considerable reliability and the testimony was crucial to the defense on the question of intent and provocation, due process required the admission of the polygraph evidence. State v. Dorsey, 87 N.M. 323, 532 P.2d 912 (Ct. App.), aff'd, 88 N.M. 184, 539 P.2d 204.

Loss of rock allegedly used by murder victim against defendant. — In murder case, where defendant allegedly shot decedent in a fight, and where it was not disputed that decedent struck defendant with a rock, the only dispute being whether defendant pulled the gun before or after being hit with the rock, the loss of the rock did not deprive defendant of due process. State v. McFerran, 80 N.M. 622, 459 P.2d 148 (Ct. App.), cert. denied, 80 N.M. 731, 460 P.2d 261 (1969).

Use of testimony from first trial held unfair under circumstances. — Where defendant was tried for murder for second time, use of the deceased witness's first trial testimony at the new trial violated this constitutional provision, because of the uncontradicted showing that at the first trial counsel proceeded under an arrangement which considered only the question of defendant's sanity, and gave no consideration to defendant's guilt or innocence, that the deceased witness had been questioned largely as a role-playing exercise by defense attorney, and that the trial judge later rejected the agreement between counsel about the insanity defense and found defendant guilty; use of deceased witness's testimony concerning guilt was fundamentally unfair under these circumstances because under the arrangement between counsel there was to be no meaningful inquiry concerning guilt. State v. Slayton, 90 N.M. 447, 564 P.2d 1329 (Ct. App. 1977).

Court's failure to call eyewitnesses itself does not deny due process. — Refusal of trial court to call eyewitnesses to a killing as witnesses of the court did not deny due process to defendant. Absent a rare instance, such as where the prosecuting attorney informed the court that a witness was available, but the prosecutor declined to call him because he could not vouch for his truthfulness and veracity, the trial court should not call a witness in a criminal case, particularly where the case is being tried before a jury. State v. McFerran, 80 N.M. 622, 459 P.2d 148 (Ct. App.), cert. denied, 80 N.M. 731, 460 P.2d 261 (1969).

Blood sample from unconscious defendant is admissible. — The admission in a prosecution for involuntary manslaughter of evidence based on the results of a blood test made of a blood sample taken from the defendant while he was unconscious, the use of which was protested both at the preliminary hearing and at the trial in district court, was not a denial of due process. Breithaupt v. Abram, 58 N.M. 385, 271 P.2d 827 (1954), aff'd, 352 U.S. 432, 77 S. Ct. 408, 1 L. Ed. 2d 448 (1957).

Proof of accuracy of testing machine by lay witnesses. — Defendant was afforded due process where the accuracy of the testing machine was supported by lay testimony, subject to full rights of cross-examination by defendant, and his right to cross-examine and confront the witnesses against him was not abridged. State v. Myers, 88 N.M. 16, 536 P.2d 280 (Ct. App. 1975).

No right to demand immunity for defense witness. — A defendant has no sixth amendment right to demand that any witness he chooses be immunized, and the prosecution's refusal to grant immunity to a defense witness who would allegedly offer exculpatory testimony to a defendant does not amount to a denial of due process or a

violation of sixth amendment rights. State v. Sanchez, 98 N.M. 428, 649 P.2d 496 (Ct. App. 1982).

When admitting improper evidence without objection is fundamental error. — Defendant's assertion that the admission of irrelevant and prejudicial evidence that defendant wrecked the automobile he was accused of taking and that he refused medical treatment so deprived him of due process of law that his conviction should be reversed despite the fact that no objection was made was without merit, since the doctrine of fundamental error is to be resorted to in criminal cases only if the innocence of the defendant appears indisputable, the question of his guilt being so doubtful that it would shock the conscience to permit his conviction to stand, and the record did not disclose the presence of these elements. State v. Gomez, 82 N.M. 333, 481 P.2d 412 (Ct. App. 1971).

A ruling on a motion for continuance rests within the sound discretion of the court and will not be interfered with unless the record shows an abuse of such discretion. State v. Nieto, 78 N.M. 155, 429 P.2d 353 (1967).

Improper comment upon consequences of verdict. — Judge who was critical of the legal system during voir dire, implying that the system is governed by legislative whim rather than by well-settled principles, and who told the jury during trial of the consequences of their verdict, in terms of the mandated sentences for first- and second-degree murder, committed reversible error by depriving defendant of a fair trial. State v. Henderson, 1998-NMSC-018, 125 N.M. 434, 963 P.2d 511.

Trial judge's remarks held not to prevent fair trial. — Comments by the trial court to defense counsel that "you shouldn't be calling people like that as a witness," referring to an individual who had not been called by the defense, and that "if you don't want your witnesses cross-examined, don't call them," although indicative of impatience, did not display bias against or in favor of a party, nor did they amount to an undue interference by the trial court or show such a severe attitude that proper presentation of the cases was prevented, and consequently, the remarks did not deprive defendant of a fair trial. State v. Herrera, 90 N.M. 306, 563 P.2d 100 (Ct. App. 1977).

The evidentiary basis for the indictment was not a matter for argument to the trial jury because it was irrelevant to the question of guilt or innocence, and the trial court could properly interrupt counsel's argument and require that the argument stay within matters pertinent to the trial; the interruption did not amount to judicial misconduct nor deny defendant a fair trial. State v. Herrera, 90 N.M. 306, 563 P.2d 100 (Ct. App. 1977).

Instructions held to justify overruling objections to prosecutor's argument. — The trial court had wide discretion in dealing with counsel's argument, and did not abuse its discretion in overruling defendant's objections to the prosecutor's closing remarks about collateral offenses committed by defendant where the jury was instructed on three occasions - during the cross-examination of the psychologist, the cross-examination of the psychiatrist and upon final submission of the case to them - that references to such

collateral offenses and to the fingerprint went only to the credibility of the experts and were not to be considered on the question of guilt. State v. Turner, 81 N.M. 571, 469 P.2d 720 (Ct. App. 1970).

Admonishment of prosecutor and proper instructions held to give due process. — Where there were three instances of improper remarks by the prosecutor, but where in each instance the prosecutor was admonished, the instructions told the jury that remarks of counsel were not to be considered as evidence, the jury was instructed not to consider what would have been the answers to questions which the court ruled could not be answered, it was instructed not to consider the court's reasons for its rulings, and it was instructed that it must follow the law as stated by the court, the prosecutor's misconduct did not deprive defendant of due process. State v. McFerran, 80 N.M. 622, 459 P.2d 148 (Ct. App.), cert. denied, 80 N.M. 731, 460 P.2d 261 (1969).

Reading law on pardon and parole to jury does not deny due process. — That the trial court, in response to a question by the jury during the course of their deliberations, read to the jury the constitutional provision and the laws concerning pardon and parole did not deprive petitioner of a fair and impartial trial or of life and liberty without due process of law. Nelson v. Cox, 66 N.M. 397, 349 P.2d 118 (1960).

General intent instruction involves no presumption. — The existence or nonexistence of general criminal intent is a question of fact for the jury, and the general intent instruction submitted the issue to the jury as a question of fact; no presumption was involved in the instruction given. State v. Kendall, 90 N.M. 236, 561 P.2d 935 (Ct. App. 1977).

And instructions on effect of voluntary intoxication on intent may be refused. — Defendant's argument that since voluntary intoxication is not a defense to the existence of a general criminal intent, a general criminal intent is always conclusively presumed from the doing of the prohibited act, that conclusive presumptions are unconstitutional and thus the refusal of requested instructions on the effect of intoxication on defendant's ability to form a general criminal intent denied defendant the right to put on a defense was patently meritless. State v. Kendall, 90 N.M. 236, 561 P.2d 935 (Ct. App. 1977).

Instruction on exculpatory statements in confession held properly refused. — The trial court was not in error when it refused to give a requested instruction on exculpatory statements contained in defendant's confession, where the court adequately instructed as to self-defense and defendant voluntarily took the stand and his own testimony corresponded to the exculpatory matter contained in the confession introduced by the state. State v. Casaus, 73 N.M. 152, 386 P.2d 246 (1963).

Jury instructions as to accomplice testimony. — Trial court's refusal to use jury instruction tendered by defendant admonishing the jury to weigh accomplice testimony with greater care than other testimony, was proper under New Mexico law and practice, and did not violate defendant's constitutional right to due process. State v. Sarracino, 1998-NMSC-022, 125 N.M. 511, 964 P.2d 72.

Inquiry as to the numerical division of a jury is error in itself, because the error goes to a fair and impartial trial, and thus violates due process. State v. Aragon, 89 N.M. 91, 547 P.2d 574 (Ct. App.) (giving rule prospective operation), cert. denied, 89 N.M. 206, 549 P.2d 284 (1976).

Where the jury had been deliberating from 3:10 p.m. until midnight, with a break for dinner, and after the trial court inquired and was informed that the numerical division was 11 to one, it gave the shotgun instruction over defendant's objection, this instruction was a lecture to one juror; within 25 minutes of this lecture, a guilty verdict was returned, and the court of appeals held that the inquiry as to numerical division followed by the shotgun instruction was coercive conduct requiring reversal. State v. Aragon, 89 N.M. 91, 547 P.2d 574 (Ct. App.), cert. denied, 89 N.M. 206, 549 P.2d 284 (1976).

Communication with juror is presumptively prejudicial. — In a criminal case any private communication, contact or tampering, directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, under due process deemed presumptively prejudicial, if not made in pursuance of known rules of the court and the instructions and directions of the court made during the trial, with full knowledge of the parties. The presumption is not conclusive, but the burden rests heavily upon the government to establish, after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant. State v. Gutierrez, 78 N.M. 529, 433 P.2d 508 (Ct. App. 1967).

Probable or inherent prejudice requires new trial. — If the situation involves probable prejudice or inherent prejudice, there must be a new trial. State v. Gutierrez, 78 N.M. 529, 433 P.2d 508 (Ct. App. 1967).

Filing of amended information not vindictive prosecution. — The filing of an amended information following the defendant's successful motion for a mistrial did not amount to vindictive prosecution, even though the amended information added two counts not contained in the original information, since it appeared that the prosecutor added these counts because they were inadvertently omitted from the original written magistrate's bind over order and from the original information. State v. Coates, 103 N.M. 353, 707 P.2d 1163 (1985).

Denying mistrial is decision that presumption was overcome. — It was for the trial court to determine whether the presumption of prejudice arising from unauthorized contact indirect or otherwise with the jury had been overcome. In denying the motion for a mistrial, the trial court, in effect, ruled that the presumption of prejudice had been overcome. State v. Gutierrez, 78 N.M. 529, 433 P.2d 508 (Ct. App. 1967).

"Make a wise decision" is not prejudicial. — No probable or inherent prejudice exists in the communication "make a wise decision." State v. Gutierrez, 78 N.M. 529, 433 P.2d 508 (Ct. App. 1967).

Nor is "return a verdict". — Under standards of due process, any unauthorized communication with a juror is presumptively prejudicial, but the record affirmatively showed no prejudice and overcame the presumption of prejudice where the jury was "ready to return a verdict," it informed the judge of this fact and, in addition, that one juror feared reprisal, and where the judge said no more than "return a verdict." State v. Maes, 81 N.M. 550, 469 P.2d 529 (Ct. App.), cert. denied, 81 N.M. 588, 470 P.2d 309 (1970).

Nor is communication after verdict has been returned. — Conversation between judge and one juror concerning juror's fear of reprisal could not prejudice verdict which had already been received. State v. Maes, 81 N.M. 550, 469 P.2d 529 (Ct. App.), cert. denied, 81 N.M. 588, 470 P.2d 309 (1970).

Death penalty may be constitutional. — Under certain circumstances a citizen's life may be forfeited pursuant to due process of law and all other constitutionally guaranteed rights. State ex rel. Serna v. Hodges, 89 N.M. 351, 552 P.2d 787, overruled on other grounds, State v. Rondeau, 89 N.M. 408, 553 P.2d 688 (1976) (former mandatory and fully discretionary death penalty statutes violated prohibition against cruel and unusual punishment).

Indeterminate sentence is not void. — The discretion vested in the probation and parole officials in determining reductions from the maximum sentence do not make an indeterminate sentence void for vagueness as a general proposition. State v. Deats, 83 N.M. 154, 489 P.2d 662 (Ct. App. 1971).

Aggravation of DWI conviction. — Aggravation of the defendant's DWI conviction under 66-8-102 NMSA 1978 for his refusal to submit to a chemical test even though he was not advised of the criminal consequences of that refusal did not violate federal or state due process provisions. State v. Kanikaynar, 1997-NMCA-036, 123 N.M. 283, 939 P.2d 1091; Kanikaynar v. Sisneros, 190 F.3d 1115 (10th Cir. 1999), cert. denied, 528 U.S. 1090, 120 S. Ct. 821, 145 L. Ed. 2d 691 (2000).

Not crediting time served under void sentence does not deny due process. — Time served by a defendant under a void conviction and sentence will not be credited upon another sentence imposed upon defendant under a conviction for a different offense, and failure to give him such credit does not deprive him of his liberty without due process of law in violation of this section. State v. Rhodes, 77 N.M. 536, 425 P.2d 47 (1967).

Good-time credit scheme. — State's statutory scheme making prisoners eligible for awards of good time credits for the periods of their post-sentencing confinement in Correction Department facilities and county jails but not for the periods of their presentence confinement in county jails does not offend the due process guarantees of the New Mexico and United States constitutions. State v. Aqui, 104 N.M. 345, 721 P.2d 771 (1986), cert. denied, 479 U.S. 917, 107 S. Ct. 321, 93 L. Ed. 2d 294 (1986).

City noise ordinance not overly vague. — The examples as set out in a city ordinance proscribing certain unreasonably loud noises were not so vague that men of common intelligence must guess at their meaning. City of Farmington v. Wilkins, 106 N.M. 188, 740 P.2d 1172 (Ct. App. 1987).

Combination of factors invading rights. — Failure to grant a continuance to allow defendant a reasonable time to prepare and present a defense, denial of his rights to subpoena witnesses and to have medical records produced, and granting the state's motion to suppress any evidence going to defendant's mental or physical condition, invaded defendant's constitutional rights to due process and a fair trial. March v. State, 105 N.M. 453, 734 P.2d 231 (1987).

Mistrial not necessitated by juror's comment, following presentation of evidence, regarding defendant's dangerousness. — A juror's comment in open court that defendant should not be allowed close proximity to a gun and shells did not necessitate a mistrial since the juror's comment clearly came after most of the evidence in the case had been presented and where there was ample evidence to support juror's conclusion that defendant was a dangerous person and the trial court immediately gave curative instructions. State v. Price, 104 N.M. 703, 726 P.2d 857 (Ct. App. 1986).

Omitted necessary instruction on specific intent fundamental error. — The failure to instruct as to specific intent, when the conviction for the crime requires proof of specific intent, amounts to fundamental, reversible error. In such circumstances, the omitted instruction as to specific intent is a substantial and material omission. State v. Shade, 104 N.M. 710, 726 P.2d 864 (Ct. App. 1986), overruled on other grounds, State v. Olguin, 118 N.M. 91, 879 P.2d 92 (Ct. App. 1994).

Proper for prosecutor to argue that death penalty protects people. — Prosecution's arguments during rebuttal that imposition of the death penalty would protect people both inside and outside of the prison was proper argument the effect of which was to merely point out to the jury the future dangerousness of this particular defendant. State v. Compton, 104 N.M. 683, 726 P.2d 837 (1986).

Prosecutorial discretion in determining cases warranting the death penalty. — The necessary and unavoidable discretion of prosecutors in determining which cases warrant the death penalty does not violate the New Mexico constitution. State v. Clark, 1999-NMSC-035, 128 N.M. 119, 990 P.2d 793.

Where death penalty decision clearly jury's responsibility, adverse prosecutorial comments alleviated. — Any adverse impact of comments by the prosecution during punishment phase of trial was alleviated because throughout both the closing and rebuttal arguments the prosecution made it perfectly clear that the decision concerning the death penalty was for the jury and further, defense counsel also made it unmistakably clear that the jury had sole responsibility for deciding defendant's fate. State v. Compton, 104 N.M. 683, 726 P.2d 837, cert. denied, 479 U.S. 890, 107 S. Ct. 291, 93 L. Ed. 2d 265 (1986).

Risk of greater sentence upon trial de novo is not unfair. — The hazard of a greater sentence upon trial de novo for violation of municipal ordinance is not fundamentally unfair. City of Farmington v. Sandoval, 90 N.M. 246, 561 P.2d 945 (Ct. App. 1977).

A greater sentence imposed by a district court for violation of certain municipal ordinances after a trial de novo does not deprive defendant of due process, nor does it amount to double jeopardy. City of Farmington v. Sandoval, 90 N.M. 246, 561 P.2d 945 (Ct. App. 1977).

And does not have unconstitutional "chilling effect" on right of appeal. — There was no "chilling effect" on defendant's right to appeal his conviction for violation of certain municipal ordinances where he took an appeal to the district court, and requiring defendant to choose between accepting the risk of a greater sentence or foregoing his appeal was not constitutionally impermissible under the facts of the case, since the choice was defendant's. City of Farmington v. Sandoval, 90 N.M. 246, 561 P.2d 945 (Ct. App. 1977).

Deprivation of due process not considered for first time on appeal. — Where record does not disclose that trial court was given opportunity to hear objections or exceptions on ground that accused was deprived of liberty without due process of law or that judgment ordering that driver's license be taken up for one year exceeded trial court's authority, the matter will not be considered on appeal. State v. Williams, 50 N.M. 28, 168 P.2d 850 (1946).

Counsel need not be appointed for appeal to United States supreme court. — Habeas corpus relief was refused on grounds that there was no constitutional compulsion requiring the supreme court of New Mexico to appoint counsel to assist defendant in taking an appeal in a criminal case from that court to the supreme court of the United States. Peters v. Cox, 341 F.2d 575 (10th Cir.), cert. denied, 382 U.S. 863, 86 S. Ct. 126, 15 L. Ed. 2d 101 (1965).

Indigent's appeal right conditioned on bonding requirement. — The right of an indigent defendant to an appeal cannot be conditioned upon a statutory bonding requirement. Mitchell v. County of Los Alamos, 112 N.M. 215, 813 P.2d 1013 (1991).

Denying motion to dismiss counsel immediately before post-conviction hearing held proper. — The denial of defendants' motions to dismiss counsel and grant a continuance so they could retain counsel immediately prior to post-conviction hearing was not an abuse of discretion nor was it a denial of due process. Bobrick v. State, 83 N.M. 657, 495 P.2d 1104 (Ct. App. 1972).

Right of indigent defendant to stay pending appeal. — An indigent defendant is entitled to a stay pending appeal, and a failure to post a supersedeas bond does not extinguish that right. Mitchell v. City of Farmington Police Dep't, 111 N.M. 746, 809 P.2d 1274 (1991).

Notice and hearing necessary to revoke suspended sentence. — The supreme court has said that a suspended sentence gives a defendant his right of personal liberty and that due process requires a notice and hearing before such suspension can be revoked. Tijerina v. Baker, 78 N.M. 770, 438 P.2d 514 (1968).

In an action to invoke a suspended sentence, a mere criminal charge was not evidence and affords no legal basis for the reinstatement of a sentence. A party defendant is entitled to be heard on the question whether she had violated the conditions of the suspension and on the question of identity. State v. Peoples, 69 N.M. 106, 364 P.2d 359 (1961), overruled on other grounds, 76 A.L.R.4th 117.

And to revoke probation. — The right of personal liberty is one of the highest rights of citizenship, and this right cannot be taken from a defendant in a probation revocation proceeding without notice and an opportunity to be heard without invading his constitutional rights. State v. Brusenhan, 78 N.M. 764, 438 P.2d 174 (Ct. App. 1968) (proceedings to revoke probation and impose sentence).

But not to revoke parole. — A sentenced prisoner released on probation has no constitutional right to a hearing prior to its revocation, and any such right depends entirely upon the existence of a statutory provision. Robinson v. Cox, 77 N.M. 55, 419 P.2d 253 (1966) (prisoner sentenced and paroled to detainer).

A parole revocation hearing may be summary in nature. Due process does not require a different result. Robinson v. Cox, 77 N.M. 55, 419 P.2d 253 (1966) (prisoner sentenced and paroled to detainer).

Counsel is not required at parole revocation hearing. — Neither due process nor the applicable statutes require that parolees be provided with appointed counsel or represented by employed counsel when they appear before the parole board in a revocation hearing. Robinson v. Cox, 77 N.M. 55, 419 P.2d 253 (1966) (prisoner sentenced and paroled to detainer).

Parole revocation hearing may be deferred. — Deferral of a parole revocation hearing following service of an intervening sentence is without prejudice and does not violate a defendant's due process rights where the parole violation was established by an intervening conviction. Moody v. Quintana, 89 N.M. 574, 555 P.2d 695 (1976).

A parolee was not entitled to an immediate parole revocation hearing following the issuance and lodging of a detainer warrant with an incarcerating institution and the fact that the paroling jurisdiction and the incarcerating jurisdiction were not the same did not create due process concerns. McDonald v. New Mexico Parole Bd., 955 F.2d 631 (10th Cir. 1991), cert. denied, 504 U.S. 920, 112 S. Ct. 1968, 118 L. Ed. 2d 568 (1992).

Jurisdiction to enforce original sentence is not lost by agreement to parole to detainer. — Where prisoner specifically agreed to parole to detainer in Arizona and to conditions set forth in parole agreement, state does not lose jurisdiction over prisoner to

enforce the original sentence upon violation of the parole terms, and exercise of such jurisdiction does not constitute a denial of due process. Snow v. Cox, 76 N.M. 238, 414 P.2d 217 (1966).

Juvenile must not be denied any of the protections guaranteed to adults by the constitution. Neller v. State, 79 N.M. 528, 445 P.2d 949 (1968).

When a juvenile is transferred to district court for criminal proceedings, all of the rights and safeguards in such cases required by law and the constitution of the United States and the constitution of New Mexico must be accorded him. Williams v. Sanders, 80 N.M. 619, 459 P.2d 145 (1969).

But has no right to more than adult. — If the procedure is sufficient for adults, the supreme court does not understand that a juvenile has a constitutional right to more. Nothing constitutionally requires that a juvenile receive anything more or better than is accorded an adult. Neller v. State, 79 N.M. 528, 445 P.2d 949 (1968).

Provisions for certification of juvenile to district court held valid. — The provisions for certification of a juvenile to district court for trial as an adult (see 32A-2-13 NMSA 1978 et seq.) were not so vague, indefinite and lacking in any recognizable standard or criterion for a determination of certification as to deny him equal protection and due process afforded by this section. State v. Jimenez, 84 N.M. 335, 503 P.2d 315 (1972).

Preliminary hearing is not constitutionally required before delinquency trial. — Under former Juvenile Code, preliminary hearing prior to trial by jury to determine delinquency status was not constitutionally required, since code itself contained adequate safeguards to assure due process and fair treatment, and since proceedings and consequences of conviction under Juvenile Code were significantly different from proceedings and consequences of conviction under criminal law. Williams v. Sanders, 80 N.M. 619, 459 P.2d 145 (1969).

Commitment to girls' home "until further order" violates due process. — Commitment to "girls' welfare home at Albuquerque until the further order of the court in the premises" was not that required by Laws 1919, ch. 86, § 2 (now repealed), and violated due process. Robinson v. State, 34 N.M. 557, 287 P. 288 (1930) (remanded for resentencing).

Summary contempt proceeding is proper for refusal to testify. — A refusal to answer questions in the presence of the court is a proper matter to be dealt with summarily, particularly where the witness is given opportunity to explain the basis of her refusal to the court, and there was no violation of due process on the basis that the court proceeded summarily. State v. Sanchez, 89 N.M. 673, 556 P.2d 359 (Ct. App. 1976).

Where the trial court took great care to make sure that a witness understood the question posed by the prosecution which she refused to answer and understood that

she could be held in contempt if she persisted in her refusal to answer, even allowing her time to confer with her attorney, and made it clear that she could purge herself of the contempt by answering the questions in the presence of the jury, the summary contempt proceeding did not violate her right to due process. State v. Sanchez, 89 N.M. 673, 556 P.2d 359 (Ct. App. 1976).

Even if proceeding is not labeled criminal. — Where a witness sentenced for contempt had notice that her refusal to answer would be a contempt and that sanctions in the form of a jail sentence or fine might be imposed, she was not deprived of due process on a theory of lack of notice because the court failed to label the contempt proceedings criminal. State v. Sanchez, 89 N.M. 673, 556 P.2d 359 (Ct. App. 1976).

III. EQUAL PROTECTION.

A. GENERALLY.

Federal and state provisions correspond. — There is a close correspondence in meaning and purpose between the principles underlying the equal protection clauses of the U.S. Const., amend. XIV, and of this section and the general versus special law provisions of the Springer Act, former 48 U.S.C. § 1471, and of N.M. Const., art. IV, § 24. Board of Trustees v. Montano, 82 N.M. 340, 481 P.2d 702 (1971).

The standards for a violation of the equal protection clauses of the United States and New Mexico constitutions are the same. Garcia v. Albuquerque Pub. Schools Bd. of Educ., 95 N.M. 391, 622 P.2d 699 (Ct. App. 1980).

For case discussing the three standards of review, and suggesting a fourth level of review, used in equal protection cases, see Alvarez v. Chavez, 118 N.M. 732, 886 P.2d 461 (Ct. App. 1994), overruled on other grounds, Trujillo v. City of Albuquerque, 1998-NMSC-031, 125 N.M. 721, 965 P.2d 305.

Only members of class discriminated against can complain. — Denial of equal rights can be urged only by those who can show that they belong to class discriminated against. State v. Hines, 78 N.M. 471, 432 P.2d 827 (1967); Wiggs v. City of Albuquerque, 56 N.M. 214, 242 P.2d 865 (1952); McKinley County Bd. of Educ. v. State Tax Comm'n, 28 N.M. 221, 210 P. 565 (1922); Pueblo of Isleta v. Tondre, 18 N.M. 388, 137 P. 86 (1913) (opinion on motion for rehearing).

Person who did not suggest that he might become purchaser of any bond under proposed bond issue could not complain that statute authorizing issuance and sale of revenue bonds to raise funds for building a municipal auditorium was discriminatory. Wiggs v. City of Albuquerque, 56 N.M. 214, 242 P.2d 865 (1952).

Equal protection does not prohibit classification for legislative purposes, provided that there is a rational and natural basis therefor, that it is based on a substantial difference between those to whom it does and those to whom it does not apply, and that

it is so framed as to embrace equally all who may be in like circumstances and situations. McGeehan v. Bunch, 88 N.M. 308, 540 P.2d 238 (1975); Rust Tractor Co. v. Bureau of Revenue, 82 N.M. 82, 475 P.2d 779 (Ct. App.), cert. denied, 82 N.M. 81, 475 P.2d 778 (1970); Michael J. Maloof & Co. v. Bureau of Revenue, 80 N.M. 485, 458 P.2d 89 (1969).

Neither the guarantee of the equal protection of the laws or the provision against local or special laws deny to the legislature the right to classify along reasonable lines. 1969 Op. Att'y Gen. No. 69-8.

The fact that the legislature is entitled to enact statutes which apply only to limited subjects or persons without having the effect of making them special legislation is well recognized. Airco Supply Co. v. Albuquerque Nat'l Bank, 68 N.M. 195, 360 P.2d 386 (1961).

If classification is reasonable. — There is no denial of the equal protection of the laws where a reasonable classification is made by the legislature and all persons within a given class are treated alike. Aragon v. Cox, 75 N.M. 537, 407 P.2d 673 (1965), overruled on another point, State v. Chavez, 77 N.M. 79, 419 P.2d 456 (1966).

Judicial inquiry under the equal protection clause does not end with a showing of equal application among the members of the class defined by the legislation; the courts must also reach and determine the question whether the classifications drawn in a statute are reasonable in light of its purpose. McGeehan v. Bunch, 88 N.M. 308, 540 P.2d 238 (1975).

A classification must be reasonable and not arbitrary, and the classification attempted, in order to avoid the constitutional prohibition, must be founded upon pertinent and real differences as distinguished from artificial ones. Mere difference, of itself, is not enough. City of Raton v. Sproule, 78 N.M. 138, 429 P.2d 336 (1967).

Classification, in order to be legal, must be rational; it must be founded upon real differences of situation or condition, which bear a just and proper relation to the attempted classification, and reasonably justify a different rule. Burch v. Foy, 62 N.M. 219, 308 P.2d 199 (1957).

It is competent for the legislature to classify and adapt a law general in nature to a class, but such classification must be a natural, and not an arbitrary or fictitious one, and the operation of such general law must be as general throughout the state as is the genera therein provided for. Crownover v. Crownover, 58 N.M. 597, 274 P.2d 127 (1954).

Equal protection does not prohibit legislatively created classifications that are rationally based. State v. Neely, 112 N.M. 702, 819 P.2d 249 (1991).

And all members of class are treated alike. — Given a reasonable classification of subjects, "equal protection of the laws" is had if all within any given class are treated alike. All such classifications must be based upon some reasonable distinction. Pueblo of Isleta v. Tondre, 18 N.M. 388, 137 P. 86 (1913) (opinion on motion for rehearing).

The test as to whether legislation is general, and therefore constitutional, depends upon the reasonableness of the classification and whether the statute is general to the class it embraces, operating uniformly on all members of that class. Airco Supply Co. v. Albuquerque Nat'l Bank, 68 N.M. 195, 360 P.2d 386 (1961).

The classification must rest on some ground of difference having a fair and substantial relation to the object of the legislation so that all persons similarly circumstanced shall be treated alike. 1961-62 Op. Att'y Gen. No. 61-68.

If legislation makes no arbitrary or unreasonable distinction within the sphere of its operation and accords substantially equal and uniform treatment to all persons similarly situated, the law complies with the equality provisions of state and federal constitutions. Weiser v. Albuquerque Oil & Gasoline Co., 64 N.M. 137, 325 P.2d 720 (1958); State v. Thompson, 57 N.M. 459, 260 P.2d 370 (1953).

While classification is proper, there must always be uniformity within the class. If persons under the same circumstances and conditions are treated differently, there is arbitrary discrimination, and not classification. Burch v. Foy, 62 N.M. 219, 308 P.2d 199 (1957).

The reasonableness of a classification is in the first instance a legislative question. The legislature is vested with a wide discretion in distinguishing, selecting and classifying. State v. Pacheco, 81 N.M. 97, 463 P.2d 521 (Ct. App. 1969); Romero v. Tilton, 78 N.M. 696, 437 P.2d 157 (Ct. App. 1967), cert. denied, 78 N.M. 704, 437 P.2d 165 (1968), overruled on another point, McGeehan v. Bunch, 88 N.M. 308, 540 P.2d 238 (1975).

The legislature of a state has necessarily a wide range of discrimination in distinguishing, selecting and classifying; it is sufficient to satisfy the demands of the constitution if the classification is practical and not palpably arbitrary. City of Raton v. Sproule, 78 N.M. 138, 429 P.2d 336 (1967).

It is in the first instance a legislative question as to whether a classification is reasonable. The policy reasons behind judicial reluctance to overturn statutes on other than grounds involving fundamental constitutional values involves separation of powers considerations whereby the judiciary defers to legislative determination as to whether a particular classification is rational. State v. Edgington, 99 N.M. 715, 663 P.2d 374 (Ct. App.), cert. denied, 464 U.S. 940, 104 S. Ct. 354, 78 L. Ed. 2d 318 (1983).

Facts sustaining classification will be presumed. — The fact that the legislature has enacted laws applicable to only one community land grant, and has thus classified

some of the grants differently, is entitled to great weight. Only if a statutory classification is so devoid of reason to support it, as to amount to mere caprice, will it be stricken down. If any state of facts can be reasonably conceived which will sustain a classification, there is a presumption that such facts exist. Board of Trustees v. Montano, 82 N.M. 340, 481 P.2d 702 (1971).

If any state of facts can reasonably be conceived which will sustain a statutory classification, the statute is valid. Garcia v. Albuquerque Pub. Schools Bd. of Educ., 95 N.M. 391, 622 P.2d 699 (Ct. App. 1980).

Under the rational basis test, a statute will not be set aside if any state of the facts may be reasonably conceived to justify it, and any redeeming value of the classification is sufficient to render the statute constitutional. State v. Edgington, 99 N.M. 715, 663 P.2d 374 (Ct. App.), cert. denied, 464 U.S. 940, 104 S. Ct. 354, 78 L. Ed. 2d 318 (1983).

Legislature's failure to compile legislative history does not mean that statute must fall. Different classifications are permitted and the court may glean the reason for those classifications from extrinsic sources. State v. Edgington, 99 N.M. 715, 663 P.2d 374 (Ct. App.), cert. denied, 464 U.S. 940, 104 S. Ct. 354, 78 L. Ed. 2d 318 (1983).

Court will not inquire into wisdom of statute. — In keeping with the traditional self-restraint of the supreme court regarding constitutional challenges, it refuses to inquire into the wisdom, the policy or the justness of an act of the legislature, and only when the court is satisfied that the legislature has wandered outside the confines of the constitution by enacting unequal, oppressive and arbitrary legislation will such legislation be struck down. McGeehan v. Bunch, 88 N.M. 308, 540 P.2d 238 (1975).

Court cannot substitute its view in selecting and classifying for that of legislature. Anaconda Co. v. Property Tax Dep't, 94 N.M. 202, 608 P.2d 514 (Ct. App. 1979), cert. denied, 94 N.M. 628, 614 P.2d 545 (1980).

Any redeeming value of classification is sufficient. — The test as to whether a statute is unconstitutional under the equal protection clauses is very strict since any redeeming value of the classification is sufficient. Espanola Hous. Auth. v. Atencio, 90 N.M. 787, 568 P.2d 1233 (1977).

But certain classifications and interests require strict scrutiny. — When a statute is challenged on the basis of the equal protection clause, specific tests are applicable. Where legislation involves "suspect classifications" (race, etc.) or touches "fundamental interests" (right to vote), it is subject to strict scrutiny. But where no such concerns are present, legislation is subject to a more liberal critique. McGeehan v. Bunch, 88 N.M. 308, 540 P.2d 238 (1975).

Classification must be capricious to be stricken down. — Only if a classification is so devoid of any semblance of reason as to amount to mere caprice, depending on legislative fiat alone for support, is a court justified in striking down a legislative act as

violative of constitutional guarantees. State v. Pacheco, 81 N.M. 97, 463 P.2d 521 (Ct. App. 1969); Romero v. Tilton, 78 N.M. 696, 437 P.2d 157 (Ct. App. 1967), cert. denied, 78 N.M. 704, 437 P.2d 165 (1968), overruled on another point, McGeehan v. Bunch, 88 N.M. 308, 540 P.2d 238 (1975).

Is it so wholly devoid of any semblance of reason to support it, as to amount to mere caprice, depending on legislative fiat alone for support? If so, it will be stricken down as violating constitutional guarantees. But the fact that the legislature has adopted the classification is entitled to great weight. City of Raton v. Sproule, 78 N.M. 138, 429 P.2d 336 (1967).

To show a violation of equal protection, it must be demonstrated that legislation is clearly arbitrary and unreasonable, not just that it is possibly arbitrary and unreasonable. Gallegos v. Homestake Mining Co., 97 N.M. 717, 643 P.2d 281 (Ct. App. 1982).

And requires only rational classification unless personal rights trammeled or suspect classification. — Unless a challenged statute trammels fundamental personal rights or is drawn upon inherently suspect classifications, such as race, religion or alienage, the court presumes the constitutionality of the statutory discrimination and requires only that the classification challenged be rationally related to a legitimate state interest. Garcia v. Albuquerque Pub. Schools Bd. of Educ., 95 N.M. 391, 622 P.2d 699 (Ct. App. 1980).

Or must be void for uncertainty. — Unless the classification is clearly arbitrary and capricious or void for uncertainty, a court cannot substitute its views in selecting and classifying for those of the legislature. Michael J. Maloof & Co. v. Bureau of Revenue, 80 N.M. 485, 458 P.2d 89 (1969).

But absolute precision in classification is not required. — The basis underlying the equal protection doctrine is that persons similarly situated shall receive like treatment; it does not require absolute precision or mathematical nicety in the designation of classifications, but it does not tolerate classifications which are so grossly overinclusive as to defy notions of fairness and reasonableness. McGeehan v. Bunch, 88 N.M. 308, 540 P.2d 238 (1975).

In the area of economics and social welfare, a state does not violate the equal protection clause merely because the classifications made by its laws are imperfect. If the classification has some reasonable basis, it does not offend the constitution simply because the classification is not made with mathematical nicety or because in practice it results in some inequality. Musgrove v. Department of Health & Social Servs., 84 N.M. 89, 499 P.2d 1011 (Ct. App.), cert. denied, 84 N.M. 77, 499 P.2d 999 (1972).

Absolutely equal treatment of parties performing similar service is not demanded in order for a legislative act to withstand an attack on its constitutionality, but it is nevertheless imperative that where classification is attempted, the same must be

reasonable and based on real differences bearing a proper relationship to the classification, and there must be uniformity of treatment within each class. Community Pub. Serv. Co. v. New Mexico Pub. Serv. Comm'n, 76 N.M. 314, 414 P.2d 675, cert. denied, 385 U.S. 933, 87 S. Ct. 292, 17 L. Ed. 2d 213 (1966).

Power to classify carries with it power to establish different sets of rules applicable to the different classes, and it is not fatal that the particular rules within the set may result in some inequality when applied to specific instances. De Soto Motor Corp. v. Stewart, 62 F.2d 914 (10th Cir. 1932).

Changed circumstances may make fair classification unfair. — A classification that may once have had a fair and substantial relation to the objectives of the statute because of an existing factual setting may lose its relationship due to altered circumstances. McGeehan v. Bunch, 88 N.M. 308, 540 P.2d 238 (1975).

And unequal administration of apparently fair law violates constitution. — Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the constitution. However unequal administration of the law or ordinance, so as to violate the state and United States constitutions, will not result unless an intentional or purposeful discrimination is shown, and this cannot be presumed. One must prove more than mere nonenforcement against other violators and present something which in effect amounts to an intentional violation of the essential principle of practiced uniformity. Barber's Super Mkts., Inc. v. City of Grants, 80 N.M. 533, 458 P.2d 785 (1969).

Classification based solely on time element is unreasonable. — To avoid constitutional prohibition, classification must be founded upon some pertinent or real differences as distinguished from artificial ones, and a legislative classification based wholly upon the time element when the time selected bears no reasonable relationship to object of the legislation is unreasonable and repugnant to constitution. State v. Sunset Ditch Co., 48 N.M. 17, 145 P.2d 219 (1944).

Statute which applied only to corporations organized under territorial law and not to corporations organized after statehood (Laws 1921, ch. 185) was unconstitutional because it denied equal protection of the law and impaired an obligation of contract. State v. Sunset Ditch Co., 48 N.M. 17, 145 P.2d 219 (1944).

As is classification based upon possibility of fraud in some cases. — Although the prevention of fraud and collusion is a valid state interest, and the courts should take notice of fraud and collusion when found to exist in a particular instance, nevertheless the fact that there may be greater opportunity for fraud or collusion in one class of cases than another does not warrant courts of law in closing the door to all cases of that class, and courts must depend upon the efficacy of the judicial processes to ferret out the

meritorious from the fraudulent in particular cases. McGeehan v. Bunch, 88 N.M. 308, 540 P.2d 238 (1975).

Right to vote may be reasonably restricted. — The state of New Mexico has the power to impose reasonable residence and other restrictions on the right to vote, so long as the restrictions are not discriminatory and are based on a reasonable classification. City of Raton v. Sproule, 78 N.M. 138, 429 P.2d 336 (1967).

Provided classification serves valid state interest. — If a challenged state statute grants the right to vote to some bona fide residents of requisite age and citizenship and denies the franchise to others, the court must determine whether the exclusions are necessary to promote a compelling state interest. As long as the election in question is not one of special interest, any classification restricting the franchise on grounds other than residence, age and citizenship cannot stand unless the district or state can demonstrate that the classification serves a compelling state interest. Prince v. Board of Educ., 88 N.M. 548, 543 P.2d 1176 (1975).

Statute exempting county from requirement of single-member districts does not violate equal protection rights of residents. Montano v. Los Alamos County, 1996-NMCA-108, 122 N.M. 454, 926 P.2d 307.

Limitation of city electors to county qualified property owners is reasonable. — The limitation of electors voting on municipal debt or bonds to those property owners who are otherwise qualified to vote in the county is based upon the practical and reasonable consideration that in New Mexico the voter registration records are kept and maintained by the county clerk, are readily available for use in checking qualifications of electors and are used by the municipalities in the county in the conduct of municipal elections. City of Raton v. Sproule, 78 N.M. 138, 429 P.2d 336 (1967). See 3-30-2, 3-30-3 and 3-30-6 NMSA 1978.

But right to vote for legislature and constitutional amendment may not be distinguished. — There is no rational basis to distinguish between voting on representatives in the legislature, and voting on constitutional amendments. One is no more a necessary ingredient of the democratic process than the other. Nor can it be said that an equal voice in selection of the legislature is of greater importance to a citizen than equality of weight in expression of views on changes in the basic charter, the constitution. State ex rel. Witt v. State Canvassing Bd., 78 N.M. 682, 437 P.2d 143 (1968).

Requirement of two-thirds vote in each county for amendment is invalid. — A requirement of a two-thirds favorable vote in every county for the adoption of an amendment, when there is a wide disparity in population among counties, must result in greatly disproportionate values to votes in the different counties. Where a vote in one county outweighs 100 votes in another, the "one person, one vote" concept announced in Gray v. Sanders, 372 U.S. 368, 83 S. Ct. 801, 9 L. Ed. 2d 821 (1963), certainly is not

met. State ex rel. Witt v. State Canvassing Bd., 78 N.M. 682, 437 P.2d 143 (1968). See N.M. Const., art. VII, § 3 and art. XIX, § 1.

Restrictions on engaging in business or profession must apply to all. — 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. Collins, 61 N.M. 184, 297 P.2d 325 (1956).

Prohibiting professionals from continuing present activities is arbitrary. — An act which would effectively prohibit architects, architect engineers and registered professional engineers from engaging in activities which they presently legally perform, involves an arbitrary division of a general class in violation of the constitution. 1967 Op. Att'y Gen. No. 67-34.

Educational qualifications may be imposed on bar applicants. — See note under same catchline under analysis line II A above.

And failure to pass examination justifies denying admission to bar. — See note under same catchline under analysis line II A above.

Without full hearing. — See note under same catchline under analysis line II A above.

Right to take bar examination may be denied for lack of good character. — See note under same catchline under analysis line II A above.

Applicant may be required to furnish character affidavit. — See note under same catchline under analysis line II A above.

But qualifications required must be connected with fitness to practice. — See note under same catchline under analysis line II A above.

Activity as attorney may be reviewed. — See note under same catchline under analysis line II A above.

License fee may be imposed on attorneys. — Enforcement of the former penalty provision of State Bar Act, Laws 1927, ch. 113, § 2 (deleted in 1949), did not deny to an attorney the equal protection of the laws. If power to impose a license fee is conceded, as it must be, then penalty which is designed solely to enforce payment of fee and which may be avoided altogether by payment is not arbitrary or unreasonable. In re Gibson, 35 N.M. 550, 4 P.2d 643 (1931).

A license to operate a motor vehicle is a mere privilege. — See note under same heading under analysis line II A above.

But license may not be suspended without sufficient proof of fault. — A statute authorizing suspension of a driver's license is unconstitutional if it fails to require

sufficient evidence of fault on the part of a driver involved in an accident resulting in the death or personal injury of another or serious property damage, in that the failure to include such a requirement denies to licensees the equal protection of the laws, contrary to this section. 1959-60 Op. Att'y Gen. No. 60-194. See 66-5-30 A(2) NMSA 1978, authorizing suspension when driver "has been . . . convicted in any accident. . . .").

There may justly be classification between employer and employee; each may be made a class, and a different rule applied, because there are differences of situation and in the considerations applicable to the various classes. Burch v. Foy, 62 N.M. 219, 308 P.2d 199 (1957).

But different minimum wages cannot be set for directly competing employers. — The former Wage and Hour Act (Laws 1955, ch. 200) constituted class legislation of the most objectionable kind insofar as it referred to drugstore employees. The classification was arbitrary and oppressive and without any valid reason for its basis. Burch v. Foy, 62 N.M. 219, 308 P.2d 199 (1957).

Under the provisions of § 3(a)(1) of the former Wage and Hour Act (Laws 1955, ch. 200), the owner of a variety store was required to pay his employees the minimum wage of $.75 per hour. On the other hand, his competitors' employees, because they worked in drugstores, whether they served food and drink for consumption on the premises or not were declared to be "service employees" and needed only be paid $.50 per hour. Thus, the variety store owner's competitors obtained a competitive advantage because they were entitled to pay a lower minimum wage to their employees performing the same functions as in direct competition with the variety store owner's employees. Burch v. Foy, 62 N.M. 219, 308 P.2d 199 (1957).

Liability of hotelkeeper for theft or negligence may be limited. — A statute limiting liability of a hotelkeeper as to property of guest for theft or negligence of hotelkeeper or his servants, 57-6-1 NMSA 1978, is not unconstitutional under this section, which provides for equal protection of the laws. Weiser v. Albuquerque Oil & Gasoline Co., 64 N.M. 137, 325 P.2d 720 (1958).

Elections in certain counties as to drive-up windows for alcohol sales. — Subsection F (now G) of 60-7A-1 NMSA 1978, which provides for an election in eligible counties on the question: "Shall a retailer or dispenser be allowed to sell or deliver alcoholic beverages at any time from a drive-up window?" does not violate the equal protection clauses of the federal and state constitutions. Thompson v. McKinley County, 112 N.M. 425, 816 P.2d 494 (1991).

Rational basis review of state liability cap. — Because the cap on tort recoveries against the state, provided in 41-4-19 NMSA 1978, affects economic interests, not fundamental rights, the appropriate level of constitutional scrutiny in an equal protection challenge is rational basis review, not the intermediate scrutiny necessary for statutes

affecting fundamental rights. Trujillo v. City of Albuquerque, 1998-NMSC-031, 125 N.M. 721, 965 P.2d 305.

Limitations on governmental tort liability. — The New Mexico Constitution's guarantee of access to the courts is not a guarantee of unlimited governmental tort liability. Trujillo v. City of Albuquerque, 1998-NMSC-031, 125 N.M. 721, 965 P.2d 305.

Intermediate scrutiny of cap on tort damages. — A tort victim's interest in full recovery of damages calls for a form of scrutiny somewhere between minimum rationality and strict scrutiny. Therefore, intermediate scrutiny should be applied to determine the constitutionality of the cap on damages in Subsection A(2) of 41-4-19 NMSA 1978 of the Tort Claims Act. Trujillo v. City of Albuquerque, 110 N.M. 621, 798 P.2d 571 (1990).

Protection of utility interests. — The preference in 62-9-1 NMSA 1978 indicated by its protection of mutual domestic water consumer associations from invasion by a regulated utility but not from an unregulated utility does not lack a rational basis, and an argument that it unconstitutionally discriminates against the invaded utility solely on the basis of the status of the invader was without merit. Morningstar Water Users Ass'n v. New Mexico Pub. Util. Comm'n, 120 N.M. 579, 904 P.2d 28 (1995).

Telephone order standard. — State Corporation Commission's (now public regulation commission's) order to a telephone local exchange carrier imposing a state-wide standard of zero primary orders held over 30 days did not violate equal protection under the federal or state constitutions. U.S. West Communications, Inc. v. New Mexico SCC, 1997-NMSC-031, 123 N.M. 554, 943 P.2d 1007.

Conservation laws may not deprive property owners of constitutional rights. — See notes under same catchline under analysis line II A above.

The classification imposed by the Guest Statute is unreasonable and arbitrary and does not rest upon some ground of difference having a fair and substantial relation to either of the objects of the legislation; as between those who are denied and those who are permitted recovery for negligently inflicted injuries, the classifications do not bear a substantial and rational relation to the statute's purposes of protecting the hospitality of the host driver and of preventing collusive lawsuits, and therefore the New Mexico guest statute is unconstitutional and void as a denial of equal protection of the law under U.S. Const., amend. XIV, and this section. McGeehan v. Bunch, 88 N.M. 308, 540 P.2d 238 (1975) (applicable to pending and future cases). See Laws 1935, ch. 15, §§ 1 and 2, compiled as 64-24-1 and 64-24-2, 1953 Comp., and recompiled by Laws 1978, ch. 35, §§ 275, as 64-5-102 and 64-5-103, 1953 Comp., all omitted from NMSA 1978.

No matter how laudable the state's interest in promoting hospitality, the former Guest Statute was irrational in allowing the host to abandon ordinary care and in denying to

nonpaying guests the common-law remedy for negligently inflicting injury. McGeehan v. Bunch, 88 N.M. 308, 540 P.2d 238 (1975).

The protection of hospitality rationale which asserts that the classification scheme merely provides a higher standard of care for those who pay than for those who do not has been recognized by the courts in the case of common carriers, but cannot reasonably be applied to guests in passenger cars since there is no principle in our general legal scheme which dictates that one must pay for the right of protection from negligently inflicted injury. The classification fails not because it draws some distinction between paying and nonpaying guests, but because it penalizes nonpaying guests by depriving them completely of protection from ordinary negligence. McGeehan v. Bunch, 88 N.M. 308, 540 P.2d 238 (1975).

The "prevention of collusion" premise is unquestionably a legitimate state interest; however, compensation is not the distinguishing factor between collusive and noncollusive lawsuits, and the former Guest Statute was an impermissible means to achieve the prevention of collusion. McGeehan v. Bunch, 88 N.M. 308, 540 P.2d 238 (1975).

The prevention of collusion rationale was insufficient to support the former Guest Statute: it is unreasonable and arbitrary, and thus unconstitutional, to do away with negligence actions for an entire class of persons solely because some undefined portion of the class may instigate fraudulent lawsuits. McGeehan v. Bunch, 88 N.M. 308, 540 P.2d 238 (1975).

In terms of preventing collusion the former Guest Statute was both overinclusive and underinclusive: overinclusive in that it eliminated lawsuits between relatives and close friends even though collusion was absent, along with causes of action where no reasonable likelihood of collusion existed (i.e., those between driver and hitchhiker), and underinclusive in that it permits negligence suits by many who had no less reason to collude than those barred from suing. McGeehan v. Bunch, 88 N.M. 308, 540 P.2d 238 (1975).

But Wrongful Death Statute classifications are reasonable. — Guarantee of equal protection of the laws does not deny to legislature the right to classify along reasonable lines; the Wrongful Death Statute (41-2-1 to 41-2-4 NMSA 1978) does not violate this section. De Soto Motor Corp. v. Stewart, 62 F.2d 914 (10th Cir. 1932) (decided when statute provided for fixed amount of damages from carriers).

Where Wrongful Death Statute limits recovery against an individual or business corporation to such damages as are fair and just, its constitutional rights are not violated because another section of the statute, dealing with another class, common carriers, provides that a fixed sum shall be paid in case of negligent death. De Soto Motor Corp. v. Stewart, 62 F.2d 914 (10th Cir. 1932).

Sovereign immunity doctrine is justified. — Plaintiff's novel argument that the doctrine of sovereign immunity arbitrarily and unreasonably creates two classes of plaintiffs (one that can be made whole for negligently inflicted injuries and one that cannot) was found to be without merit by the court of appeals, which believed there were substantive differences justifying the special treatment of states and their political subdivisions when carrying on their governmental functions. Dairyland Ins. Co. v. Board of County Comm'rs, 88 N.M. 180, 538 P.2d 1202 (Ct. App. 1975).

And different limitations may apply to suits against cities, counties and state. — Section 37-1-24 NMSA 1978 does not violate this section, since the fact that cities are limited in their expenditures and that the ability of cities to raise money to meet such expense is restricted provides a rational basis for limiting the time period in which a suit may be brought against a city to one year, as opposed to a three-year period for suits against the county or state. Espanola Hous. Auth. v. Atencio, 90 N.M. 787, 568 P.2d 1233 (1977).

Favoring nonresidents denies residents equal protection. — Discrimination favorable to nonresidents deprives residents of state of equal protection of the laws where distinction does not rest upon some real and substantial basis, and distinction in Laws 1939, ch. 236, § 1001(d) limiting importation of alcoholic liquor by residents was arbitrary and unreasonable. State v. Martinez, 48 N.M. 232, 149 P.2d 124, 155 A.L.R. 811 (1944).

But tax on resident vendor without tax on importations by nonresident is constitutional. — The failure of the legislature to protect resident vendor against the unfair competitions of importations into New Mexico, without the payment of a sales tax, of chemical reagents did not offend the equal protection clause of the constitution of either the United States or of New Mexico so as to invalidate the former school tax against him. Edmunds v. Bureau of Revenue, 64 N.M. 454, 330 P.2d 131 (1958).

Automobiles may be distinguished from other vehicles. — The objection that a statute like Laws 1912, ch. 28 (now repealed), providing for state automobile licenses, is a special law, because it legislates only upon automobiles and does not attempt to legislate upon all vehicles using the public highways has been rejected; such an act applies to and affects alike all members of a class and is therefore a general and not a special law. State v. Ingalls, 18 N.M. 211, 135 P. 1177 (1913).

But nonresident motor vehicle owners or operators are one indivisible class. — Nonresident owners or operators of motor vehicles constitute a general class, and a statute which divides such class within itself by imposing a license fee on those gainfully employed and exempting those who are not is discriminatory and invalid. State v. Pate, 47 N.M. 182, 138 P.2d 1006 (1943).

Required use of passenger restraint device does not violate equal protection provisions. — Section 66-7-373B, which provides that failure to be secured by a child passenger restraint device or by a safety belt as required by the Safety Belt Use Act

shall not in any instance constitute fault or negligence and shall not limit or apportion damages, does not violate the equal protection provisions of the United States and New Mexico Constitutions. Armijo v. Atchison, T. & S.F. Ry., 754 F. Supp. 1526 (D.N.M. 1990), rev'd in part on other grounds, 19 F.3d 547 (10th Cir. 1994).

Welfare benefits are not constitutionally required. — There is no constitutional requirement that New Mexico provide financial assistance to the needy. The authority for such assistance is statutory. New Mexico has considerable latitude to set its own standard of need and determine the level of benefits by the amount of funds devoted to the program. Padilla v. Health & Social Servs. Dep't, 84 N.M. 140, 500 P.2d 425 (Ct. App. 1972).

And insufficient assistance for shelter does not deny equal protection. — The former health and social services department did not deprive recipient of equal protection of the law in providing financial assistance for shelter in an amount insufficient to cover her unmet need for housing, since there was a rational basis for financial assistance, the amount of which was determined by the conveniences in the dwelling. Padilla v. Health & Social Servs. Dep't, 84 N.M. 140, 500 P.2d 425 (Ct. App. 1972).

Nor does denying credit for rent paid relative. — A regulation is not unreasonable and unlawful when it denies a credit for rent actually paid to a relative and does not set up an unreasonable and arbitrary classification based upon no reasonable distinction between relatives and nonrelatives and is thus not discriminatory. Musgrove v. Department of Health & Social Servs., 84 N.M. 89, 499 P.2d 1011 (Ct. App.), cert. denied, 84 N.M. 77, 499 P.2d 999 (1972).

Nor does time limitation on benefits to temporarily disabled persons without children. — A regulation of the former state health and social services department placing a six-month limitation on general assistance benefits paid to temporarily disabled needy persons with no minor children did not violate state and federal equal protection clauses, since it treated all temporarily disabled and needy persons exactly the same. Equal protection does not require but one classification based solely upon the length of time a temporary disability is suffered, and does not prohibit a single classification related to the availability of funds and a time period less than the entire period of the temporary disability, so long as the classification treats all who fall therein equally. Health & Social Servs. Dep't v. Garcia, 88 N.M. 640, 545 P.2d 1018 (1976).

Equalization of peremptory challenges unauthorized. — Rule 1-038E NMRA does not authorize an "equalization" of peremptory challenges and does not violate the right to equal protection under the New Mexico or federal constitutions. Gallegos ex rel. Gallegos v. Southwest Community Health Servs., 117 N.M. 481, 872 P.2d 899 (Ct. App. 1994).

Constitutional regulations and legislation. — See notes under same catchline under analysis line II A above.

The state of New Mexico had no compelling interest in the exclusion of Navajo reservation residents from a district bond election and properly included them, since the parents of the children who live on the reservation have a distinct interest in the district affairs. Prince v. Board of Educ., 88 N.M. 548, 543 P.2d 1176 (1975).

The requirement of 35-2-1 NMSA 1978 that magistrates in magistrate districts having a population of 100,000 (now 200,000) persons or more be lawyers is a reasonable legislative classification and does not violate this section or N.M. Const., art. IV, § 24. 1969 Op. Att'y Gen. No. 69-8.

There is no discrimination in an act which increases hunting or fishing license fees as of a certain effective date except that which may result from an individual's own action or inaction. 1963-64 Op. Att'y Gen. No. 64-91.

Where an act of the legislature increases hunting or fishing license fees as of a certain date, any discrimination between persons on the basis of when they purchase a license is permissible, rational and unavoidable. 1963-64 Op. Att'y Gen. No. 64-91.

The ordinance under which a city acted by resolution to authorize a contract for garbage disposal with a sanitation company was a police measure involving the health and welfare of all members of the community and not a violation of due process or equal protection as to persons engaged in the business of hauling garbage. Gomez v. City of Las Vegas, 61 N.M. 27, 293 P.2d 984 (1956).

Section 40-4-5 C NMSA 1978, establishing for jurisdiction in divorce cases involving the military different residency requirements than for the population in general, was held not violative of this section, as the requirements have a uniform operation throughout the state and they therefore need not affect every individual, every class or every community alike. Crownover v. Crownover, 58 N.M. 597, 274 P.2d 127 (1954).

The classification of irrigation ditches made by 73-9-1 NMSA 1978 was not repugnant to fourteenth amendment to United States constitution, nor to this section, as being class legislation. Davy v. McNeill, 31 N.M. 7, 240 P. 482 (1925).

The Tort Claims Act (41-4-1 to 41-4-27 NMSA 1978) does not violate the equal protection clauses of the United States and New Mexico constitutions. Garcia v. Albuquerque Pub. Schools Bd. of Educ., 95 N.M. 391, 622 P.2d 699 (Ct. App. 1980).

Establishment of surviving parents as a separate class for purposes of awarding death benefits, apart from that of surviving spouses and dependent children, is not an unconstitutional distinction, nor violative of equal protection of the laws. Gallegos v. Homestake Mining Co., 97 N.M. 717, 643 P.2d 281 (Ct. App. 1982).

The distinction between federal reclamation projects and other areas of water use in 72-9-4 NMSA 1978 is neither unreasonable nor arbitrary and the section does not deny

equal protection. City of Raton v. Vermejo Conservancy Dist., 101 N.M. 95, 678 P.2d 1170 (1984).

The distinction between conservancy districts and other water users in 73-17-21 NMSA 1978 is neither unreasonable nor arbitrary and does not deny equal protection as there is an entire body of law applying to conservancy districts for the purpose of providing and maintaining flood protection, river control, drainage and water storage for irrigation needs and for distribution systems. City of Raton v. Vermejo Conservancy Dist., 101 N.M. 95, 678 P.2d 1170 (1984).

The operation of off-highway motorcycles is a potentially dangerous activity and the singling out of these vehicles in 66-3-1013 NMSA 1978 is not precluded by the equal protection clause. Vandolsen v. Constructors, Inc., 101 N.M. 109, 678 P.2d 1184 (Ct. App. 1984).

Section 60-7A-1 NMSA 1978, regulating the sale of alcoholic beverages and allowing local option districts to prohibit Sunday sales, is a proper exercise of legislative power and does not violate equal protection of the laws under U.S. Const., amend. XIV, § 1 and this section, nor the prohibitions of the furtherance and establishment of religion clause of U.S. Const., amend. I and N.M. Const., art. II, § 11. Pruey v. Department of ABC, 104 N.M. 10, 715 P.2d 458 (1986).

Village's classification, whereby owners of American Pit Bull Terriers were treated differently than owners of other breeds of dog, was not violative of equal protection. Garcia v. Village of Tijeras, 108 N.M. 116, 767 P.2d 355 (Ct. App. 1988).

City ordinance limiting the selling of goods in the city's historic zone to New Mexico residents who were members of the Navajo Nation or of a federally recognized Indian tribe or pueblo violated the equal protection clause, where there was no factual predicate to suggest that the ordinance remedied past discrimination as to licensing in the zone. Tafoya v. City of Albuquerque, 751 F. Supp. 1527 (D.N.M. 1990).

The failure of 41-4-15 NMSA 1978 to provide a tolling provision for persons under a legal disability with claims against governmental entities does not violate the right of a mentally handicapped plaintiff to equal protection of the laws. Jaramillo v. State, 111 N.M. 722, 809 P.2d 636 (Ct. App. 1991).

A definition in the regulations of the mining commission that classified mining operations into different categories did not violate the dictates of equal protection. Old Abe Co. v. New Mexico Mining Comm'n, 121 N.M. 83, 908 P.2d 776 (Ct. App. 1995).

The workers' compensation permanent total disability benefit statute, 52-1-25 NMSA 1978, does not violate equal protection under the federal and state constitutions. Valdez v. Wal-Mart Stores, Inc., 1998-NMCA-030, 124 N.M. 655, 954 P.2d 87, cert. denied, 124 N.M. 589, 953 P.2d 1087 (1998).

Unconstitutional legislation. — See notes under same catchline under analysis line II A above.

Classification of teachers for salary purposes, based on residency, per se, bears no reasonable relationship to the teaching qualifications of the teacher, and on its face it is unreasonable and arbitrary. 1963-64 Op. Att'y Gen. No. 64-85.

A section of the Fair Trade Act, Laws 1937, ch. 44, § 2 (now repealed), was unconstitutional and void as an arbitrary and unreasonable exercise of the police power without any substantial relation to the public health, safety or general welfare insofar as it concerned persons who were not parties to contracts provided for in Laws 1937, ch. 44, § 1 (now repealed). Skaggs Drug Center v. General Elec. Co., 63 N.M. 215, 315 P.2d 967 (1957).

The citizenship requirements imposed by the Dental Act (former 61-5-1 NMSA 1978 et seq.) cannot be enforced consistently with constitutional guarantees of equal protection. 1980 Op. Att'y Gen. No. 80-20.

The cap on damages mandated by the Dramshop Act, 41-11-1 NMSA 1978 (alcohol licensee's liability), is constitutionally invalid as violative of the equal protection clause. Richardson v. Carnegie Library Restaurant, Inc., 107 N.M. 688, 763 P.2d 1153 (1988), overruled on other grounds, Trujillo v. City of Albuquerque, 1998-NMSC-031, 125 N.M. 721, 965 P.2d 305 (1998).

County officers as bail bondsmen. — The prohibitions against county officers acting as bail bondsmen in 59A-51-4 NMSA 1978 and 59A-51-13C NMSA 1978 does satisfy heightened rational-basis scrutiny; thus, that element of the statutes is invalid under the equal protection clause of the New Mexico Constitution. Alvarez v. Chavez, 118 N.M. 732, 886 P.2d 461 (Ct. App. 1994), overruled on other grounds, Trujillo v. City of Albuquerque, 1998-NMSC-031, 125 N.M. 721, 965 P.2d 305.

Employment discrimination claim. — The law in New Mexico is unsettled as to whether a claim of discrimination in employment that is asserted under the New Mexico Human Rights Act, § 28-1-1 et seq., can also be maintained under the equal protection clause of the New Mexico constitution. Roybal v. City of Albuquerque, 653 F. Supp. 102 (D.N.M. 1986).

Workers' Compensation Act provision requiring use of the American Medical Association's guide to evaluate impairment is not violative of equal protection since it is rationally related to its purpose and does not result in dissimilar treatment of similarly-situated individuals. Madrid v. St. Joseph Hosp., 1996-NMSC-064, 122 N.M. 524, 928 P.2d 250.

Workers' Compensation Act treatment of survivor's wrongful death actions not violative of equal protection. — Barring nondependent survivors of a deceased workman from pursuing a wrongful death action, while permitting nondependent

survivors of a tort victim fatally injured outside the course and scope of his employment to bring such an action, is not violative of equal protection: Because the Workers' Compensation Act, 52-1-1 NMSA 1978 et seq., provides for expeditious payment to the workman or his dependents without a showing of the employer's fault, it requires, in return, a limitation on the liability of the employer from common-law tort actions. Sanchez v. M.M. Sundt Constr. Co., 103 N.M. 294, 706 P.2d 158 (Ct. App. 1985).

Greater workers' compensation benefits for dependents not unconstitutional. — Setting a different, and more expansive, remedy provision in the Workers' Compensation Act, 52-1-1 NMSA 1978 et seq., for dependent survivors of a deceased workman than for nondependents, is well within legislative prerogatives and is not violative of equal protection. Sanchez v. M.M. Sundt Constr. Co., 103 N.M. 294, 706 P.2d 158 (Ct. App. 1985).

Statutory limitation on attorney fees. — The statutory limitation on attorney fees that may be awarded in workers' compensation cases does not violate the due process or equal protection guarantees of the federal or state constitutions. Mieras v. Dyncorp, 1996-NMCA-095, 122 N.M. 401, 925 P.2d 518.

Compulsory school attendance law must bear rational relation to legitimate state interest. — In the application of equal protection principles, the standard for reviewing the compulsory school attendance law is whether it bears some rational relation to a legitimate state interest. State v. Edgington, 99 N.M. 715, 663 P.2d 374 (Ct. App.), cert. denied, 464 U.S. 940, 104 S. Ct. 354, 78 L. Ed. 2d 318 (1983).

And state may constitutionally prohibit home instruction by parent, guardian or custodian. — The exclusion of home instruction by a parent, guardian or custodian of a child from satisfying the requirements of the compulsory school attendance law does not violate equal protection as guaranteed in the United States and New Mexico constitutions. State v. Edgington, 99 N.M. 715, 663 P.2d 374 (Ct. App.), cert. denied, 464 U.S. 940, 104 S. Ct. 354, 78 L. Ed. 2d 318 (1983).

Municipal clean indoor air ordinance did not violate the guarantee to equal protection of the laws because its smoking restrictions applied to some public places but not to others. 1989 Op. Att'y Gen. No. 89-03.

Immunity of public defenders from malpractice claims. — Public defenders, whether regular employees of the public defender's office or performing as contractors, are immune from malpractice claims, and statutes providing such immunity did not violate the equal protection rights of a represented defendant. Coyazo v. State, 120 N.M. 47, 897 P.2d 234 (Ct. App. 1995).

B. TAXATION.

The legislature possesses great freedom in classification for tax purposes. Property Appraisal Dep't v. Ransom, 84 N.M. 637, 506 P.2d 794 (Ct. App. 1973)

(distinction for tax assessment between subdivided and unsubdivided agricultural land upheld).

In the exercise of its taxing power the state may select its subjects of taxation, and so long as the tax is equal and uniform on all subjects of a class and the classifications for taxation are reasonable, such legislation does not offend the state or federal constitutions. Rust Tractor Co. v. Bureau of Revenue, 82 N.M. 82, 475 P.2d 779 (Ct. App.), cert. denied, 82 N.M. 81, 475 P.2d 778 (1970).

Power of legislature to classify for purposes of taxation and to impose tax in question must be conceded if any reasonable or sound basis can be found to sustain it. Sovereign Camp, W.O.W. v. Casados, 21 F. Supp. 989 (D.N.M.), aff'd, 305 U.S. 558, 59 S. Ct. 79, 83 L. Ed. 352 (1938).

Including exemptions. — Inequalities which result from a singling out of one particular class for taxation or exemption infringe no constitutional limitation. Dikewood Corp. v. Bureau of Revenue, 74 N.M. 75, 390 P.2d 661 (1964).

Former act providing exemption for sales of tangible personal property to United States government but not for sales of services did not violate equal protection clause of this section. Dikewood Corp. v. Bureau of Revenue, 74 N.M. 75, 390 P.2d 661 (1964).

Every conceivable basis for tax classification must be negatived for successful attack. — In the field of taxation, more than in other fields, the legislature possesses the greatest freedom in classification, and to attack such a classification places the burden on the one attacking to negative every conceivable basis which might support the classification, and unless the classification is clearly arbitrary and capricious or void for uncertainty, the appellate court cannot substitute its views in selecting and classifying for those of the legislature. New Mexico Newspapers, Inc. v. Bureau of Revenue, 82 N.M. 436, 483 P.2d 317 (Ct. App. 1971); Rust Tractor Co. v. Bureau of Revenue, 82 N.M. 82, 475 P.2d 779 (Ct. App.), cert. denied, 82 N.M. 81, 475 P.2d 778 (1970).

In considering the equal protection issue it must be recognized that the legislature possesses great freedom in classifications in the tax field, and the taxpayer has the burden of negating every conceivable basis which might support the classification; unless the classification is clearly arbitrary and capricious, it cannot be held unconstitutional. Halliburton Co. v. Property Appraisal Dep't, 88 N.M. 476, 542 P.2d 56 (Ct. App. 1975).

Violations of constitutional uniform taxation requirements frequently result in violations of equal protection clauses. Ernest W. Hahn, Inc. v. County Assessor, 92 N.M. 609, 592 P.2d 965 (1978).

Lease limitation exemption. — Constitutional guarantees of equal protection and uniform taxation are not violated by the provision of 7-36-4 NMSA 1978 for a 75-year

limitation on leases qualifying for exemption. Welch v. Sandoval County Valuation Protests Bd., 1997-NMCA-086, 123 N.M. 722, 945 P.2d 452.

Taxpayer must show that taxing statute patently arbitrary and capricious or void for uncertainty in order to defeat the statute on constitutional grounds. C & D Trailer Sales v. Taxation & Revenue Dep't, 93 N.M. 697, 604 P.2d 835 (Ct. App. 1979).

Arbitrary classification between incomes would be invalid. — A statute making an arbitrary classification between incomes to be taxed and those in part or in whole exempt from or not subject to taxation is invalid. 1961-62 Op. Att'y Gen. No. 61-68.

But present graduated income tax provisions do not conflict with the equal protection clause of this section. 1968 Op. Att'y Gen. No. 68-9. See 7-2-1 NMSA 1978 et seq.

New Mexico was not taxing an out-of-state activity where it included gain from the cutting of timber treated by the taxpayer as a sale or exchange for federal tax purposes, under the election offered by 26 U.S.C. § 631, in the apportionable business income of the corporation; the tax was not levied on the particular business activity of the taxpayer carried on within the borders of the taxing state, but on a percentage of the taxpayer's business income from all its business activity, and the taxation was not beyond the state's taxing authority; unrealized gain can be included in "net income" for state tax purposes. Champion Int'l Corp. v. Bureau of Revenue, 88 N.M. 411, 540 P.2d 1300 (Ct. App. 1975).

Reasonable classifications in imposing privilege or excise taxes are permissible. — See notes under same catchline under analysis line II A above.

There is a substantial difference between those classes of persons who acquire title and ownership of property and those who acquire only the interest of a bailee under a lease agreement, and such a classification is not arbitrary or capricious and does not warrant the conclusion that the legislation is subject to constitutional objection. Rust Tractor Co. v. Bureau of Revenue, 82 N.M. 82, 475 P.2d 779 (Ct. App.) (gross receipts and compensating taxes), cert. denied, 82 N.M. 81, 475 P.2d 778 (1970).

A classification of commodities, businesses or occupations for excise tax purposes, under which the classes are taxed at unequal rates or one class is taxed and another is exempted, will be upheld as constitutional if it is neither arbitrary nor capricious and rests upon some reasonable basis of difference or policy. Beatty v. City of Santa Fe, 57 N.M. 759, 263 P.2d 697 (1953).

Tobacco taxes are valid. — In almost every case in which the question has arisen the courts have sustained the validity of statutes or ordinances imposing a tax on cigars, cigarettes and other forms of tobacco, as against objections based on violation of the rule requiring uniformity of taxation or constitutional provisions guaranteeing equal protection of the law. Beatty v. City of Santa Fe, 57 N.M. 759, 263 P.2d 697 (1953).

Taxes on gasoline sales by both city and state are constitutional. — See note under same catchline under analysis line II A above.

Gross receipts tax on sale of mobile homes constitutional. C & D Trailer Sales v. Taxation & Revenue Dep't, 93 N.M. 697, 604 P.2d 835 (Ct. App. 1979).

Gross receipts tax on franchise fees constitutional. — The imposition of gross receipts tax on franchise fees received from this state's dealers does not violate the due process clause or commerce clause and is proper where the franchisor is in the business of selling franchises, developing and marketing parts, receiving its primary source of income from the sale of franchises, collecting a percentage of the franchisee's gross receipts as a lease payment for use of the trademark and trade name and where its leased trademarks and trade names and their businesses are protected by the laws of this state; thus, franchisor is engaged in business in this state. AAMCO Transmissions v. Taxation & Revenue Dep't, 93 N.M. 389, 600 P.2d 841 (Ct. App.), cert. denied, 93 N.M. 205, 598 P.2d 1165 (1979).

Different tax treatment cannot be based on reporting values to different offices. — A classification based solely on the use of machinery and equipment in more than one county is patently unreasonable, and cannot be defended on the basis of assessment procedures; administrative convenience in arriving at a valuation of the property involved does not show a rational basis for taxing inventories of contractors who report value to the property appraisal department rather than to the county assessor; the fact that taxpayers may reasonably be required to report their property values to different government offices because of differences in geographic operations does not provide a reasonable basis for a difference in tax treatment on the values reported. Halliburton Co. v. Property Appraisal Dep't, 88 N.M. 476, 542 P.2d 56 (Ct. App. 1975).

Where the effect of former 7-36-9 NMSA 1978 former and 72-6-4, 1953 Comp. (predecessor of 7-36-2 NMSA 1978), was that contractors whose machinery and equipment was used in more than one county were subject to property tax on sales inventories, and contractors whose machinery and equipment was not used in more than one county were not subject to property tax on sales inventories, it was held that this difference in tax treatment based solely on whether a contractor uses his equipment in more than one county was arbitrary and resulted in a denial of equal protection of the law, and therefore to the extent that valuation by the former property appraisal department deprived the taxpayer of the exemption in former 7-36-9 NMSA 1978, that statute was unconstitutional. Halliburton Co. v. Property Appraisal Dep't, 88 N.M. 476, 542 P.2d 56 (Ct. App. 1975).

Factors in determining discrimination in property revaluation plan. — In determining whether a property revaluation plan constitutes intentional and arbitrary discrimination in violation of N.M. Const., art. VIII, § 1 and this section, all relevant circumstances should be taken into consideration. Such factors should include, but not be limited to, the resources realistically available to the assessing authority, the time limitations involved in the plan, the availability of other alternatives and the amount of

temporary inequalities in valuations which result from the cyclical implementation of the plan. Ernest W. Hahn, Inc. v. County Assessor, 92 N.M. 609, 592 P.2d 965 (1978).

Taxpayer must not be subjected to discrimination in imposition of property tax burden which results from systematic, arbitrary or intentional revaluation of some property at a figure greatly in excess of the undervaluation of other like properties. Ernest W. Hahn, Inc. v. County Assessor, 92 N.M. 609, 592 P.2d 965 (1978).

Inequality in yearly reappraisals of property unconstitutional. — Singling out one or a few taxpayers for reappraisals for several years in succession while virtually all other owners of comparable properties do not undergo a single reappraisal in the same period is an inequality that is neither temporary nor constitutional. Ernest W. Hahn, Inc. v. County Assessor, 92 N.M. 609, 592 P.2d 965 (1978).

But temporary inequalities constitutional. — Temporary inequalities which result from the practicalities of carrying out a county-wide systematic and definite property appraisal program are inevitable and constitutional. Dale Bellamah Land Co. v. County of Bernalillo, 92 N.M. 615, 592 P.2d 971 (1978).

Assessment based on invalid automatic carry-over, unconstitutional. — Where a taxpayer's 1975 assessment is not based on any new reappraisal, but is the result of an automatic carry-over of a 1974 assessment which was constitutionally invalid, the 1975 assessment is unconstitutional. Dale Bellamah Land Co. v. County of Bernalillo, 92 N.M. 615, 592 P.2d 971 (1978).

There is a substantial difference between underground and open-pit mines sufficient to support a distinction between them for tax purposes. Anaconda Co. v. Property Tax Dep't, 94 N.M. 202, 608 P.2d 514 (Ct. App. 1979), cert. denied, 94 N.M. 628, 614 P.2d 545 (1980).

Section 7-37-5C(3)(e) NMSA 1978 violates equal protection by limiting a tax exemption to those Vietnam veterans who resided in the state before May 8, 1976. Hooper v. Bernalillo County Assessor, 472 U.S. 612, 105 S. Ct. 2862, 86 L. Ed. 2d 487 (1985) (decided prior to 1986 amendment of 7-37-5 NMSA 1978, which eliminated residency requirement).

Compulsory school attendance law must bear rational relation to legitimate state interest. — In the application of equal protection principles, the standard for reviewing the compulsory school attendance law is whether it bears some rational relation to a legitimate state interest. State v. Edgington, 99 N.M. 715, 663 P.2d 374 (Ct. App.), cert. denied, 464 U.S. 940, 104 S. Ct. 354, 78 L. Ed. 2d 318 (1983).

And state may constitutionally prohibit home instruction by parent, guardian or custodian. — The exclusion of home instruction by a parent, guardian or custodian of a child from satisfying the requirements of the compulsory school attendance law does not violate equal protection as guaranteed in the United States and New Mexico

constitutions. State v. Edgington, 99 N.M. 715, 663 P.2d 374 (Ct. App.), cert. denied, 464 U.S. 940, 104 S. Ct. 354, 78 L. Ed. 2d 318 (1983).

C. CRIMINAL CASES.

Only members of class discriminated against can complain. — The denial of equal rights can be urged only by those who can show they belong to the class discriminated against. State v. Hines, 78 N.M. 471, 432 P.2d 827 (1967). See also analysis line III A above.

Making cattle rustling a felony regardless of value is constitutional. — The portion of larceny statute, 30-16-1 NMSA 1978, which made it a felony to steal livestock regardless of its value, applied to all persons who steal livestock in the state of New Mexico and did not constitute special legislation contrary to N.M. Const., art. IV, § 24, nor did it deny defendant equal protection under the law. State v. Pacheco, 81 N.M. 97, 463 P.2d 521 (Ct. App. 1969).

Statute proscribing child abuse does not deny equal protection simply because it makes a distinction between those persons who batter a child and those persons who batter an adult, since children, who are oftentimes defenseless, are in need of greater protection than adults, and a stricter penalty is one means of attaining this greater degree of protection. State v. Lucero, 87 N.M. 242, 531 P.2d 1215 (Ct. App.), cert. denied, 87 N.M. 239, 531 P.2d 1212 (1975). See 30-6-1 NMSA 1978.

Nor does statute penalizing failure to support dependent. — Section 30-6-2 NMSA 1978 does not violate equal protection because the statute does not provide that public welfare benefits must be sought or because the statute applies only to those persons who leave minor children dependent on public support, as the partial correction of the social evil has a rational relation to the object of the legislation. State v. Villalpando, 86 N.M. 193, 521 P.2d 1034 (Ct. App.), cert. denied, 86 N.M. 189, 521 P.2d 1030 (1974).

Nor does credit card fraud statute. — Section 30-16-32 NMSA 1978 is directed to the prevention of fraud in connection with credit cards, sales slips or agreements and applies when a person, with the requisite intent, signs a name other than his own or the name of a fictitious person. Thus, defendant's argument that the statute denies to defendant and others in his class the equal protection of the laws because the class of people who use the credit card of another with the same name as theirs, and sign that name, which is both theirs and the cardholder's, are exempt from prosecution under the statute, since they are not signing "the name of another," is without merit. State v. Sweat, 84 N.M. 416, 504 P.2d 24 (Ct. App. 1972).

Nor does statute as to harboring or aiding felon. — The exemptions from the application of 30-22-4 NMSA 1978, as to harboring or aiding a felon, of certain named groups of persons on the basis of relationship to the felon are reasonable classifications and do not violate the equal protection clauses of the New Mexico and United States constitutions. State v. Lucero, 88 N.M. 441, 541 P.2d 430 (1975).

Nor does failure of Controlled Substances Act to say when marijuana must be weighed. — The fact that Controlled Substances Act (30-31-1 NMSA 1978 et seq.) did not specifically state when weighing of marijuana was to be done did not mean that 30-31-23 B(3) NMSA 1978, as applied to defendant convicted of possession of more than eight ounces of "green" marijuana, was a violation of his rights to equal protection, since it was the possession of marijuana on the date of the offense which was the prohibited act and not the amount in some subsequent form suitable to a particular defendant. State v. Olive, 85 N.M. 664, 515 P.2d 668 (Ct. App.), cert. denied, 85 N.M. 639, 515 P.2d 643 (1973).

Implied consent to sobriety test is constitutional. — See note under same catchline under analysis line II B above.

Slight delay does not deny equal protection. — Some personal discomfort, occasioned by being jailed for a few hours awaiting preliminary examination, does not constitute a denial of due process or equal protection, nor can it be said to constitute cruel and unusual punishment. Christie v. Ninth Judicial Dist., 78 N.M. 469, 432 P.2d 825 (1967).

Nor does failure to apply rules retroactively as to dismissal for delay. — Where a prior mistrial was declared, the case was reset for trial, but in the interim the New Mexico supreme court and legislature adopted rules and statutes providing for dismissal of indictments in certain unduly delayed trials, and the state declined to hold these provisions retroactive, the failure to apply these new rules retroactively was not a denial of equal protection. New Mexico v. Torres, 461 F.2d 342 (10th Cir. 1972).

Provision as to prescribing qualifications of municipal judges is not discriminatory. — Section 35-14-3 NMSA 1978 on its face is not discriminatory and does not present an equal protection problem, since New Mexico's scheme does not establish classes of municipalities, some of which must have attorney judges and others which do not, and once a New Mexican municipality has determined the minimum educational and other qualifications for its municipal court judges, all defendants in that municipality are tried by judges that have met these qualifications, so that at the individual municipal court level there is equal treatment for all defendants with respect to the judges having satisfied the same qualifications. Furthermore, in New Mexico there exists an ameliorative feature which insures that if defendants tried before a nonattorney municipal judge want to have an attorney judge, then after trial or upon a nolo contendere or a guilty plea they could seek an immediate trial de novo in district court before an attorney judge. Tsiosdia v. Rainaldi, 89 N.M. 70, 547 P.2d 553 (1976).

In criminal trials a state cannot discriminate against a defendant on account of his poverty. Such discrimination would be a denial of equal protection of the law. State v. Apodaca, 80 N.M. 244, 453 P.2d 764 (Ct. App. 1969).

And must provide free transcript to indigent. — If the defendant is indigent, the state may not deny him a free transcript of the testimony at a preliminary hearing. State v. Apodaca, 80 N.M. 244, 453 P.2d 764 (Ct. App. 1969).

When transcript is necessary for effective defense or appeal. — The state must, as a matter of equal protection, provide indigent prisoners with the basic tools of an adequate defense or appeal, when those tools are available for a price to other prisoners. There can be no doubt that the state must provide an indigent defendant with a transcript of prior proceedings when that transcript is needed for an effective defense or appeal. Two factors that are relevant to the determination of need are: (1) the value of the transcript to the defendant in connection with the appeal or trial for which it is sought and (2) the availability of alternative devices that would fulfill the same functions as a transcript. This rule should be construed liberally in favor of a defendant's right to equal protection of the law and effective cross-examination. State v. Romero, 87 N.M. 279, 532 P.2d 208 (Ct. App. 1975).

Where defendant's basic defense was to persuade the jury that certain statements relied on heavily by the state were involuntary, and that the officer who testified about the circumstances of these statements testified differently at trial than at the suppression hearing, a copy of the prior hearing transcript would have been invaluable, and where there were different judges, court reporters and attorneys in the hearing on the motion to suppress, on the motion for a transcript and at trial there were no reasonable alternatives to a transcript of the prior hearing. State v. Romero, 87 N.M. 279, 532 P.2d 208 (Ct. App. 1975).

Limitation upon appointed counsel's fee is constitutional. — See note under same catchline under analysis line II B above.

Reference to repealed section where offense otherwise charged does not violate rights. — See note under same catchline under analysis line II B above.

Waiving jury trial by voluntary guilty plea does not deny rights. — See note under same catchline under analysis line II B above.

State may not have choice of which statute to prosecute under. — Where two statutes condemn certain conduct, the state does not have a choice in selecting the statute to be employed in a prosecution for violation. That view would permit the law enforcement authorities to subject one person to the possibility of a greater punishment than another who has committed an identical act and would do violence to the equal protection clauses of the state and federal constitutions. State v. Chavez, 77 N.M. 79, 419 P.2d 456 (1966).

Last amended penalty provision will control if two condemn same act. — Where two statutes condemn the same act, they are in pari materia. If the penalty provisions are different, they are irreconcilable, but if the legislature has amended one of the penalty provisions and not amended the other penalty provision, it impliedly intended

that its last expression would control. Accordingly, the prosecution is properly conducted under the amended statute. State v. Chavez, 77 N.M. 79, 419 P.2d 456 (1966).

But where both are amended, special statute will be operative. State v. Riley, 82 N.M. 235, 478 P.2d 563 (1970).

And defendant must be charged under special statute. — Where two statutes condemn the same offense and one is a special statute and one is a general statute, the accused should be charged under the general statute. State v. Riley, 82 N.M. 235, 478 P.2d 563 (1970).

Prosecution under special, not general, statute does not deny equal protection. — Defendant's contention that he was denied equal protection because at time of conviction there existed two separate penalty provisions for possession of LSD, one constituting a felony, the other constituting a misdemeanor, thus giving the opportunity to enforce the laws without uniformity, was without merit, as one provision included "hallucinogenic drugs" but did not specifically define LSD as such, while the other section, under which defendant was charged, specifically proscribed the possession of LSD, and where there are two laws covering the same act, one being general and the other being specific, it is not a denial of equal protection to prosecute defendant under the special statute (since repealed). Campion v. State, 84 N.M. 137, 500 P.2d 422 (Ct. App. 1972).

Alleged discriminatory use of peremptory challenges. — Although the defendant established a prima facie case of discrimination involving the state's use of one of its peremptory challenges against the only black juror on the panel, the state rebutted the prima facie case by providing a racially-neutral explanation for its challenge. The juror had previously been on a jury that had failed to reach a verdict. State v. Goode, 107 N.M. 298, 756 P.2d 578 (Ct. App. 1988).

The prosecution's peremptory challenge to remove the only black juror who could have served on the jury panel based on the prospective juror's failure to make eye contact and lack of assertiveness was not shown to be purposeful discrimination or to be unsupported by substantial evidence. State v. Jones, 1996-NMCA-020, 121 N.M. 383, 911 P.2d 891, aff'd, 1997-NMSC-016, 123 N.M. 73, 934 P.2d 267.

Disallowance of juries in metropolitan court for petty criminal offenses. — Because of the legislature's requirement that magistrate judges in metropolitan court be attorneys and magistrates elsewhere throughout the state need not meet that qualification, the disallowance of juries in metropolitan court for petty criminal offenses is not arbitrary, unreasonable nor unrelated to a legitimate legislative purpose. Meyer v. Jones, 106 N.M. 708, 749 P.2d 93 (1988).

Guilty but mentally ill verdicts. — New Mexico statutory provisions authorizing a verdict of guilty but mentally ill do not impinge upon a defendant's right to a fair trial and

do not violate the equal protection clauses of the United States and New Mexico Constitutions. State v. Neely, 112 N.M. 702, 819 P.2d 249 (1991).

Failure to give retroactive effect to presentence confinement credit statute. — Failure to give 31-20-12 NMSA 1978, allowing credit for presentence confinement, retroactive effect did not violate the equal protection provisions of the state and federal constitutions. State v. Dalrymple, 79 N.M. 670, 448 P.2d 182 (Ct. App. 1968).

State's good time credit statutory scheme does not offend the constitutional guarantee of equal protection of the law; it is reasonable not to award good time credits for presentence confinement to detainees who are presumed innocent and therefore are not yet subject to rehabilitation efforts or to compulsory labor requirements, especially when they are held without systematic evaluation in county jails lacking rehabilitation programs. State v. Aqui, 104 N.M. 345, 721 P.2d 771 (1986), cert. denied, 479 U.S. 917, 107 S. Ct. 321, 93 L. Ed. 2d 294 (1988).

Failure to give credit for the time served under a void sentence when the defendant is retried and convicted and given a new sentence does not violate the equal protection clause of the New Mexico and United States constitutions. New Mexico allows credit for time served where the trial itself is valid, but the sentence alone is erroneous, but refuses credit where the trial itself is constitutionally defective, although the sentence is correct. Newman v. Rodriguez, 375 F.2d 712 (10th Cir. 1967).

Defendant may not be imprisoned solely for inability to pay costs. — A defendant may not be imprisoned beyond the maximum statutory sentence because of his inability to pay the costs assessed against him, as to do such would deprive defendant of equal protection of the law. State v. Chavez, 86 N.M. 199, 521 P.2d 1040 (Ct. App.), cert. denied, 86 N.M. 189, 521 P.2d 1030 (1974).

Nonuniformity in sentencing is not deprivation of equal protection. — Lack of uniformity in enforcement of the law does not excuse a particular defendant's violation of the law and does not deprive a particular defendant of equal protection of the law. Campion v. State, 84 N.M. 137, 500 P.2d 422 (Ct. App. 1972); State v. Lujan, 79 N.M. 525, 445 P.2d 749 (Ct. App. 1968).

Defendant was not denied equal protection of the law because he received a sentence while others, similarly situated, did not. Campion v. State, 84 N.M. 137, 500 P.2d 422 (Ct. App. 1972).

Defendant was not denied equal protection of the law because he received an enhanced sentence as an habitual offender while others, similarly situated, did not. State v. Lujan, 79 N.M. 525, 445 P.2d 749 (Ct. App. 1968).

Nor is nonuniformity in time served under same indeterminate sentence. — The fact that another prisoner may serve less, or more, time under the same indeterminate sentence does not violate equal protection, because this constitutional provision does

not require identical punishments and does not protect defendant from the consequences of his crime. State v. Deats, 83 N.M. 154, 489 P.2d 662 (Ct. App. 1971).

Or repeated prosecutions against one person only. — Fact that defendant was the first person in 24 years to be tried three times for the same offense in his judicial district did not deny him equal protection, since state and federal constitutions did not require uniform enforcement of the law and did not protect defendant from the consequences of his crime. State v. Lunn, 88 N.M. 64, 537 P.2d 672 (Ct. App.), cert. denied, 88 N.M. 318, 540 P.2d 248 (1975), cert. denied, 423 U.S. 1058, 96 S. Ct. 793, 46 L. Ed. 2d 648 (1976).

Prohibition against carrying concealed weapon. — Section 30-7-2, the prohibition against carrying a concealed weapon, does not violate equal protection on the basis that it impermissibly distinguishes between rich and poor in that home and vehicle owners may properly conceal weapons, but poor people do not own a residence or vehicle in which to conceal a weapon. State v. McDuffie, 106 N.M. 120, 739 P.2d 989 (Ct. App. 1987).

Counsel need not be appointed for appeal to United States Supreme Court. — See note under same catchline under analysis line II B above.

IV. EQUAL RIGHTS AMENDMENT.

City of Albuquerque ordinance which prohibits public nudity does not make an invidious gender classification that operates to the disadvantage of women and does not violate the New Mexico equal rights amendment. City of Albuquerque v. Sachs, 2004-NMCA-065, 135 N.M. 578, 92 P.3d 24, cert. denied, 2004-NMCERT-006, 135 N.M. 789, 93 P.3d 1292.

City of Albuquerque ordinance which prohibits public nudity does not discriminate against women in violation of the equal rights amendment in the New Mexico Constitution because it prohibits a women from showing her breast in a public place without a fully opaque covering of her entire nipple when there is no such prohibition against men. City of Albuquerque v. Sachs, 2004-NMCA-065, 135 N.M. 578, 92 P.3d 24, cert. denied, 2004-NMCERT-006, 135 N.M. 789, 93 P.3d 1292.

Restrictions on funding for abortions. — Rule of the Human Services Department prohibiting the use of state funds to pay for abortions for Medicaid-eligible women except when necessary to save the life of the mother, to end an ectopic pregnancy, or when the pregnancy resulted from rape or incest violates the equal rights amendment. New Mexico Right to Choose/NARAL v. Johnson, 1999-NMSC-005, 126 N.M. 788, 975 P.2d 841, cert. denied, 526 U.S. 1020, 119 S. Ct. 1256, 143 L. Ed. 2d 352 (1999).

Conditions governing alimony not prescribed, except equal protection. — The equal rights amendment (amendment to this section by H.J.R. No. 2, § 1 (Laws 1972)) does not prescribe conditions governing when and why alimony should be granted,

beyond the requirement of equal protection, particularly when the award of alimony includes support for the children. Schaab v. Schaab, 87 N.M. 220, 531 P.2d 954 (1974).

Excluding women from military institute cadets is unconstitutional. — The exclusion of women from New Mexico military institute's cadet program violates the equal rights amendment. 1975 Op. Att'y Gen. No. 75-74.

Sec. 19. [Retroactive laws; bills of attainder; impairment of contracts.]

No ex post facto law, bill of attainder nor law impairing the obligation of contracts shall be enacted by the legislature.

ANNOTATIONS

Prohibition against ex post facto laws in this section is not at issue with amendment to 66-8-102 NMSA 1978 by House Bill 117 (Laws 2003, ch. 90) and House Bill 278 (Laws 2003, ch. 164) because House Bill 117 went into effect immediately under its emergency clause. State v. Smith, 2004-NMSC-032, 136 N.M. 372, 93 P.3d 1022.

Sex Offender Registration and Notification Act does not violate either the federal or state ex post facto clause. State v. Druktenis, 2004-NMCA-032, 135 N.M. 223, 86 P.3d 1050.

Retroactive application of Sex Offender Registration and Notification Act does not violate the New Mexico Constitution’s ex post facto clause. State v. Druktenis, 2004-NMCA-032, 135 N.M. 223, 86 P.3d 1050.

Retroactivity, per se, not invalid. — In the absence of an expressed prohibition, a law is not invalid merely because retroactive in operation. 1961-62 Op. Att'y Gen. No. 61-68.

This constitutional inhibition is applicable to city ordinances as it is to state statutes. 1961-62 Op. Att'y Gen. No. 62-62.

Ex post facto law defined. — An ex post facto law is defined as one which operating retrospectively and on penal or criminal matters only renders a previously innocent act criminal. 1969 Op. Att'y Gen. No. 69-10.

The scope of the prohibition against ex post facto laws is limited in its application to laws of a criminal nature. 1963-64 Op. Att'y Gen. No. 64-91.

Prohibition applies to judicial rulemaking. — A state constitutional prohibition on legislative enactments applies equally to judicial rulemaking. State v. Norush, 97 N.M. 660, 642 P.2d 1119 (Ct. App.), cert. denied, 98 N.M. 50, 644 P.2d 1039 (1982).

Such as jury instructions. — Jury instructions which deprive an accused of a defense available at the time of his act are prohibited as ex post facto. State v. Norush, 97 N.M. 660, 642 P.2d 1119 (Ct. App. 1982).

Bill of attainder defined. — A bill of attainder is defined as a legislative act inflicting punishment without a judicial trial. 1969 Op. Att'y Gen. No. 69-10.

Substitution of punishments permissible. — Statute substituting electrocution for hanging, and applicable to those under sentence of hanging on effective date of the statute, was not ex post facto. Woo Dak San v. State, 36 N.M. 53, 7 P.2d 940 (1931).

Age confinement must end under Children's Code. — The constitutional prohibition against ex post facto laws prevents the courts from applying the Children's Code adopted in 1993 to permit the confinement of a child until he or she reaches the age of twenty-one where the delinquent acts and original adjudication occurred while the prior Code was in effect. State v. Adam M., 1998-NMCA-014, 124 N.M. 505, 953 P.2d 40.

Denial or obstruction of contract rights. — Statute which denies or obstructs preexisting contract rights is constitutionally objectionable even though it professes to act only upon the remedy. Rubalcava v. Garst, 53 N.M. 295, 206 P.2d 1154 (1949), opinion partly superseded and case remanded for inclusion of indispensable parties, 56 N.M. 647, 248 P.2d 207 (1952), subsequent appeal after suit on administrator's bond,.

Existing contracts are subject to the legitimate exercise of the police power, and a sign ordinance is a legitimate exercise of the city's police power. Thus, such an ordinance does not unconstitutionally impair the obligation of a contract. Temple Baptist Church, Inc. v. City of Albuquerque, 98 N.M. 138, 646 P.2d 565 (1982).

Alteration of contract by providing cost-of-living increases. — The governor's veto of cost-of-living increases, included in the general fund appropriation, for certain private employees of community based providers of mental health services who had contracted with the health and environment department, was valid. The legislature may not attempt to alter the terms of existing contractual relationships through the appropriation process. State ex rel. Coll v. Carruthers, 107 N.M. 439, 759 P.2d 1380 (1988).

Law requiring corporation to change name invalid. — Name of foreign corporation admitted to do business in state becomes part of its assets, and state contracts that such corporation shall have right to use it and may not require it to be changed, and law attempting to do so is invalid. 1931-32 Op. Att'y Gen. 65.

Increase in workmen's compensation benefits. — To give amendment increasing maximum allowable medical benefits under workmen's compensation a retroactive effect would alter a substantial term of the contract existing between employer and employee at the time of injury, contrary to the constitutional provisions prohibiting impairment of contracts. Noffsker v. K. Barnett & Sons, 72 N.M. 471, 384 P.2d 1022 (1963).

Change in accrual rate of annual vacation leave for public employee. — The personnel board's decision that juvenile probation officers transferred from the judicial branch to the executive branch should accrue annual leave from the time of the transfer at rates specified under regulations for the executive branch and not at the judicial branch rates did not constitute an unconstitutional infringement of the employee's contract rights given that the legislation governing the transfer of the officers did not confer the right, contractual or otherwise, to retain the judicial branch rates of annual leave accrual and also given that statutes fixing the compensation or terms of public employment are presumed merely to establish public policy subject to legislative revision and not to create contractual or vested rights. Whitely v. New Mexico State Personnel Bd., 115 N.M. 308, 850 P.2d 1011 (1993).

Oral adoption contract. — Law requiring written agreement of adoption to maintain claim against decedent's estate based upon adoption contract is not applicable to oral contract made and performed prior to its effective date. Rubalcava v. Garst, 53 N.M. 295, 206 P.2d 1154 (1949), opinion partly superseded and case remanded for inclusion of indispensable parties, 56 N.M. 647, 248 P.2d 207 (1952), subsequent appeal after suit on administrator's bond,.

Payment of bounties earned. — A person earning bounties before law authorizing them was repealed was still entitled to them. Hayner v. Board of Comm'rs, 29 N.M. 311, 222 P. 657 (1924).

Lease obligations not impaired. — General appropriations bill, Laws 1971, ch. 327, directing that vocational rehabilitation division of the state board of education should relocate its office from lessor's premises to a site more accessible to its clients, did not impair obligations of rental contract which specifically provided that lessee had right to terminate if directed by the legislature to move its offices. National Bldg. v. State Bd. of Educ., 85 N.M. 186, 510 P.2d 510 (1973).

Retrospective operation of statute prescribing costs. — The fact that enactments awarding attorneys' fees, which are valid exercises of the power to prescribe costs, operate retrospectively will not render them unconstitutional. Cutter Flying Serv., Inc. v. Straughan Chevrolet, Inc., 80 N.M. 646, 459 P.2d 350 (1969).

Statute of limitations. — In view of saving clause allowing reasonable time for pursuit of actions accruing prior to enactment, 37-1-24 NMSA 1978, providing limitations for suits against cities, towns and villages, was not an unconstitutional impairment of contract. Hoover v. City of Albuquerque, 58 N.M. 250, 270 P.2d 386 (1954).

Repurchase rights alterable. — Legislature may at any time alter preference rights of former owners to repurchase property which state has acquired upon tax sale, because there is no contract with the former owner and no vested rights are disturbed. Yates v. Hawkins, 46 N.M. 249, 126 P.2d 476 (1942).

Alteration of bank stockholders' liability. — Where bank stockholders' liability is changed pursuant to N.M. Const., art. XI, § 13, right of legislature to make the change has been reserved by the latter and does not violate this section. Melaven v. Schmidt, 34 N.M. 443, 283 P. 900 (1929).

Contract with debenture holders. — Statute authorizing refund of gasoline excise taxes only out of surplus not necessary to payment of interest and principal of highway debentures did not impair obligations of contract between state and debenture holders. Streit v. Lujan, 35 N.M. 672, 6 P.2d 205 (1931), appeal dismissed, 285 U.S. 527, 52 S. Ct. 405, 76 L. Ed. 924 (1932).

State highway debentures issued under the law of 1933 are valid and are not affected by or subject to a referendum, as such law could not be suspended by referendum petition from which constitution exempts laws providing for preservation of public peace, safety and health, and prohibits enactment of ex post facto law or one impairing obligations of contracts. 1933-34 Op. Att'y Gen. 99.

Taxes pledged for debt. — Former 67-19-3, 1953 Comp., violated this section and U.S. Const., art. I, § 10, cl. 1, insofar as it related to county, school district and municipal taxes, which by the Bateman Act were pledged to the payment of debts arising during the year for which taxes are levied. 1939-40 Op. Att'y Gen. 44.

Limiting application of revenue. — Former act which limited the application of municipal revenue from public utilities did not impair obligation of contract. Dreyfus v. City of Socorro, 26 N.M. 127, 189 P. 878 (1920).

Retroactive law valid. — Laws 1923, ch. 140, § 515 (now repealed), relating to liens of assessments for conservancy districts, did not violate this section. In re Proposed Middle Rio Grande Conservancy Dist., 31 N.M. 188, 242 P. 683 (1925).

No vested rights in licenses. — A liquor license is a privilege and not property within the meaning of the due process and contract clauses of state and federal constitutions, and in them licensees have no vested property rights. Baca v. Grisolano, 57 N.M. 176, 256 P.2d 792 (1953).

A privilege or license to do business in a state is not a contract, and does not vest in the holder thereof the right to enforce the same under constitutional guarantees. Sovereign Camp, W.O.W. v. Casados, 21 F. Supp. 989 (D.N.M.), aff'd, 305 U.S. 558, 59 S. Ct. 79, 83 L. Ed. 352 (1938).

Privilege tax. — Former 2% privilege tax from which qualified benefit societies were exempted did not violate federal constitution, art. I, § 10, nor this section. Sovereign Camp, W.O.W. v. Casados, 21 F. Supp. 989 (D.N.M.), aff'd, 305 U.S. 558, 59 S. Ct. 79, 83 L. Ed. 352 (1938).

Limitations on change of party affiliation. — A provision which would not preclude one from seeking office, but would merely prevent his changing of party affiliation between its enactment and the next election, would not be an unconstitutional interference with a vested right. 1969 Op. Att'y Gen. No. 69-10.

Prohibition on enforcement of prepayment penalty. — The prohibition on enforcement of a prepayment penalty in Subsection A of 48-7-19 NMSA 1978 is sufficiently justified by the significant and legitimate public purpose of promoting the alienability of land to withstand challenge under this section. Los Quatros, Inc. v. State Farm Life Ins. Co., 110 N.M. 750, 800 P.2d 184 (1990).

Comparable provisions. — Idaho Const., art. I, § 16.

Iowa Const., art. I, § 21.

Montana Const., art. II, § 31.

Utah Const., art. I, § 18.

Wyoming Const., art. I, § 35.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 16A Am. Jur. 2d Constitutional Law §§ 634, 655, 682.

Redemption period, statutes extending in general, 1 A.L.R. 143, 38 A.L.R. 229, 89 A.L.R. 966.

Prohibiting possession of liquor lawfully acquired, 2 A.L.R. 1098.

Franchise rates, state increasing, 3 A.L.R. 730, 9 A.L.R. 1165, 28 A.L.R. 587, 29 A.L.R. 356.

Banks, examination and supervision by public officers as impairing charter rights, 8 A.L.R. 898.

Carriers, grant of free transportation as contract protected against impairment, 10 A.L.R. 499.

Street railways, paving ordinances as impairing franchises, 10 A.L.R. 879.

Rent laws as impairing contracts, 11 A.L.R. 1252, 16 A.L.R. 178.

Wages, statutes regulating time for payment, 12 A.L.R. 635, 26 A.L.R. 1396.

Child labor laws as impairing contracts, 12 A.L.R. 1221, 21 A.L.R. 1437.

Insurance, statutes relating to amount or basis of computation on settlement under life policy, 17 A.L.R. 962.

Banks, statutes granting preferences on insolvency, 31 A.L.R. 790, 79 A.L.R. 582, 83 A.L.R. 1080.

Wages, constitutionality of statute relating to assignment of wages or salary, 37 A.L.R. 872, 137 A.L.R. 738.

Changes affecting grand jury or substituting information for indictment, 53 A.L.R. 716.

Constitutionality of statutes imposing absolute liability on private persons or corporations, irrespective of negligence or breach of a specific statutory duty, for injury to person or property, 53 A.L.R. 875.

Special assessments, statutes impairing or extinguishing lien on sale for taxes, 53 A.L.R. 1140.

Penalty or punishment changed after conviction, 55 A.L.R. 443.

Punishment for subsequent offense increased, 58 A.L.R. 21, 82 A.L.R. 345, 116 A.L.R. 209, 132 A.L.R. 91, 139 A.L.R. 673.

Tax on lender or owner of obligation, statute imposing duty on borrower to collect and pay, 60 A.L.R. 742.

Bank deposits, statute relating to interest on, 62 A.L.R. 489.

Corporations, use of name implying subjection to government control, 63 A.L.R. 1049.

Corporations, constitutional or statutory provisions increasing liability of stockholders, 72 A.L.R. 1252.

Automobile carriers, taxation by license, 75 A.L.R. 44.

Cooperative marketing of farm products by producers' associations, 77 A.L.R. 405, 98 A.L.R. 1406, 12 A.L.R.2D 130.

Liens for public improvements, giving priority over preexisting contractual lien, 78 A.L.R. 513.

Banks, statutes for aid of bank or depositors where in need of cash, 82 A.L.R. 1025.

Master and servant, statute invalidating contract exonerating employer from liability for injuries to employee, 84 A.L.R. 1303.

Public improvements, constitutional provisions against impairing obligation of contract as applicable to statutes affecting rights or remedies of holders or owners of improvement bonds or liens, 85 A.L.R. 244, 97 A.L.R. 911.

Redemption period, emergency legislation extending, 86 A.L.R. 1539, 88 A.L.R. 1519, 96 A.L.R. 312, 96 A.L.R. 826.

Bonds, subsequent issue by public body as impairing obligation to prior creditors, 87 A.L.R. 397.

Interest, statutes governing, 87 A.L.R. 462.

Bankruptcy or insolvency, statutes relating to preference of claims, 88 A.L.R. 257.

Bondholders, protecting as class without consent of all against sacrifice of property on foreclosure, 88 A.L.R. 1270.

Emergency powers of government, 88 A.L.R. 1519, 96 A.L.R. 312, 96 A.L.R. 826.

Mortgages, fixing upset price on foreclosure or limiting deficiency, 89 A.L.R. 1087, 90 A.L.R. 1330, 94 A.L.R. 1352, 96 A.L.R. 853, 97 A.L.R. 1123, 104 A.L.R. 375.

Attorneys' fees, statutes providing for, 90 A.L.R. 530.

Hours of labor, statute limiting, 90 A.L.R. 837.

Debt limit, raising constitutional as impairment of existing contract, 90 A.L.R. 859.

Banks, statutes providing for conservators, 91 A.L.R. 234, 92 A.L.R. 1258, 107 A.L.R. 1431.

Exemption statutes, 93 A.L.R. 177.

Wages, claims for, statutes giving lien or preference on insolvency of employer, 94 A.L.R. 1295.

Bank deposits, statutes relating to "freezing" or "stabilizing," 95 A.L.R. 1214.

Local improvements, impairment of rights and remedies of owners of property subject to assessment, 100 A.L.R. 164.

Defendant's right to elect as to punishment where statutory provision as to punishment is changed after commission of offense, but before conviction, 103 A.L.R. 1041.

Constitutional prohibition of ex post facto laws as applicable to statutes relating to joinder of offenses or defendants, 110 A.L.R. 1308.

Statutory enactment or repeal subsequent to tax sale or issuance of tax certificates as affecting rights of holders of tax certificates or purchasers at tax sale, 111 A.L.R. 237.

Constitutionality, construction and application of statutes empowering court to require judgment debtor to make payment out of income or by installments, 111 A.L.R. 392.

Character of defenses that may be cut off by retrospective legislation, 113 A.L.R. 768.

Constitutional provisions against impairment of obligations of contract as applied to sinking funds for retirement of municipal or other public bonds, 115 A.L.R. 220.

Statutes affecting mortgagee's rights and remedies in respect of deficiency as unconstitutional impairment of obligation of contract, 115 A.L.R. 435, 130 A.L.R. 1482, 133 A.L.R. 1473.

War moratorium acts, 137 A.L.R. 1256.

Bank deposits, statutes relating to disposition of unclaimed, 151 A.L.R. 836.

Tax exemptions and the contract clause, 173 A.L.R. 15.

Retrospective modification of, or refusal to enforce, decree for alimony, separate maintenance, or support, 6 A.L.R.2d 1277, 52 A.L.R.2d 156.

Constitutionality, construction and application of statute or ordinance providing for reduction of pension or retirement benefit of public officer or employee because of independent income, 7 A.L.R.2d 692.

Reforestation: constitutionality of reforestation or forest conservation legislation, 13 A.L.R.2d 1095.

Attachment: contract impairment clause as affecting foreign attachment or garnishment in action by nonresident against nonresident or foreign corporation upon a foreign cause of action, 14 A.L.R.2d 420.

Statutes relating to sexual psychopaths, 24 A.L.R.2d 350.

Constitutionality of statute shifting the burden of federal excise tax, 26 A.L.R.2d 925.

Retrospective operation of legislation affecting estates by the entireties, 27 A.L.R.2d 868.

Derivative action: application to pending action or existing cause of action of statute regulating stockholders' actions, 32 A.L.R.2d 851.

Retrospective application of statute relating to trust investments, 35 A.L.R.2d 991.

Validity of compulsory pooling or unitization statute or ordinance requiring owners or lessees of oil and gas lands to develop their holdings as single drilling unit and the like, 37 A.L.R.2d 434.

Validity of statute or ordinance requiring real estate broker to procure license, 39 A.L.R.2d 606.

Venue statute, retroactive operation and effect of, 41 A.L.R.2d 798.

Construction, application, and effect of constitutional provisions or statutes relating to cumulative voting of stock for corporate directors, 43 A.L.R.2d 1322.

Assertion of immunity as ground for removing or discharging public officer or employee, 44 A.L.R.2d 789.

Cemetery: impairment of obligation of contract by public prohibition or regulation of location of, 50 A.L.R.2d 905.

Pension law modifications, retrospective operation of, 52 A.L.R.2d 437.

Validity of statute making private property owner liable to contractor's laborers, materialmen, or subcontractors where owner fails to exact bond or employ other means of securing their payment, 59 A.L.R.2d 885.

Validity, under state constitutions, of nonsigner provisions of Fair Trade Laws, 60 A.L.R.2d 420.

Usury: constitutionality of retrospective operation of statute denying defense of usury to corporation, 63 A.L.R.2d 929.

Wrongful death, retroactive effect of statute changing manner and method of distribution of recovery or settlement for, 66 A.L.R.2d 1444.

Burial contracts: validity of retrospective operation of statutes regulating preneed contracts for the sale or furnishing of burial services and merchandise, 68 A.L.R.2d 1251.

State succession, transfer, inheritance, or estate tax in respect of life insurance and annuities, 73 A.L.R.2d 157.

Constitutionality of state legislation to reimburse public utilities for cost of relocating their facilities because of highway construction, conditioned upon federal reimbursement of the state under the terms of Federal-Aid Highway Act (23 USC sec. 123), 75 A.L.R.2d 419.

Public pension fund, validity and effect of retroactive change in rate of employee's contribution to, 78 A.L.R.2d 1197.

Validity, and applicability to causes of action not already barred, of a statute enlarging limitation period, 79 A.L.R.2d 1080.

Prospective or retroactive operation of overruling decision, 10 A.L.R.3d 1371.

Long-arm statutes: retrospective operation of state statutes or rules of court conferring in personam jurisdiction over nonresidents or foreign corporations on the basis of isolated acts or transactions, 19 A.L.R.3d 138.

Divorce: retrospective effect of statute prescribing grounds of divorce, 23 A.L.R.3d 626.

Statutory change of age of majority as affecting preexisting status or rights, 75 A.L.R.3d 228.

Validity of statute canceling, destroying, nullifying, or limiting enforcement of possibilities of reverter or rights of re-entry for condition broken, 87 A.L.R.3d 1011.

16A C.J.S. Constitutional Law §§ 277, 392, 411, 429.

Sec. 20. [Eminent domain.]

Private property shall not be taken or damaged for public use without just compensation.

ANNOTATIONS

I. GENERAL CONSIDERATION.

A. IN GENERAL.

Cross references. — For similar provision, see Kearny Bill of Rights, cl. 4.

Scope of section. — Constitutional provision that private property shall not be taken for public use without just compensation applies only to property taken under the power of eminent domain. 1959-60 Op. Att'y Gen. No. 60-70.

State may appropriate private property under inherent power of eminent domain by a legislative act. State ex rel. Red River Valley Co. v. District Court, 39 N.M. 523, 51 P.2d 239 (1935).

But right to recover just compensation is conferred on condemnee by this section. Garver v. Public Serv. Co., 77 N.M. 262, 421 P.2d 788 (1966).

Taking or damages compensable. — In order for an owner to be entitled to compensation a taking is not required - it being sufficient if there are consequential damages. Board of County Comm'rs v. Harris, 69 N.M. 315, 366 P.2d 710 (1961).

Jurisdiction of municipal condemnation of public utility. — The public utilities commission does not have jurisdiction over municipal condemnations of regulated water and sewer utilities. United Water N.M., Inc. v. New Mexico Pub. Util. Comm'n, 1996-NMSC-007, 121 N.M. 272, 910 P.2d 906.

County can unilaterally abandon condemnation proceedings following the entry of a permanent order of entry anytime before the entry of a final judgment confirming the compensation award, subject to paying compensation for the temporary taking that occurred and other expenses necessary to do equity. In assessing these damages and expenses, the court shall not award any damages for any reduction in value to the property based solely on its relocation. In this case, because there is no permanent taking of the owner's property, the owner had no right to any incidental damages to what would have otherwise been the remainder of his property. County of Bernalillo v. Morris, 117 N.M. 398, 872 P.2d 371 (Ct. App. 1994).

Deliberate harm required. — A property owner must allege and prove conduct on the part of the governmental actor more serious - in terms of culpability, or in terms of the probability of harm to an owner's property - than mere negligence. For an act to give rise to a claim for compensation under this section, the act must at least be one in which the risk of damage to the owner's property is actually foreseen by the governmental actor, or in which it is so obvious that its incurrence amounts to the deliberate infliction of harm for the purpose of carrying out the governmental project. Electro-Jet Tool & Mfg. Co. v. City of Albuquerque, 114 N.M. 676, 845 P.2d 770 (1992).

When compensation unnecessary. — Municipality is immune from constitutional requirement of compensating for injury to or "taking" of property only in the reasonable exercise of the police power, to the extent that it is required or necessary in order to advance the best interests of society in general. 1959-60 Op. Att'y Gen. No. 60-70.

There is no limitation on legislature's right to designate agencies that shall exercise the power of eminent domain except as restricted by the constitution. State ex rel. State Hwy. Comm'n v. Burks, 79 N.M. 373, 443 P.2d 866 (1968).

Applicability of federal case law. — In view of the fact that the provisions of N.M. Const., art. II, § 18, concerning due process and this section, concerning the taking of private property without just compensation, are worded exactly as those contained in U.S. Const., amend. V, the holdings of the United States supreme court may be applicable to issues thereunder. 1968 Op. Att'y Gen. No. 68-9.

Graduated income tax valid. — Graduated income tax does not violate N.M. Const., art. II, § 18, or this section. 1968 Op. Att'y Gen. No. 68-9.

Public ownership of underground water constitutional. — Laws 1931, ch. 131 (72-12-1 to 72-12-10 NMSA 1978), which declares ownership of underground waters to be in the public, does not violate N.M. Const., art. II, §§ 18 and 20, because the patents from the United States issued after 1866, and particularly those issued after the Desert Land Act of 1877, conveyed no interest in, or right to, the use of surface or underlying water with which lands could be irrigated, except such portions thereof as were used to reclaim the particular land applied for under the act. State ex rel. Bliss v. Dority, 55 N.M. 12, 225 P.2d 1007 (1950), appeal dismissed, 341 U.S. 924, 71 S. Ct. 798, 95 L. Ed. 1356 (1951).

Law authorizing uncompensated diversion of water invalid. — Section 72-5-26 NMSA 1978, insofar as it authorizes the delivery of water from a junior ditch into a senior ditch and the diversion of the water above or below without compensation to the owner of the senior ditch, violates this section. Insofar as it authorizes diversion of water from other sources, it is unobjectionable. Miller v. Hagerman Irrigation Co., 20 N.M. 604, 151 P. 763 (1915).

Comparable provisions. — Idaho Const., art. I, § 14.

Iowa Const., art. I, § 18.

Montana Const., art. II, § 29.

Utah Const., art. I, § 22.

Wyoming Const., art. I, § 33.

Law reviews. — For article, "Private Nuisance in New Mexico," see 4 N.M. L. Rev. 127 (1974).

For note, "The Use of Eminent Domain for Oil and Gas Pipelines in New Mexico," see 4 Nat. Resources J. 360 (1964).

For note, "Appropriation By the State of Minimum Flows in New Mexico Streams," see 15 Nat. Resources J. 809 (1975).

For comment on State ex rel. State Hwy. Comm'n v. Danfelser, 72 N.M. 361, 384 P.2d 241 (1963), cert. denied, 375 U.S. 969, 84 S. Ct. 487, 11 L. Ed. 2d 416 (1964), see 4 Nat. Resources J. 181 (1964).

For student symposium, "Constitutional Revision - Water Rights," see 9 Nat. Resources J. 471 (1969).

For note, "Natural Gas Pipelines and Eminent Domain: Can a Public Use Exist in a Pipeline?," see 25 Nat. Resources J. 829 (1985).

For comment, "Land Use Regulations and the Takings Clause: Are Courts Applying a Tougher Standard to Regulators after *Nollan*?," see 32 Nat. Resources J. 959 (1992).

For note, "Property Owners in Condemnation Actions May Receive Compensation for Diminution in Value to Their Property Caused by Public Perception: *City of Santa Fe v. Komis*," see 24 N.M.L. Rev. 535 (1994).

For note, "United Water New Mexico v. New Mexico Public Utility Commission: Why Rules Governing the Condemnation and Municipalization of Water Utilities May Not Apply to Electric Utilities," see 38 Nat. Resources J. 667 (1998).

For article, “Valuation of Minerals in Takings Cases,” see 42 Nat. Resources J. 185 (2002).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 26 Am. Jur. 2d Eminent Domain, §§ 6, 17 et seq.

"Owner," meaning in statutes relating to condemnation, 2 A.L.R. 785, 95 A.L.R. 1085.

Electric railway in street or highway carrying freight as additional servitude, 2 A.L.R. 1404, 46 A.L.R. 1472.

Property of United States, condemnation by state, 4 A.L.R. 548.

Hospital, depreciation of property by erection of municipal, 4 A.L.R. 1012.

Dower, wife's right to compensation for interference with inchoate right of, 5 A.L.R. 1347, 101 A.L.R. 697.

Dams, statutes relieving person constructing from liability for damage to adjoining property, 6 A.L.R. 1326.

Particular use of property, power to condemn against, 8 A.L.R. 594.

Telegraph or telephone line along railroad right-of-way, fee owner's right to compensation for, 8 A.L.R. 1293, 19 A.L.R. 383.

Railroad crossings, requiring railroad to construct or maintain private crossings without compensation, 12 A.L.R. 227.

City or town planning statutes or ordinances, constitutionality, 12 A.L.R. 679, 28 A.L.R. 314, 44 A.L.R. 1377, 53 A.L.R. 1222.

Property previously condemned or purchased for public use, right to condemn where not actually so used, 12 A.L.R. 1502.

Interurban railway in city street as additional servitude, 13 A.L.R. 809.

Navigation, extension of power of public to improve without compensating riparian owner to improvements not in aid of navigation, 18 A.L.R. 403.

Second condemnation proceeding, compensation in, 18 A.L.R. 569.

Levee, compensation for land left outside of, 20 A.L.R. 302.

Consequential damages to property not taken, recovery in other than eminent domain proceeding, 20 A.L.R. 516.

Navigation, improvements affecting riparian owner's access, 21 A.L.R. 206.

Railroad in street, abutting owner's right to compensation, 22 A.L.R. 145.

Street forming boundary of city, rural or urban character as affecting right of abutting owner to compensation for use by utilities, 30 A.L.R. 746.

Abandonment of eminent domain proceedings, liability for loss or expenses incurred by property owner, 31 A.L.R. 352, 121 A.L.R. 12, 92 A.L.R.2d 355.

Zoning as taking property without compensation, 33 A.L.R. 287, 38 A.L.R. 1496, 43 A.L.R. 668, 54 A.L.R. 1030, 86 A.L.R. 659, 117 A.L.R. 1117.

Cemetery, damage to property from proximity, 36 A.L.R. 527.

Bridge approach interfering with access, right to compensation, 45 A.L.R. 534.

Railroad, changing location as a taking or damaging for which compensation must be made, 46 A.L.R. 1446.

Railroad property leases or privileges, requiring grant or renewal as taking of property, 47 A.L.R. 109.

Vacation of street or highway, nonabutter's right to compensation, 49 A.L.R. 330, 93 A.L.R. 639.

Civil rights legislation as taking of property, 49 A.L.R. 506.

Narrowing or partial vacation of street or highway, right of property owner to compensation, 49 A.L.R. 1254.

Combination of public and private uses or purposes as permitting condemnation, 53 A.L.R. 9

Private payment of compensation or cost of improvement as affecting question of whether improvement is for public or private purpose, 53 A.L.R. 33.

Public benefit or convenience as distinguished from use by public as ground for condemnation, 54 A.L.R. 7

Widening highway space for traffic, right of abutting owner to compensation, 55 A.L.R. 896.

Railroad overhead or underground crossing changing grade, right of property owner to compensation, 57 A.L.R. 657.

Lack of diligence as affecting right to compensation, 58 A.L.R. 681, 133 A.L.R. 11, 133.

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Failure to claim compensation in special assessment proceedings, effect, 64 A.L.R. 764.

Extension of municipal boundaries as taking property without compensation, 64 A.L.R. 1360.

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Tenant's right to remove building or fixtures as affecting his right to compensation, 75 A.L.R. 1495.

Conveyance as passing right to condemnation proceedings, 82 A.L.R. 1063.

Purchaser at invalid tax or assessment sale, right to reimbursement from condemnation award, 86 A.L.R. 1232.

Interstate use of property taken, effect, 90 A.L.R. 1032.

Delay or negligence in condemning property, damages for, 92 A.L.R. 379.

Easement, compensation for taking, 98 A.L.R. 640.

Private motor vehicles for hire, regulations affecting as taking of property without compensation, 109 A.L.R. 550, 175 A.L.R. 1333.

Cemetery: right to take property under eminent domain as affected by fact that property is already devoted to cemetery purposes, 109 A.L.R. 1502.

Abandonment of eminent domain proceedings, right to abandon and effect of, 121 A.L.R. 12.

Obstruction or diversion of, or other interference with, flow of surface water as taking or damaging property within constitutional provision against taking or damaging without compensation, 128 A.L.R. 1195.

Injunction against exercise of power of eminent domain, 133 A.L.R. 11, 93 A.L.R.2d 465.

War, compensation for property confiscated or requisitioned during, 137 A.L.R. 1290, 147 A.L.R. 1297, 148 A.L.R. 1384, 149 A.L.R. 1451.

Damage to private property caused by negligence of governmental agents as "taking," "damage" or "use" for public purposes, in constitutional sense, 2 A.L.R.2d 677.

Damage to property caused by negligence of governmental agents, as "taking," "damage," or "use" for public purposes, in constitutional sense, 2 A.L.R.2d 677.

Liability of municipality or other governmental subdivision in connection with flood protection measures, 5 A.L.R.2d 57.

Subsurface: new or additional compensation for use by municipality or public of subsurface of street or highway for purposes other than sewers, pipes, conduits for wires, and the like, 11 A.L.R.2d 180.

Validity of compulsory pooling or unitization statute or ordinance requiring owners or lessees of oil and gas lands to develop their holdings as a single drilling unit and the like, 37 A.L.R.2d 434.

Access: abutting owner's right to compensation for loss of access because of limited-access highway or street, 43 A.L.R.2d 1072, 42 A.L.R.3d 13, 42 A.L.R.3d 148.

Conveyance of land as bounded by road, street, or other way as giving grantee rights in or to such way, 46 A.L.R.2d 461.

Cemetery: public prohibition or regulation of location of cemetery as taking private property without compensation, 50 A.L.R.2d 905.

Public water supply: necessity of condemnation where private rights are affected by regulation of bathing, swimming, boating, fishing or the like, to protect public water supply, 56 A.L.R.2d 790.

Electric light or power line in street or highway as additional servitude, 58 A.L.R.2d 525.

Billboards: municipal regulation of billboards and outdoor advertising as taking property without compensation, 58 A.L.R.2d 1314.

Liability of public utility to abutting owner for destruction or injury of trees in or near highway or street, 64 A.L.R.2d 866.

Compensation or damages for condemning a public utility plant, 68 A.L.R.2d 392, 35 A.L.R.4th 1263.

Solid mineral royalty real or personal property, 68 A.L.R.2d 728.

Validity of statutes, ordinances, or regulations for protection of vegetation against disease or infection, 70 A.L.R.2d 852.

Access: power to directly regulate or prohibit, without making compensation, abutter's access to street or highway, 73 A.L.R.2d 652.

Relative rights and liabilities of abutting owners and public authorities in parkways in the center of street, 81 A.L.R.2d 1436.

Options: right to damages or compensation upon condemnation of property, of holder of unexercised option to purchase, 85 A.L.R.2d 588.

Use or improvement of highway as establishing grade necessary to entitle abutting owner to compensation on subsequent change, 2 A.L.R.3d 985.

Restrictive covenant or right to enforcement thereof as compensable property right, 4 A.L.R.3d 1137.

Zoning as a factor in determination of damages in eminent domain, 9 A.L.R.3d 291.

Deduction of benefits in determining compensation or damages in proceedings involving opening, widening or otherwise altering highway, 13 A.L.R.3d 1149.

Restrictive covenant, existence of, as element in fixing value of property condemned, 22 A.L.R.3d 961.

Eminent domain: right to enter land for preliminary survey or examination, 29 A.L.R.3d 1104.

Platting or planning in anticipation of improvement as taking or damaging of property affected, 37 A.L.R.3d 127.

Cost of substitute facilities as measure of compensation paid to state or municipality for condemnations of public property, 40 A.L.R.3d 143.

Measure of damages for condemnation of cemetery lands, 42 A.L.R.3d 1314.

Traffic noise and vibration from highway as element of damages in eminent domain, 51 A.L.R.3d 860.

Condemned property's location in relation to proposed site of building complex or similar improvement as factor fixing compensation, 51 A.L.R.3d 1050.

Goodwill or "going concern" value as element of lessee's compensation for taking leasehold in eminent domain, 58 A.L.R.3d 566.

Loss of liquor license as compensable in condemnation proceeding, 58 A.L.R.3d 581.

Compensation for diminution in value of remainder of property resulting from taking or use of adjoining land of others for the same undertaking, 59 A.L.R.3d 488.

Consideration of fact that landowner's remaining land will be subject to special assessment in fixing severance damages, 59 A.L.R.3d 534.

Determination of just compensation for condemnation of billboards or other advertising signs, 73 A.L.R.3d 1122.

Right to condemn property owned or used by private educational, charitable or religious organization, 80 A.L.R.3d 833.

Goodwill as element of damages for condemnation of property on which private business is conducted, 81 A.L.R.3d 198.

Recovery of value of improvements made with knowledge of impending condemnation, 98 A.L.R.3d 504.

Zoning regulations limiting use of property near airport as taking of property, 18 A.L.R.4th 542.

Local use zoning of wetlands or flood plain as taking without compensation, 19 A.L.R.4th 756.

Airport operations or flight of aircraft as constituting taking or damaging of property, 22 A.L.R.4th 863.

Damages resulting from temporary conditions incident to public improvements or repairs as compensable taking, 23 A.L.R.4th 674.

Eminent domain: compensability of loss of view from owner's property - state cases, 25 A.L.R.4th 671.

Seizure of property as evidence in criminal prosecution or investigation as compensable taking, 44 A.L.R.4th 366.

Validity, construction, and application of state relocation assistance laws, 49 A.L.R.4th 491.

Inverse condemnation state court class actions, 49 A.L.R.4th 618.

Court appointment of attorney to represent, without compensation, indigent in civil action, 52 A.L.R.4th 1063.

Eminent domain: industrial park or similar development as public use justifying condemnation of private property, 62 A.L.R.4th 1183.

Abutting owner's right to damages for limitation of access caused by traffic regulation, 15 A.L.R.5th 821.

Construction and application of rule requiring public use for which property is condemned to be "more necessary" or "higher use" than publicuse to which property is already appropriated - state takings, 49 A.L.R. 5th 769.

29A C.J.S. Eminent Domain §§ 4, 21 to 26.

B. TAKING OR DAMAGING.

"Taking" defined. — "Taking" may be defined as entering upon private property for more than a momentary period and under the warrant or color of legal authority, devoting it to public use or otherwise informally appropriating or injuriously affecting it in such a way as to substantially oust the owner and deprive him of beneficial enjoyment thereof. 1974 Op. Att'y Gen. No. 74-16.

Interference with property's use. — When interference with the use of property by its owner consists of actual entry upon land and its devotion to public use for more than a momentary period, "there is a taking of property in the constitutional sense, whether there has been any formal condemnation or not." City of Albuquerque v. Chapman, 77 N.M. 86, 419 P.2d 460 (1966).

When regulatory prohibition held not to be "taking". — A regulation which imposes a reasonable restriction on the use of private property will not constitute a "taking" of that property if the regulation is: (1) reasonably related to a proper purpose; and (2)

does not unreasonably deprive the property owner of all, or substantially all, of the beneficial use of his property. Thus, if a regulation simply prohibits the use of property for purposes declared to be injurious to the health, morals, or safety of the community, the prohibition cannot be deemed a "taking" of property for the public benefit. Temple Baptist Church, Inc. v. City of Albuquerque, 98 N.M. 138, 646 P.2d 565 (1982).

Telephone orders standard. — State Corporation Commission's order to a telephone local exchange carrier imposing a state-wide standard of zero primary orders held over 30 days did not amount to an illegal taking of property under the federal or state constitutions. U.S. West Communications, Inc. v. New Mexico SCC, 1997-NMSC-031, 123 N.M. 554, 943 P.2d 1007.

Form not determinative. — Constitutional rights rest on substance, not on form; therefore, liability to pay compensation is not to be evaded by leaving title in the owner while depriving him of the beneficial use of the property. City of Albuquerque v. Chapman, 77 N.M. 86, 419 P.2d 460 (1966).

Acquisition by prescription is not a taking and does not require compensation to the landowner for the servitude. Luevano v. Maestas, 117 N.M. 580, 874 P.2d 788 (Ct. App. 1994).

No taking shown. — Where the preliminary order of entry was never made permanent and there was no physical entry or disturbance of the plaintiff's possession, no taking occurred. State ex rel. State Hwy. Dep't v. Yurcic, 85 N.M. 220, 511 P.2d 546 (1973).

Regulation not related to a proper purpose that does not deprive a property owner of all or substantially all beneficial use of property simply does not implicate an interest protected by the Takings Clause; thus, although a property owner may have a right to seek redress for an unlawful regulation, the method of redress is not a takings action. Estate of Sanchez v. County of Bernalillo, 120 N.M. 395, 902 P.2d 550 (1995).

Necessity of taking not for courts. — The question of the necessity or expediency of a taking in eminent domain lies with the legislature and is not a proper subject for judicial review. State ex rel. State Hwy. Comm'n v. Burks, 79 N.M. 373, 443 P.2d 866 (1968).

What damages compensable. — When an injury complained of is not due to interference of enjoyment by an abutter of his frontage on a public way, or by a riparian owner of his adjacency to a stream, and does not consist of any physical injury to property cognizable to the senses, there is ordinarily no damage for which the constitution requires compensation unless the injury is one for which a liability would have existed at common law if it had been inflicted without statutory authority. Aguayo v. Village of Chama, 79 N.M. 729, 449 P.2d 331 (1969).

Damage to be special and direct. — Only one whose damage, occasioned by highway improvement, is special and direct as distinguished from remote and

consequential, and which differs in kind from that of the general public, suffers a compensable injury. State ex rel. State Hwy. Comm'n v. Silva, 71 N.M. 350, 378 P.2d 595 (1962).

Depreciation not always "damage". — Not every depreciation in the market value of land resulting from the proximity of a public improvement is a damage in the constitutional sense. Aguayo v. Village of Chama, 79 N.M. 729, 449 P.2d 331 (1969).

Nature of damage decided case by case. — The line between noncompensable damage through an exercise of the police power, and damage for which payment must be made for a taking under eminent domain is one not easily drawn, and the supreme court has not attempted to state a rule of universal application, but will decide each case as it arises. Board of County Comm'rs v. Harris, 69 N.M. 315, 366 P.2d 710 (1961).

Authorized condemnor may be liable in trespass. — An authorized condemnor may be liable in trespass to a property owner for taking more land than is reasonably necessary or for causing excessive damage by the manner in which the taking occurs, but only when there is evidence of fraud, bad faith or gross abuse of discretion. North v. Public Serv. Co., 101 N.M. 222, 680 P.2d 603 (Ct. App. 1983).

Damages for trespass when an authorized condemnor is liable cover only that portion of the damage over and above what results from the taking itself. North v. Public Serv. Co., 101 N.M. 222, 680 P.2d 603 (Ct. App. 1983).

C. PUBLIC USE.

Taking authorized for public use only. — At the outset, there can be no question under the constitution that the taking or damaging of private property through eminent domain is permitted for none other than a public use. Kaiser Steel Corp. v. W.S. Ranch Co., 81 N.M. 414, 467 P.2d 986 (1970).

Nature of use for courts. — Necessity and expediency of the taking is a legislative question; whether use to which property is to be put is a public use is a judicial question. State ex rel. Red River Valley Co. v. District Court, 39 N.M. 523, 51 P.2d 239 (1935).

Private condemnation right may be created in private entity. — It is not unconstitutional for the legislature to create a private right of condemnation in a private entity, where the purpose is beneficial use of a vitally important natural resource. Kennedy v. Yates Petroleum Corp., 104 N.M. 596, 725 P.2d 572 (1986).

Natural gas pipeline deemed public use. — The trial court was correct in concluding that a natural gas pipeline bore a real and substantial relation to the public use as required by statute and case law. Kennedy v. Yates Petroleum Corp., 104 N.M. 596, 725 P.2d 572 (1986).

Beneficial use of water is public use, and condemnation of a right-of-of way to make the beneficial use possible is clearly provided for in 72-1-5 NMSA 1978 and is constitutional. Kaiser Steel Corp. v. W.S. Ranch Co., 81 N.M. 414, 467 P.2d 986 (1970).

Taking property for reservoir. — Taking property for a dam or reservoir to impound and conserve water power is a public use. State ex rel. Red River Valley Co. v. District Court, 39 N.M. 523, 51 P.2d 239 (1935).

Logging railroad as public use. — This section is not violated by 42-1-22 NMSA 1978, authorizing taking of property for logging railroad for public use, the question of public use being left to judicial determination. Threlkeld v. Third Judicial Dist. Court, 36 N.M. 350, 15 P.2d 671 (1932).

No public use in coal mining. — Insofar as Laws 1919, ch. 109 (42-1-31 to 42-1-34, 42-1-36, 42-1-37 NMSA 1978) impliedly declares a public use in business or industry of coal mining, it is violative of this section. Gallup Am. Coal Co. v. Gallup S.W. Coal Co., 39 N.M. 344, 47 P.2d 414 (1935).

Nor in relocation of nonowned ditch. — The relocation of borrow ditch, the use of which for purpose of irrigation was permissive only and subject to termination at will, was not a matter of public interest or concern and the taking of the private property of defendant upon which to relocate a ditch, which plaintiffs had no obligation, duty or right to relocate, is not a public use. Board of County Comm'rs v. Sykes, 74 N.M. 435, 394 P.2d 278 (1964).

II. COMPENSABLE TAKINGS.

Private property cannot be taken for ditch without just compensation. 1969 Op. Att'y Gen. No. 69-96.

The fact that ditch commissioners are given the right to alter, change the location of, enlarge, extend or reconstruct a ditch under the conditions set forth in 73-2-56 NMSA 1978 cannot be construed as giving them authority to take private property for these uses without just compensation, contrary to this section, and without regard to requisite procedures. Marjon v. Quintana, 82 N.M. 496, 484 P.2d 338 (1971).

Township and section lines declared public highways. — Although 67-5-1 NMSA 1978 authorizes county commissioners to declare township and section lines public highways, they must provide compensation for any private property taken and comply with the ordinary statutory procedures for the establishment of county roads. 1988 Op. Att'y Gen. No. 88-59.

Access to highway which landowners abut is property right of which they cannot be deprived without just compensation. State ex rel. State Hwy. Comm'n v. Mauney, 76 N.M. 36, 411 P.2d 1009 (1966).

Defendants, as owners of real estate abutting on a highway, have a right of access - the right of ingress and egress to and from their property - which is a property right - a special interest of which they cannot be deprived without just compensation. State ex rel. State Hwy. Comm'n v. Silva, 71 N.M. 350, 378 P.2d 595 (1962).

Lowering of highway grade. — Depreciation in value of property by 20 inch lowering of grade of highway on which property abutted was compensable. Board of County Comm'rs v. Harris, 69 N.M. 315, 366 P.2d 710 (1961).

Not every change of highway grade would be compensable. It must be a material change, and one which causes consequential damage. Board of County Comm'rs v. Harris, 69 N.M. 315, 366 P.2d 710 (1961).

Inclusion of private land in game refuge damaging. — The inclusion of private land within a game management area for the purpose of providing a place for migratory birds "to rest and feed unmolested" may result in consequential damage to the owner of private land included therein, contrary to this section, even though there was no actual taking of any part of the land itself. Allen v. McClellan, 75 N.M. 400, 405 P.2d 405 (1965), appeal after remand, 77 N.M. 801, 427 P.2d 677 (1967) (holding that game commission could not include private land within game refuge without consent of owners or acquisition in lawful manner).

No duty on owner to minimize damage by harvesting crops. — Contention of game commission that at time of year when Canada geese arrive in New Mexico, crops should have been harvested and removed from fields so that enforced resting and feeding places would not constitute consequential damaging of private property without just compensation was without merit, as no requirement of law requires the owner of private land to remove his crops at any particular time. Allen v. McClellan, 75 N.M. 400, 405 P.2d 405 (1965), appeal after remand, 77 N.M. 801, 427 P.2d 677 (1967).

Construction of utility lines. — Power utility constructing lines on private property had the duty to properly construct its lines and the obligation to justly compensate for the taking. Garver v. Public Serv. Co., 77 N.M. 262, 421 P.2d 788 (1966).

Fixing of reasonable rates mandated. — Private property may not be taken for public use without just compensation, and thus the failure of a regulatory commission to provide for rates that would provide a fair and reasonable rate of return (one that was compensable) constituted a violation of due process. Mountain States Tel. & Tel. Co. v. New Mexico State Corp. Comm'n, 90 N.M. 325, 563 P.2d 588 (1977).

Failure to increase rates as confiscation. — When it became obvious that the decision of the commission on new rates would be delayed and the company would suffer irreparable loss of revenue in the interim, failure to increase the rates was an unconstitutional confiscation of the company's property without due process of law. Mountain States Tel. & Tel. Co. v. New Mexico State Corp. Comm'n, 90 N.M. 325, 563 P.2d 588 (1977).

Substitution of franchises. — Where telephone company was operating under 99-year franchise legally granted by county commissioners, it could not be compelled to accept new franchise from municipality imposing additional terms and burdens not contained in the original franchise; such compulsion would impair the obligation of contract and would take company's property without due process. Mountain States Tel. & Tel. Co. v. Town of Belen, 56 N.M. 415, 244 P.2d 1112 (1952).

Effect on city's liability of "dedication" after taking. — Where city had already occupied a 35-foot strip and put it to beneficial use under court authority, the filing of a plat by defendants showing public dedication of said strip did not relieve the city of liability to pay compensation therefor, as the defendants could no longer alienate it at this point; nor did the fact that condemnation had not yet been entered change the result. City of Albuquerque v. Chapman, 77 N.M. 86, 419 P.2d 460 (1966).

Right to practice profession or vocation is a property right. Roberts v. State Bd. of Embalmers & Funeral Dirs., 78 N.M. 536, 434 P.2d 61 (1967).

Taking of public property used in proprietary capacity compensable. — Public property held and used in a proprietary capacity may not be taken for another public use without payment of just compensation. Silver City Consol. School Dist. No. 1 v. Board of Regents of N.M.W. College, 75 N.M. 106, 401 P.2d 95 (1965).

Municipal park lands not to be taken without compensation. — State highway commission [state transportation commission] may not occupy and use municipal park lands, the establishment and maintenance of which is a corporate or proprietary function, for highway purposes without payment of compensation. State ex rel. State Hwy. Comm'n v. City of Albuquerque, 67 N.M. 383, 355 P.2d 925 (1960), distinguished in State ex rel. State Hwy. Comm'n v. Board of County Comm'rs, 72 N.M. 86, 380 P.2d 830 (1963).

III. NONCOMPENSABLE TAKINGS.

No compensation guaranteed government property under constitution. — Property owned by county and utilized in connection with county courthouse and county hospital, being public property used for governmental purposes, is not guaranteed compensation under this constitutional provision. State ex rel. State Hwy. Comm'n v. Board of County Comm'rs, 72 N.M. 86, 380 P.2d 830 (1963).

Legislature may exercise control over property acquired by an agency of the state for the performance of a strictly public duty, devolved upon it by law, by requiring the state agency or governmental subdivision to transfer such property to another agency of the government to be devoted to a strictly public purpose without receiving compensation therefor. Silver City Consol. School Dist. No. 1 v. Board of Regents of N.M.W. College, 75 N.M. 106, 401 P.2d 95 (1965) (upholding provisions of former law requiring state institution to convey property once used for high school to school district).

But compensation for highway use legislatively mandated. — The legislature has indicated an intent that compensation should be paid when public property is condemned for highway purposes, including property being used for a governmental as well as a proprietary purpose. State ex rel. State Hwy. Comm'n v. Board of County Comm'rs, 72 N.M. 86, 380 P.2d 830 (1963).

No special damage in closing portion of highway. — One whose property abuts upon a road or highway, a part of which is closed or vacated, has no special damage (unless his lands abut upon the closed portion thereof) if there remains a reasonable access to the main highway system. State ex rel. State Hwy. Comm'n v. Silva, 71 N.M. 350, 378 P.2d 595 (1962).

Fact that defendants' travel to main highway system could be in only one direction and that the traveling public would find it less convenient to reach defendants' premises was a common injury inevitable in the building of highways. State ex rel. State Hwy. Comm'n v. Silva, 71 N.M. 350, 378 P.2d 595 (1962).

Nor in obstructing portion thereof. — An obstruction placed in a highway by public authority and reasonably necessary for the protection of the public is not a special injury to an abutting landowner. State ex rel. State Hwy. Comm'n v. Silva, 71 N.M. 350, 378 P.2d 595 (1962).

Where defendants' right of access to the road upon which their property abutted had not been affected, although it had been obstructed some 800 feet north of their property, preventing further travel in that direction, such injury, suffered in common with the general public was not compensable. State ex rel. State Hwy. Comm'n v. Silva, 71 N.M. 350, 378 P.2d 595 (1962).

No right in abutting landowners to direct access. — Abutters have a right of access to the public roads system, but it does not necessarily follow that they have a right of direct access to the main-traveled portions thereof. State ex rel. State Hwy. Comm'n v. Danfelser, 72 N.M. 361, 384 P.2d 241 (1963), cert. denied, 375 U.S. 969, 84 S. Ct. 487, 11 L. Ed. 2d 416 (1964).

Defendants never had direct access to a new highway, constructed upon a different location, and were not entitled to direct access to it. State ex rel. State Hwy. Comm'n v. Silva, 71 N.M. 350, 378 P.2d 595 (1962).

Nor to be free of mere inconvenience. — Mere inconvenience resulting from the closing of streets or roads does not give rise to a legal right in one so inconvenienced, when another reasonable, although perhaps not equally accessible, means of ingress and egress is afforded. State ex rel. State Hwy. Comm'n v. Brock, 80 N.M. 80, 451 P.2d 984 (1968); State ex rel. State Hwy. Comm'n v. Silva, 71 N.M. 350, 378 P.2d 595 (1962).

Circuity of travel noncompensable where reasonable access afforded. — Once reasonable access is given to the main highway system by means of frontage roads, any circuity of travel occasioned by the loss of direct ingress and egress is noncompensable. State ex rel. State Hwy. Comm'n v. Brock, 80 N.M. 80, 451 P.2d 984 (1968).

Circuity of travel, as long as it is not unreasonable, and any loss in land value by reason of the diversion of express traffic, are noncompensable. State ex rel. State Hwy. Comm'n v. Danfelser, 72 N.M. 361, 384 P.2d 241 (1963), cert. denied, 375 U.S. 969, 84 S. Ct. 487, 11 L. Ed. 2d 416 (1964).

No vested interest in traffic flow. — A landowner, abutting on a public highway, enjoys no vested interest in the flow of public travel past his premises, and is not entitled to compensation for depreciation in his property value or loss of business resulting from diversion of traffic by the opening of a new highway. State ex rel. State Hwy. Comm'n v. Silva, 71 N.M. 350, 378 P.2d 595 (1962).

Loss of business from diversion of traffic noncompensable. — Landowner is not entitled to compensation for loss of business resulting from diversion of traffic by opening of more convenient route, since owner enjoys no vested interest in flow of public travel. Board of County Comm'rs v. Slaughter, 49 N.M. 141, 158 P.2d 859 (1945).

Even though a new road traverses a portion of claimant's land for which compensation is awarded, he is not entitled to judgment for consequential damages resulting from diversion of traffic. Board of County Comm'rs v. Slaughter, 49 N.M. 141, 158 P.2d 859 (1945).

Loss of business or of prospective business, because the traveling public cannot reach a roadside business establishment as readily as before, due to restriction of direct access, amounts only to a diversion of traffic and is noncompensable. State ex rel. State Hwy. Comm'n v. Brock, 80 N.M. 80, 451 P.2d 984 (1968).

Temporary interference from construction. — In New Mexico a condemnee may not recover damages by way of expenses or loss of business for temporary inconvenience, annoyance or interference with access occasioned by construction, unless the period of construction was unduly long or the conduct of the condemnor causing the loss was unreasonable, arbitrary or capricious. State ex rel. State Hwy. Dep't v. Kistler-Collister Co., 88 N.M. 221, 539 P.2d 611 (1975).

Destruction of contaminated food not compensable. — The state is not required to make compensation when it seizes and destroys food found to be contaminated within the provisions of the New Mexico Food Act. State v. 44 Gunny Sacks of Grain, 83 N.M. 755, 497 P.2d 966 (1972).

The right to seize and destroy unfit or impure foods is predicated upon the police power, and does not fall within this section, which deals with takings "for public use," which is to

say, by eminent domain. State v. 44 Gunny Sacks of Grain, 83 N.M. 755, 497 P.2d 966 (1972).

Forfeiture under drug laws. — Forfeiture under former Narcotic Drug Act of tractor and trailer used in transportation of amphetamines did not constitute the taking of property without just compensation. State v. One 1967 Peterbilt Tractor, 84 N.M. 652, 506 P.2d 1199 (1973).

Tax for street improvements. — A tax to pay off bonds issued for special street improvements does not constitute taking of private property for public use without just compensation as contemplated under this section. Stone v. City of Hobbs, 54 N.M. 237, 220 P.2d 704 (1950).

Tax sale. — Acquisition of property by state through tax sale procedure is not a taking of private property for public use as contemplated by this section. Yates v. Hawkins, 46 N.M. 249, 126 P.2d 476 (1942).

Zoning. — As a valid exercise of the police power, zoning is not a compensable taking, even when it results in a substantial reduction in the value of property; any incidental economic loss involved is merely the price of living in a modern enlightened and progressive community. Only if governmental regulation deprives the owner of all beneficial use of his property will it be unconstitutional. Miller v. City of Albuquerque, 89 N.M. 503, 554 P.2d 665 (1976).

Treatment of electric utility's interest in generating facility. — Exclusion of an electric utility's interest in a generating facility from its rate base, coupled with the public service commission's refusal to decertify the facility, did not violate the due process provisions or the takings clauses of the New Mexico and United States Constitutions. Public Serv. Co. v. Public Serv. Comm'n, 112 N.M. 379, 815 P.2d 1169 (1991).

Relocation of gas lines. — The state highway commission [state transportation commission] had no obligation to reimburse defendant utility for cost of relocating its gas lines because of widening and improving of state highway as it involved no damage to or taking of the property of the utility as contemplated by this section. State Hwy. Comm'n v. Southern Union Gas Co., 65 N.M. 84, 332 P.2d 1007, 75 A.L.R.2d 408 (1958), overruled on other grounds, State ex rel. City of Albuquerque v. Lavender, 69 N.M. 220, 365 P.2d 652 (1961).

Plugging and repairing wells. — Abatement of public nuisance under statute by plugging and repairing artesian wells, when owner fails to do so after notice, does not violate this section, since common-law right summarily to abate a nuisance is not in conflict with a constitutional provision protecting rights to property. Eccles v. Ditto, 23 N.M. 235, 167 P. 726, 1918B L.R.A. 126 (1917).

Location of treatment plant. — Mere location of a treatment plant in the neighborhood of plaintiffs' land gives rise to no cause of action unless it is a nuisance per se, which,

generally speaking, a sewage disposal plant is not. Aguayo v. Village of Chama, 79 N.M. 729, 449 P.2d 331 (1969).

Termination of permissive use of ditch. — Where use by a party of a ditch classified for irrigation by the irrigation district was permissive only, use for such purpose was subject to termination at will and vested in such party no property right as against the public. Board of County Comm'rs v. Sykes, 74 N.M. 435, 394 P.2d 278 (1964).

Right to sell liquor is not property right, but a privilege only, which may be revoked at any time by the power granting it. Floeck v. Bureau of Revenue, 44 N.M. 194, 100 P.2d 225 (1940).

"Amortization" as constitutional alternative to just compensation. — If an amortization period is reasonable, it is a constitutional means for municipalities to terminate nonconforming uses and, as such, is a constitutional alternative to just compensation. Temple Baptist Church, Inc. v. City of Albuquerque, 98 N.M. 138, 646 P.2d 565 (1982).

"Amortization" does not connote a requirement of compensation, but merely suggests that a sign owner or user is put on notice that he has a certain period of time in which to make necessary adjustments to bring his nonconforming structure into conformity with a sign ordinance. Temple Baptist Church, Inc. v. City of Albuquerque, 98 N.M. 138, 646 P.2d 565 (1982).

Expenses of defending discontinued condemnation suit. — In the absence of bad faith or unreasonable delay upon the part of the party instituting condemnation proceedings which are ultimately discontinued, the owner is not constitutionally entitled to recover expenses and losses suffered during their pendency. State ex rel. State Hwy. Dep't v. Yurcic, 85 N.M. 220, 511 P.2d 546 (1973).

IV. MEASURE OF COMPENSATION.

"Just" compensation. — "Just" compensation can only mean that the framers of the constitution intended that a fair and reasonable amount of compensation should be awarded; it follows that the compensation must be fair and just to both sides. Board of Comm'rs v. Gardner, 57 N.M. 478, 260 P.2d 682 (1953).

Balance between damages and benefits. — Compensation is had when the balance is struck between the damages and the benefits conferred on him by the act complained of. Board of Comm'rs v. Gardner, 57 N.M. 478, 260 P.2d 682 (1953).

"Fair market value" explained. — "Fair market value" which includes in its determination all relative elements of injury and benefit received by the landowner is theoretically what a willing seller would take and a willing buyer offer, but as a willing seller is usually lacking in condemnation cases, the court has a special responsibility for seeing that the seller receives what is honestly due him, as well as for making sure that

under the pressure of compulsion the seller does not gouge the public for more than his property is reasonably worth. Board of Comm'rs v. Gardner, 57 N.M. 478, 260 P.2d 682 (1953).

Value based on highest and best use. — The value of the property is determined by considering not merely the uses to which it was applied at the time of condemnation, but the highest and best uses to which it could be put. Determination of the highest and best use should be made with regard to the existing business or wants of the community, or such as may be reasonably expected in the immediate future. City of Albuquerque v. PCA-Albuquerque #19, 115 N.M. 739, 858 P.2d 406 (1993).

"Before and after" rule. — The so-called "before and after" rule, whereby the owner of property is entitled to recover as compensation the amount the fair market value of his property is depreciated by the taking, is applicable where damage to property results from a change in grade of the abutting highway. Board of County Comm'rs v. Harris, 69 N.M. 315, 366 P.2d 710 (1961).

All elements of damage to be considered. — Denial of right to have all elements of damage resulting from condemnation considered in arriving at award would be of questionable constitutionality as permitting the taking or damaging of property without the payment of just compensation. State ex rel. State Hwy. Comm'n v. Chavez, 80 N.M. 394, 456 P.2d 868 (1969).

Dual responsibilities of state commission in evaluating damages. — This section makes it the responsibility of the highway commission not only to see that land necessary for public highways is obtained at a price fair to the public, but also to see that the property owner is fairly compensated; since the commission is a public body charged with these two responsibilities, there is no valid reason why use by a condemnee of the opinion of an expert employed by the commission and paid from public funds is unfair to the commission. State ex rel. State Hwy. Comm'n v. Steinkraus, 76 N.M. 617, 417 P.2d 431 (1966).

When frustration of future plans compensable. — While mere frustration of owner's hopes or plans for the future is a noncompensable element of damages, this is not the same as compensation based on planned future uses for which the property is adaptable by reason of location, state of improvement or other special elements of value inherent therein. State ex rel. State Hwy. Dep't v. Kistler-Collister Co., 88 N.M. 221, 539 P.2d 611 (1975).

Plans for future properly considered. — Where property was already developed for commercial uses with definite plans and provisions in the existing structure having been made for the future development of the property for these uses, the trial court properly received into evidence these architectural plans and testimony relative thereto, and the consequent uses to which the property could be put were properly considered in arriving at appraisals of the damages suffered in taking of a portion of the property. State ex rel. State Hwy. Dep't v. Kistler-Collister Co., 88 N.M. 221, 539 P.2d 611 (1975).

Alternate uses also relevant. — While it was proper for the jury in fixing damages to consider owner's plans for development of the property, the jury was also entitled to consider alternate plans for commercial development, as well as evidence of other uses for which the property was suitable or adaptable, in determining its before and after fair market value. State ex rel. State Hwy. Dep't v. Kistler-Collister Co., 88 N.M. 221, 539 P.2d 611 (1975).

Compensation to be determined even after default judgment. — Under 42-2-14 NMSA 1978, part of the act establishing special alternative condemnation procedure, after entry of default by the clerk, the court shall conduct a hearing and determine the amount of just compensation due; this is in recognition of this section, which provides that property shall not be taken or damaged without just compensation. Board of County Comm'rs v. Boyd, 70 N.M. 254, 372 P.2d 828 (1962).

Appraisal of damages caused by conservancy district. — Provision of Conservancy Act (73-17-18 NMSA 1978) providing for appraisal and hearing regarding damages to property caused by conservancy district pertaining to appraisal of damages has reference to damages to property in the sense employed in eminent domain proceedings. Zamora v. Middle Rio Grande Conservancy Dist., 44 N.M. 364, 102 P.2d 673 (1940).

Allowance of interest from date of condemnation petition was essential to just compensation under the circumstances, even though condemnees may have been responsible for first continuance. State ex rel. State Hwy. Comm'n v. Peace Found., Inc., 79 N.M. 576, 446 P.2d 443 (1968).

There is no constitutional requirement for payment in advance for the property taken. Timberlake v. Southern Pac. Co., 80 N.M. 770, 461 P.2d 903 (1969).

This section does not require payment in advance of the taking or damage. State Hwy. Comm'n v. Ruidoso Tel. Co., 73 N.M. 487, 389 P.2d 606 (1963).

Constitution does not require advance compensation for damaging private property in improvement of state highway. State Hwy. Comm'n v. Ruidoso Tel. Co., 73 N.M. 487, 389 P.2d 606 (1963); Summerford v. Board of County Comm'rs, 35 N.M. 374, 298 P. 410 (1931).

Date of taking. — Clearly and logically the date of taking, whether partial or whole, was the date on which the condemnor became vested with the legal right to possession, dominion and control over the real estate being condemned. State ex rel. State Hwy. Dep't v. Yurcic, 85 N.M. 220, 511 P.2d 546 (1973).

Awards improper. — Awards in condemnation proceeding which were far below and outside the bounds of the testimony of any witness were improper. AT & T Co. v. Walker, 77 N.M. 755, 427 P.2d 267 (1967).

V. INVERSE CONDEMNATION.

No constitutional right to sue state. — Contention that this section necessarily implies consent to sue the state if private property is taken or damaged by a state agency or subdivision without compensation is expressly rejected. State ex rel. Board of County Comm'rs v. Burks, 75 N.M. 19, 399 P.2d 920 (1965).

Remedy of inverse condemnation explained. — If property has been actually taken or damaged for public use, and the person or agency taking or damaging the same for such purpose has failed for some reason to proceed by condemnation proceedings to exercise the power of eminent domain, though vested with that right, the remedy of inverse condemnation is available to secure the recovery of just compensation. Garver v. Public Serv. Co., 77 N.M. 262, 421 P.2d 788 (1966).

Actual taking not required for compensation. — In order for an owner of private property to be compensated, an actual taking of the property is not required; it is sufficient if there are consequential damages. Public Serv. Co. v. Catron, 98 N.M. 134, 646 P.2d 561 (1982).

Exclusive nature of remedy. — Landowners could not recover for the alleged trespasses upon the premises, and their only remedy, if any, was limited to a recovery of just compensation for property taken or damaged for public use by an action in the nature of inverse condemnation. Garver v. Public Serv. Co., 77 N.M. 262, 421 P.2d 788 (1966).

Damage must affect right of landowner separate from right of public. — In order to be compensated, damage to property must affect some right or interest which the landowner enjoys and which is not shared or enjoyed by the public generally. The damage must be different in kind, not merely in degree, from that suffered by the public in general. Public Serv. Co. v. Catron, 98 N.M. 134, 646 P.2d 561 (1982).

For inverse condemnation to be based upon a "damage," a property owner must suffer some compensable injury that is not suffered by the public in general. Estate of Sanchez v. County of Bernalillo, 120 N.M. 395, 902 P.2d 550 (1995).

Right to sue for damage caused by highway construction. — Constitutional right of compensation for damaging private property by construction or improvement of state highway may be enforced by civil action against party liable therefor. Summerford v. Board of County Comm'rs, 35 N.M. 374, 298 P. 410 (1931).

Where private property has been damaged through the methods followed or adopted in the design, construction or maintenance of a public highway, it constitutes damage for a public use for which adequate compensation is guaranteed to the owner by this section, and for which a county is subject to suit. Wheeler v. Board of County Comm'rs, 74 N.M. 165, 391 P.2d 664 (1964).

Counties are liable under the statutes to damages for lands taken for highway purposes by them or with their acquiescence. Mesich v. Board of County Comm'rs, 46 N.M. 412, 129 P.2d 974 (1942).

Members of state highway commission [state transportation commission] were not personally liable for compensation for cutting off ingress and egress to and from land by erecting viaduct on state highway without prior ascertainment and settlement of damages. Summerford v. Board of County Comm'rs, 35 N.M. 374, 298 P. 410 (1931).

Action maintainable by purchaser. — A person who holds interest in land under contract of sale may maintain an action for compensation. Mesich v. Board of County Comm'rs, 46 N.M. 412, 129 P.2d 974 (1942).

No action for interference with television reception. — The fact that an adjoining electrical transmission line will interfere with radio and television reception fails to state a cause of action for inverse condemnation. Public Serv. Co. v. Catron, 98 N.M. 134, 646 P.2d 561 (1982).

Or unsightly structure. — Damages cannot be recovered because of the unsightly character of a structure, and aesthetic considerations are not compensable in the absence of a legislative provision. Public Serv. Co. v. Catron, 98 N.M. 134, 646 P.2d 561 (1982).

Or for noise. — Damages in inverse condemnation from noise are not allowed. Public Serv. Co. v. Catron, 98 N.M. 134, 646 P.2d 561 (1982).

Sec. 21. [Imprisonment for debt.]

No person shall be imprisoned for debt in any civil action.

ANNOTATIONS

Civil contempt fine. — Order that judgment debtor should be jailed until he paid civil contempt fine was not imprisonment for failure to pay a debt, nor did fact that payment of the fine would reduce prior judgment alter the situation. Atlas Corp. v. DeVilliers, 447 F.2d 799 (10th Cir. 1971), cert. denied, 405 U.S. 933, 92 S. Ct. 939, 30 L. Ed. 2d 809, rehearing denied, 405 U.S. 1033, 92 S. Ct. 1288, 31 L. Ed. 2d 491 (1972) (decided under former law).

It is not a violation of the constitutional provision against imprisonment for debt to jail a person who does not pay a contempt fine. Hall v. Hall, 114 N.M. 378, 838 P.2d 995 (Ct. App. 1992).

Violation of restraining order. — Contempt decree imprisoning husband, for definite term or until sum was paid wife, for violating divorce action restraining order prohibiting removal of estate from jurisdiction, did not violate this section (habeas corpus

proceeding). In re Canavan, 17 N.M. 100, 130 P. 248 (1912). See also, Canavan v. Canavan, 18 N.M. 640, 139 P. 154, 51 L.R.A (n.s.) 972 (1914).

Failure of administrator to turn over money. — Where an administrator is committed for contempt in not paying over money ordered by court, statute against imprisonment for debt is violated. In re Jaramillo, 8 N.M. 598, 45 P. 1110 (1896).

Comparable provisions. — Idaho Const., art. I, § 15.

Iowa Const., art. I, § 19.

Montana Const., art. II, § 27.

Utah Const., art. I, § 16.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 16A Am. Jur. 2d Constitutional Law §§ 618 to 624.

Worthless check act as violating constitutional provision against imprisonment for debt, 23 A.L.R. 495.

Application to nonpayment of taxes, fees or other governmental obligations, 40 A.L.R. 77, 48 A.L.R.3d 1324.

Statute making husband's failure to support wife or family a criminal offense as violation of constitutional guarantee against imprisonment for debt, 48 A.L.R. 1195.

Payment, statute making refusal to pay for commodities a criminal offense as violating inhibition of imprisonment for debt, 76 A.L.R. 1338.

Execution, statute providing for proceedings supplementary to, as violating constitutional guarantee against imprisonment for debt, 106 A.L.R. 383.

Constitutional provision against imprisonment for debt as applicable in bastardy proceedings, 118 A.L.R. 1109.

Constitutionality of "bad check" statute, 16 A.L.R.4th 631.

Validity, construction, and effect of body execution statutes allowing imprisonment based on judgment, debt, or the like - modern cases. 79 A.L.R.4th 232.

16A C.J.S. Constitutional Law §§ 487 to 490.

Sec. 22. [Alien landownership.]

Until otherwise provided by law no alien, ineligible to citizenship under the laws of the United States, or corporation, copartnership or association, a majority of the stock or interest in which is owned or held by such aliens, shall acquire title, leasehold or other interest in or to real estate in New Mexico. (As amended September 20, 1921.)

ANNOTATIONS

Cross references. — As to statutory authority for aliens to acquire or hold real estate by deed, will, inheritance or otherwise, see 45-2-111 NMSA 1978.

The 1921 amendment, which was proposed by J.R. No. 9 (Laws 1921) and adopted at the special election held on September 20, 1921, with a vote of 25,921 for and 18,342 against, amended this section, which formerly provided that no distinction should be made by law between resident aliens and citizens in regard to the ownership or descent of property.

Compiler's notes. — An amendment proposed by S.J.R. No. 22 (Laws 2001), which would have repealed this section, was submitted to the people at the general election held on November 5, 2002. It was defeated by a vote of 199,736 for and 232,950 against.

Constitutionality of alien land laws is open to certain doubts. 1963-64 Op. Att'y Gen. No. 63-120.

Legislation enacted prior to amendment not "otherwise provided". — This section, as amended in 1921, is broad enough to prohibit the acquiring of any interest whatever in real estate by an alien ineligible to citizenship, and no legislation enacted prior to 1921 could be construed as a provision of law such as contemplated by the words "until otherwise provided by law." 1929-30 Op. Att'y Gen. 11.

Prohibition suspended. — Because former 45-2-112 NMSA 1978 was enacted subsequent to the 1921 amendment to this section, it operates to suspend the prohibition against ownership of real property in New Mexico by persons other than United States citizens. 1981 Op. Att'y Gen. No. 81-6.

Phrase "eligible to citizenship" means a person belonging to a class which is eligible and who is capable of becoming a citizen upon due compliance with naturalization laws. 1963-64 Op. Att'y Gen. No. 63-120.

Law reviews. — For article, "The Perils of Intestate Succession in New Mexico and Related Will Problems," see 7 Nat. Resources J. 555 (1967).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 3A Am. Jur. 2d Aliens and Citizens §§ 2003, 2005.

Escheat for alienage of owner, or kindred of owner, who dies intestate, 23 A.L.R. 1237, 79 A.L.R. 1364.

Escheat of property of alien corporation, 23 A.L.R. 1247, 79 A.L.R. 1364.

Escheat as affecting contract for sale or lease to alien, 23 A.L.R. 1250, 79 A.L.R. 1364.

State regulation of landownership by alien corporation, 21 A.L.R.4th 1329.

3 C.J.S. Aliens §§ 16, 17.

Sec. 22. *(Proposed repeal) [Alien landownership.]*

Until otherwise provided by law no alien, ineligible to citizenship under the laws of the United States, or corporation, copartnership or association, a majority of the stock or interest in which is owned or held by such aliens, shall acquire title, leasehold or other interest in or to real estate in New Mexico. (As amended September 20, 1921.)

ANNOTATIONS

Compiler's note. — Section 2 of S.J.R. No. 10 (Laws 2005) provides that this proposed amendment shall be submitted to the people for their approval or rejection at the next general election or at any special election prior to that date that may be called for that purpose.

Sec. 23. [Reserved rights.]

The enumeration in this constitution of certain rights shall not be construed to deny, impair or disparage others retained by the people.

ANNOTATIONS

Comparable provisions. — Idaho Const., art. I, § 21.

Iowa Const., art. I, § 25.

Montana Const., art. II, § 34.

Utah Const., art. I, § 25.

Wyoming Const., art. I, § 36.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 16 Am. Jur. 2d Constitutional Law §§ 7, 280.

16 C.J.S. Constitutional Law §§ 53, 58; 16A C.J.S. Constitutional Law § 445.

Sec. 24. [Victim's rights.] (1992)

A. A victim of arson resulting in bodily injury, aggravated arson, aggravated assault, aggravated battery, dangerous use of explosives, negligent use of a deadly weapon, murder, voluntary manslaughter, involuntary manslaughter, kidnapping, criminal sexual penetration, criminal sexual contact of a minor, homicide by vehicle, great bodily injury by vehicle or abandonment or abuse of a child or that victim's representative shall have the following rights as provided by law:

(1) the right to be treated with fairness and respect for the victim's dignity and privacy throughout the criminal justice process;

(2) the right to timely disposition of the case;

(3) the right to be reasonably protected from the accused throughout the criminal justice process;

(4) the right to notification of court proceedings;

(5) the right to attend all public court proceedings the accused has the right to attend;

(6) the right to confer with the prosecution;

(7) the right to make a statement to the court at sentencing and at any post-sentencing hearings for the accused;

(8) the right to restitution from the person convicted of the criminal conduct that caused the victim's loss or injury;

(9) the right to information about the conviction, sentencing, imprisonment, escape or release of the accused;

(10) the right to have the prosecuting attorney notify the victim's employer, if requested by the victim, of the necessity of the victim's cooperation and testimony in a court proceeding that may necessitate the absence of the victim from work for good cause; and

(11) the right to promptly receive any property belonging to the victim that is being held for evidentiary purposes by a law enforcement agency or the prosecuting attorney, unless there are compelling evidentiary reasons for retention of the victim's property.

B. A person accused or convicted of a crime against a victim shall have no standing to object to any failure by any person to comply with the provisions of Subsection A of Section 24 of Article 2 of the constitution of New Mexico.

C. The provisions of this amendment shall not take effect until the legislature enacts laws to implement this amendment. (As added November 3, 1992.)

ANNOTATIONS

Cross references. — For the Crime Victims Reparation Act, see Chapter 31, Article 22 NMSA 1978.

For the Victims of Crime Act, see 31-26-1 to 31-26-14 NMSA 1978.

The 1992 amendment to Article 2, which was proposed by S.J.R. No. 4 (Laws 1992) and adopted at the general election held on November 3, 1992, by a vote of 324,509 for and 148,419 against, added this section.

Crimes committed before effective date of victim's rights laws — The effective date of the victim's rights laws did not affect the admission of victim impact evidence in a death penalty case. States are free to admit this type of evidence following the United States Supreme Court's ruling in Payne v. Tennessee, 501 U.S. 808 (1991), and 31-20A-1C NMSA 1978 and 31-20A-2B NMSA 1978 already provide authority for the admission of this type of evidence. State v. Allen, 2000-NMSC-002, 128 N.M. 482, 994 P.2d 728, cert. denied, 530 U.S. 1218, 120 S. Ct. 2225, 147 L. Ed. 2d 256 (2000).

The Rules of Evidence requiring relevance and the balancing of unfair prejudice also apply to testimony and exhibits that are introduced in a capital felony sentencing proceeding for the purpose of showing victim impact. State v. Allen, 2000-NMSC-002, 128 N.M. 482, 994 P.2d 728, cert. denied, 530 U.S. 1218, 120 S. Ct. 2225, 147 L. Ed. 2d 256 (2000).

Defendant was not unfairly prejudiced by impact evidence that included a videotaped depiction of the victim prior to her death in addition to the testimony of two witnesses. State v. Allen, 2000-NMSC-002, 128 N.M. 482, 994 P.2d 728, cert. denied, 530 U.S. 1218, 120 S. Ct. 2225, 147 L. Ed. 2d 256 (2000).

Section does not protect against waiver of privilege not to disclose medical records. — In a prosecution for criminal sexual penetration, this section did not apply to give the victim the right to release her medical and psychotherapy records to the police and state's attorneys and then invoke an absolute privilege against *in camera* inspection by the court or subsequent disclosure to other parties. State v. Gonzales, 1996-NMCA-026, 121 N.M. 421, 912 P.2d 297.

Victim impact testimony. — The application of this section and 31-26-4G NMSA 1978, granting the representatives of a murder victim the right to make a statement to the court at sentencing and at any post-sentencing hearings, does not violate ex post facto prohibitions. Nor do these sections prohibit the jury from hearing victim impact testimony. State v. Clark, 1999-NMSC-035, 128 N.M. 119, 990 P.2d 793.

ARTICLE III
Distribution of Powers

Section 1. [Separation of departments; establishment of workers compensation body.]

The powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial, and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments, shall exercise any powers properly belonging to either of the others, except as in this constitution otherwise expressly directed or permitted. Nothing in this section, or elsewhere in this constitution, shall prevent the legislature from establishing, by statute, a body with statewide jurisdiction other than the courts of this state for the determination of rights and liabilities between persons when those rights and liabilities arise from transactions or occurrences involving personal injury sustained in the course of employment by an employee. The statute shall provide for the type and organization of the body, the mode of appointment or election of its members and such other matters as the legislature may deem necessary or proper. (As amended November 4, 1986.)

ANNOTATIONS

I. GENERAL CONSIDERATION.

Cross references. — As to the workers' compensation division, see 52-5-1 NMSA 1978.

The 1986 amendment, which was proposed by H.J.R. No. 7 (Laws 1986) and adopted at the general election held on November 4, 1986, by a vote of 173,989 for and 92,419 against, added the last two sentences.

State constitutions are not grants of power to the legislative, executive or judiciary branches, but are limitations on the powers of each, and no branch of the state may add to, nor detract from, its clear mandate. State ex rel. Hovey Concrete Prods. Co. v. Mechem, 63 N.M. 250, 316 P.2d 1069 (1957), overruled on other grounds Wylie Corp. v. Mowrer, 104 N.M. 751, 726 P.2d 1381 (1986).

Each of three departments of government is equal and coordinate and responsible only to the people, and the courts are not warranted in assuming that their department is the only one to which it is safe to entrust enforcement of provisions of constitution regulating enactment of statutes. Kelley v. Marron, 21 N.M. 239, 153 P. 262 (1915).

Functions of departments. — The legislature makes, the executive executes and the judiciary construes the laws. State v. Fifth Judicial Dist. Court, 36 N.M. 151, 9 P.2d 691 (1932).

What delegation impermissible. — No one of the three branches of government can effectively delegate any of the powers that peculiarly and intrinsically belong to that branch. State v. Roy, 40 N.M. 397, 60 P.2d 646, 110 A.L.R. 1 (1936).

Members of one department not to manage affairs of others. — This article of constitution means that powers of state government shall be divided into three departments, and that members of one department shall have no part in management of either of the others. State ex rel. Chapman v. Truder, 35 N.M. 49, 289 P. 594 (1930).

Nor exercise their powers and duties. — One branch of the state government may not exercise powers and duties belonging to another. State ex rel. SCC v. McCulloh, 63 N.M. 436, 321 P.2d 207 (1957).

But occasional overlapping of powers contemplated. — Our constitution does not necessarily foreclose exercise by one department of the state of powers of another but contemplates in unmistakable language that there are certain instances where the overlapping of power exists. State ex rel. Holmes v. State Bd. of Fin., 69 N.M. 430, 367 P.2d 925 (1961).

The doctrine of separation of powers allows some overlap in the exercise of governmental functions. Mowrer v. Rusk, 95 N.M. 48, 618 P.2d 886 (1980).

The interests protected by maintaining separation of powers can best be furthered, not by requiring a total separation of functions among the branches, but by ensuring that adequate checks exist to keep each branch free from the control or coercive influence of the other branches. Board of Educ. v. Harrell, 118 N.M. 470, 882 P.2d 511 (1994).

Compulsory arbitration. — The "principle of check," which entails courts retaining power to make enforceable, binding judgments through review of agency determinations, requires that courts have an opportunity to review decisions of arbitrators in statutorily compelled arbitration such as is required by 22-10-17.1 NMSA 1978. Board of Educ. v. Harrell, 118 N.M. 470, 882 P.2d 511 (1994).

Appointment of legislator to executive council. — A state representative's appointment to an executive advisory council does not violate this section providing for the separation of powers. 1977 Op. Att'y Gen. No. 77-3.

Public school teachers and administrators in legislature. — School teachers are not "public officers" but only employees, and they are not barred by the separation of powers provision from being legislators. State ex rel. Stratton v. Roswell Indep. Schools, 111 N.M. 495, 806 P.2d 1085 (Ct. App. 1991).

A member of the state legislature is not precluded by state law from serving as an elected local school board member. 1991 Op. Att'y Gen. No. 91-02.

This state's strong constitutional separation-of-powers doctrine precludes public school teachers and administrators from serving in the legislature. 1988 Op. Att'y Gen. No. 88-20.

Representative serving on state defense force. — A New Mexico state representative may not serve in the New Mexico State Defense Force; the offices of legislator and state defense force member are incompatible and serving on both would create a conflict of interest. 1988 Op. Att'y Gen. No. 88-71.

This article does not relate to municipal offices. State ex rel. Chapman v. Truder, 35 N.M. 49, 289 P. 594 (1930).

This section does not apply to the distribution of power within local governments. Board of County Comm'rs v. Padilla, 111 N.M. 278, 804 P.2d 1097 (Ct. App. 1990).

Applicability of section to public employees. — This section applies to public officers, not employees, in the different branches of government. State ex rel. Stratton v. Roswell Indep. Schools, 111 N.M. 495, 806 P.2d 1085 (Ct. App. 1991).

To be a public officer, the person must be invested wiht sovereign power. State ex rel. Stratton v. Roswell Indep. Schools, 111 N.M. 495, 806 P.2d 1085 (Ct. App. 1991).

Governor lacked authority under separation of powers doctrine to bind the state by unilaterally entering into compacts and revenue-sharing agreements with Indian tribes which would permit gaming on Indian lands pursuant to the federal Indian Gaming Regulatory Act. State ex rel. Clark v. Johnson, 120 N.M. 562, 904 P.2d 11 (1995).

Mandamus proceeding against governor. — The supreme court's issuance of writs commanding the governor to abide by a legislative decision extending the term of an agreement pursuant to the Public Employee Bargaining Act and to recognize a statutory or constitutional right of petitioners to organize and collectively bargain would require the court to exceed its constitutional powers in violation of this section. State ex rel. AFSCME v. Johnson, 1999-NMSC-031, 128 N.M. 481, 994 P.2d 727.

Nature of functions of state corporation commission (now public regulation commission). — Functions of state corporation commission (now public regulation commission) are not confined to any of the three departments of government, but its duties and powers pervade them all. In re Atchison, T. & S.F. Ry., 37 N.M. 194, 20 P.2d 918 (1933).

Naming of commission members by legislature. — Oil Conservation Act is not unconstitutional on the ground that since the legislature has named the members of the oil conservation commission there has been an invasion of the executive power of appointment. 1951-52 Op. Att'y Gen. No. 5397.

Power of governor to pardon criminal contempt. — Criminal contempt is an offense against authority of court, community and state, not the judge personally, and hence is one in which state has power, through its governor, to extend grace and forgiveness, by means of pardoning power, without violating this section. State v. Magee Publishing Co., 29 N.M. 455, 224 P. 1028, 38 A.L.R. 142 (1924).

Charging fees for services. — In the absence of express authority, fees may not be charged by the board of trustees of the New Mexico Supreme Court Law Library to patrons using the library in order to generate income for the library. Administrative bodies do not have implied authority to charge fees for services. 1988 Op. Att'y Gen. No. 88-78.

Selection of specific programs for which funds to be used. — The governor's veto of the following language that appears as overstricken was valid: "Included in the general fund appropriation to the New Mexico center for women is fifty thousand dollars ($50,000) to be used for providing a training program for female inmates." The legislature is authorized to define the basic purpose for which funds are appropriated, but the selection and identification of specific programs is the responsibility of the executive branch of government. State ex rel. Coll v. Carruthers, 107 N.M. 439, 759 P.2d 1380 (1988).

Appropriation for specific data processing system. — The legislature, in appropriating funds for data processing services, overstepped its traditional oversight and appropriation functions when it used the appropriation process to name the general services department as the contracting party and the ISD-2 system as the system to be contracted for. Such legislative action effectively "swallowed up" the executive management function. State ex rel. Coll v. Carruthers, 107 N.M. 439, 759 P.2d 1380 (1988).

Grand jury is a function of the courts; that is, of the judicial branch of government. 1982 Op. Att'y Gen. No. 82-14.

Necessity of preserving error. — On appeal, for a party to challenge a statute requiring registration of engineers, on constitutional grounds, as making a delegation of either legislative or judicial power to an administrative board, a motion must be presented, ruled on and excepted to at trial in order to preserve the error for appeal. Hatfield v. New Mexico State Bd. of Registration for Professional Eng'rs & Land Surveyors, 60 N.M. 242, 290 P.2d 1077 (1955).

Comparable provisions. — Idaho Const., art. II, § 1.

Iowa Const., art. III, § 1.

Montana Const., art. III, § 1.

Utah Const., art. V, § 1.

Wyoming Const., art. II, § 1.

Law reviews. — For comment on Continental Oil Co. v. Oil Conservation Comm'n, 70 N.M. 310, 373 P.2d 809 (1962), see 3 Nat. Resources J. 178 (1963).

For comment on Kelley v. Carlsbad Irrigation Dist., 71 N.M. 464, 379 P.2d 763 (1963), see 3 Nat. Resources J. 340 (1963).

For note, "Separation of Powers Doctrine in New Mexico," see 4 Nat. Resources J. 350 (1964).

For note, "Annexation of Unincorporated Territory in New Mexico," see 6 Nat. Resources J. 83 (1966).

For article, "Constitutional Limitations on the Exercise of Judicial Functions by Administrative Agencies," see 7 Nat. Resources J. 599 (1967).

For article, "The Writ of Prohibition in New Mexico," see 5 N.M. L. Rev. 91 (1974).

For article, "Medical Malpractice Legislation in New Mexico," see 7 N.M. L. Rev. 5 (1976-77).

For note, "Conservation, Lifeline Rates and Public Utility Regulatory Commissions," see 19 Nat. Resources J. 411 (1979).

For article, "Separation of Powers and the Judicial Rule-Making Power in New Mexico: The Need for Prudential Restraints," see 15 N.M.L. Rev. 407 (1985).

For annual survey of New Mexico criminal procedure, see 16 N.M.L. Rev. 25 (1986).

For survey of workers' compensation law in New Mexico, see 18 N.M.L. Rev. 579 (1988).

For 1984-88 survey of New Mexico administrative law, 19 N.M.L. Rev. 575 (1990).

For comment, "Deannexation: A proposed statute," see 20 N.M.L. Rev. 713 (1990).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 16 Am. Jur. 2d Constitutional Law §§ 294 to 359.

Delegation of powers by various branches of government, 2 A.L.R. 882, 12 A.L.R. 1435, 27 A.L.R. 927, 32 A.L.R. 1406, 40 A.L.R. 347, 47 A.L.R. 70, 48 A.L.R. 454, 54 A.L.R. 1104, 55 A.L.R. 372, 70 A.L.R. 1243, 84 A.L.R. 1147, 86 A.L.R. 1554, 88 A.L.R. 1519, 91 A.L.R. 799, 92 A.L.R. 400, 96 A.L.R. 312, 96 A.L.R. 826.

Delegation of power to the judiciary, 6 A.L.R. 218, 18 A.L.R. 67, 34 A.L.R. 1128, 64 A.L.R. 1373, 69 A.L.R. 266, 70 A.L.R. 1284, 71 A.L.R. 821, 87 A.L.R. 546.

Delegation of power to the people, 6 A.L.R. 218, 18 A.L.R. 67, 20 A.L.R. 1491, 29 A.L.R. 41, 53 A.L.R. 149, 64 A.L.R. 1378, 70 A.L.R. 1062, 72 A.L.R. 1339, 76 A.L.R. 105, 123 A.L.R. 950.

Power of court to force the legislative body to apportion representatives or election districts as required by the constitution, 46 A.L.R. 964.

Censorship laws as delegations of power, 64 A.L.R. 505.

Governmental powers in peace-time emergency, 86 A.L.R. 1539, 88 A.L.R. 1519, 96 A.L.R. 312, 96 A.L.R. 826.

Emergency as affecting validity of delegation of power to executive, 86 A.L.R. 1554, 88 A.L.R. 1519, 96 A.L.R. 312, 96 A.L.R. 826.

Constitutionality, construction, and application of provisions of state tax law for conformity with federal income tax law or administrative and judicial interpretation, 42 A.L.R.2d 797.

Validity, construction, and effect of statute, ordinance, or other measure involving chemical treatment of public water supply, 43 A.L.R.2d 453.

Arbitration statute as unconstitutional delegation of judicial power, 55 A.L.R.2d 432.

Construction and application, under state law, of doctrine of "executive privilege," 10 A.L.R.4th 355.

Automobiles: validity and construction of legislation authorizing revocation or suspension of operator's license for "habitual," "persistent," or "frequent" violations of traffic regulations, 48 A.L.R.4th 367.

16 C.J.S. Constitutional Law §§ 111 to 227.

II. LEGISLATIVE DELEGATION OF POWER.

Legislature may lawfully delegate authority to an administrative agency when that authority is restricted by specific legislative standards. Montoya v. O'Toole, 94 N.M. 303, 610 P.2d 190 (1980).

The legislature has the power to establish administrative agencies and to delegate to them the enforcement of statutes regulating the conduct of professions. 1980 Op. Att'y Gen. No. 80-09.

But governor does not have authority to legislate the regulation of massage practitioners and he cannot delegate it to a massage board. 1980 Op. Att'y Gen. No. 80-09.

Where legislature delegates powers, reasonable standards must be provided as a guide in the exercise of the discretionary power conferred. State ex rel. State Park & Recreation Comm'n v. New Mexico State Auth., 76 N.M. 1, 411 P.2d 984 (1966).

Workers' compensation administration. — Creation of a workers' compensation administration and vesting in it the power to decide controversies thereunder, is a valid exercise of legislative power. Wylie Corp. v. Mowrer, 104 N.M. 751, 726 P.2d 1381 (1986), overruling State ex rel. Hovey Concrete Products Co. v. Mechem, 63 N.M. 250, 316 P.2d 1069 (1957).

Creation of administrative board. — Powers conferred upon state loan board, created by Laws 1912, ch. 16 (executed), were not judicial but administrative, so that act did not violate this section. State v. Kelly, 27 N.M. 412, 202 P. 524, 21 A.L.R. 156 (1921).

Administrative body may be delegated power to make fact determinations to which the law, as set forth by the legislative body, is to be applied. Fellows v. Shultz, 81 N.M. 496, 469 P.2d 141 (1970); Continental Oil Co. v. Oil Conservation Comm'n, 70 N.M. 310, 373 P.2d 809 (1962).

Powers in arbitration board. — Former annexation statute which provided that board of arbitrators should order annexation when it found that benefits of municipality were or could be made available in reasonable time to territory desired to be annexed and that board could not arbitrarily withhold annexation was not invalid as a delegation of legislative power. Cox v. City of Albuquerque, 53 N.M. 334, 207 P.2d 1017 (1949).

Reduction of annexation area by arbitration board. — Fact that board or arbitration provided for under former annexation act limited its finding of benefits to less than the whole area described in the plat, so that the area subject to annexation became reduced, did not constitute an unlawful delegation of legislative power. Cox v. City of Albuquerque, 53 N.M. 334, 207 P.2d 1017 (1949).

Determination of prevailing wage by commissioner. — Laws 1937, ch. 179 (former 6-6-6 to 6-6-10, 1953 Comp.), dealing with minimum wages on public works, was not unconstitutional as an unlawful delegation of legislative authority to the state labor commissioner (now replaced by the chief of the labor and industrial bureau of the employment service division) because the act did not establish any standard or formula by which he could determine the prevailing wage. City of Albuquerque v. Burrell, 64 N.M. 204, 326 P.2d 1088 (1958).

Spacing unit standards adequate. — The standards of preventing waste and protecting correlative rights, as laid out in 70-2-11 NMSA 1978, are sufficient to allow the oil conservation commission (now the oil conservation division) power under 70-2-

18 NMSA 1978 to prorate and create standard or nonstandard spacing units to remain intact, the latter section not being an unlawful delegation of legislative power. Rutter & Wilbanks Corp. v. Oil Conservation Comm'n, 87 N.M. 286, 532 P.2d 582 (1975).

Assessment powers. — Procedure outlined in former Conservancy Act (Laws 1923, ch. 140) was not an unlawful delegation of the power of taxation vested in the legislature by the organic law. In re Proposed Middle Rio Grande Conservancy Dist., 31 N.M. 188, 242 P. 683 (1925).

Investigative powers in boundary commission. — Commitment to boundary commission of power to investigate question of proper location of a boundary is not a delegation of improper power. State ex rel. Clancy v. Hall, 23 N.M. 422, 168 P. 715 (1917).

Authorization of administrative rule-making not unconstitutional delegation. — Statute authorizing state game commission to promulgate rules concerning game animals and fish is a proper exercise of state's police power, and is not an unconstitutional delegation of legislative power. State ex rel. Sofeico v. Heffernan, 41 N.M. 219, 67 P.2d 240 (1936).

Conferring of quasi-judicial powers on agencies. — Legislature, in exercising its police powers, may confer certain "quasi-judicial" powers on administrative agencies with regard to laws affecting the general public, but such powers do not extend to determinations of rights and liabilities between individuals. Fellows v. Shultz, 81 N.M. 496, 469 P.2d 141 (1970).

Quasi-judicial school board functions. — School board functions which are quasi-judicial do not constitute a violation of the separation of powers clause of the constitution as a delegation of judicial powers to the board. McCormick v. Board of Educ., 58 N.M. 648, 274 P.2d 299 (1954).

Control of liquor traffic. — Pursuant to 60-6B-4 NMSA 1978, the delegation of the legislative authority to disapprove the transfer of a liquor license on moral as well as on safety and health grounds is within the traditional definition of the state's police power and thus constitutional. Dick v. City of Portales, 116 N.M. 472, 863 P.2d 1093 (Ct. App. 1993), rev'd on other grounds, 118 N.M. 541, 883 P.2d 127 (1994).

Revocation procedure not improper legislative delegation. — Former 67-21-21, 1953 Comp., purporting to confer power on the state board of registration for professional engineers and land surveyors to revoke the certificate of any registrant who is found guilty by the board after trial of gross negligence, incompetency or misconduct in the practice of his profession, is not an unlawful delegation of legislative power. Hatfield v. New Mexico State Bd. of Registration for Professional Eng'rs & Land Surveyors, 60 N.M. 242, 290 P.2d 1077 (1955).

Formation of college districts by petition not improper delegation. — This section was not violated by authorization in former 21-13-4 NMSA 1978 (repealed) for formation of junior college districts by petition method, as this was not a delegation of power but merely a statutory method for implementing the legislative determination of a purpose to be fulfilled. Daniels v. Watson, 75 N.M. 661, 410 P.2d 193 (1966).

Direction to governor to conform national guard. — Statute directing governor to issue such orders as might be necessary to conform the national guard of New Mexico to that prescribed by the war department was not a delegation of legislative authority. State ex rel. Charlton v. French, 44 N.M. 169, 99 P.2d 715 (1940).

Determination of property misuse improperly delegated. — Subdivision A(2) of 30-14-4 NMSA 1978, proscribing the remaining in or occupying of any public property after having been requested to leave by the lawful custodian or his representative, who has determined that the public property is being used or occupied contrary to its intended or customary use, is without sufficiently definite standards to be enforceable and, thus, an unconstitutional delegation of legislative power. State v. Jaramillo, 83 N.M. 800, 498 P.2d 687 (Ct. App. 1972).

Legislature cannot delegate power to appropriate money. — Under constitutional separation-of-powers principles, the legislature cannot delegate its power to appropriate money unless specifically authorized by the state constitution. State ex rel. Schwartz v. Johnson, 120 N.M. 820, 907 P.2d 1001 (1995).

Reduction of budgets by board unconstitutional. — The unrestricted and unguided power contained in Laws 1961, ch. 254, § 24 (an appropriation section), whereby state board of finance could impose a reduction of up to 10% on operating budgets simply if in its opinion the legislature had been overly generous, was an unconstitutional grant of legislative power and the board could not legally proceed thereunder. State ex rel. Holmes v. State Bd. of Fin., 69 N.M. 430, 367 P.2d 925 (1961).

Executive control of expenditures permissible. — Legislature, without the same constituting any violation of N.M. Const., art. IV, § 22, or of this section, may provide in the general appropriation bill for the executive to control the expenditure of the amounts appropriated. State ex rel. Holmes v. State Bd. of Fin., 69 N.M. 430, 367 P.2d 925 (1961).

Executive agency controlling expenditure of appropriations. — The legislature may provide in the general appropriations bill for an executive agency to control the expenditure of the amounts appropriated without constituting a violation of the separation-of-powers provisions in this section. 1987 Op. Att'y Gen. No. 87-32.

Promulgation of collective bargaining rules by personnel board. — The words "among other things" at the beginning of § 10-9-13 do not constitute a valid delegation of legislative power, authorizing the personnel board to promulgate rules allowing state employees to bargain collectively with state agencies, since the state constitution

commits New Mexico to the doctrine of separation of powers and also vests the legislative powers in the legislature. It is fundamental that no one of the three branches can delegate effectively any of the powers which belong to it. 1987 Op. Att'y Gen. No. 87-41.

Pharmacy board allowed to schedule drugs. — To allow the board of pharmacy to schedule drugs, resulting in the attachment of differing criminal penalties for the possession of different drugs, is not an unconstitutional delegation of authority. Montoya v. O'Toole, 94 N.M. 303, 610 P.2d 190 (1980).

Unconstitutional delegation of zoning power. — Section 3-21-18 NMSA 1978, which permits private individuals to "create" a special zoning district without any limitation on the size and location of the district, is void as an unconstitutional delegation of legislative power because there is no standard to guide the private individuals in determining the size or location of the district. Deer Mesa Corp. v. Los Tres Valles Special Zoning Dist. Comm'n, 103 N.M. 675, 712 P.2d 21 (Ct. App. 1985).

III. LEGISLATION AFFECTING JUDICIARY.

A. LEGISLATION VALIDLY AFFECTING COURTS.

Court decisions may be modified by legislative enactment. — The legislature's plenary authority is limited only by the state and federal constitutions. Court decisions may be modified by legislative enactment in any manner and to any degree decided by the legislature, so long as the legislation conforms to constitutional standards. Ferguson v. New Mexico State Hwy. Comm'n, 99 N.M. 194, 656 P.2d 244 (Ct. App. 1982).

Impartiality provision valid. — It is no invasion of judicial power for the legislature to say that such power shall not be exercised by judges who are believed by the litigants to be partial. State ex rel. Hannah v. Armijo, 38 N.M. 73, 28 P.2d 511 (1933).

Longarm statute not violative of courts' powers. — Section 38-1-16 NMSA 1978 is not an unconstitutional invasion of the judicial branch in violation of the separation of powers provision of the constitution. Gray v. Armijo, 70 N.M. 245, 372 P.2d 821 (1962).

Provision in 38-1-16 NMSA 1978, which allows substituted service on nonresidents involved in automobile accidents, does not constitute unconstitutional exercise of judicial powers by the legislature. Clews v. Stiles, 303 F.2d 290 (10th Cir. 1960).

Domicile presumption valid. — The presumption of domicile established for military personnel stationed in this state for six months, under 40-4-5 NMSA 1978 (relating to jurisdictional requirements for dissolution of marriage), is not an unconstitutional interference with the judicial branch of government. Crownover v. Crownover, 58 N.M. 597, 274 P.2d 127 (1954).

No unconstitutional delegation of judicial powers. — Section 30-20-13 NMSA 1978, regarding interference, trespass and damage to public facilities and providing penalties therefor, does not unconstitutionally delegate judicial power since it contemplates ultimate determination by judge or jury that the person accused committed disruptive acts. State v. Silva, 86 N.M. 543, 525 P.2d 903 (Ct. App.), cert. denied, 86 N.M. 528, 525 P.2d 888 (1974).

Legislative act making a sentence mandatory, and thus denying any right of the courts to suspend sentences, does not violate the doctrine of separation of powers. State v. Mabry, 96 N.M. 317, 630 P.2d 269 (1981).

Procedural statute effective unless conflicts with court rule. — Since the supreme court has no quarrel with a statutory arrangement which seems reasonable and workable, a statute regulating practice and procedure, although not binding on the supreme court, is given effect until there is a conflict between it and a rule adopted by the court. State v. Herrera, 92 N.M. 7, 582 P.2d 384 (Ct. App.), cert. denied, 91 N.M. 751, 580 P.2d 972 (1978).

Legislation dealing with procedure in judicial proceedings is not automatically in violation of this section; rather, such legislation is unconstitutional only when it conflicts with procedure adopted by the supreme court. Otero v. Zouhar, 102 N.M. 493, 697 P.2d 493 (Ct. App. 1984), aff'd in part and rev'd on other grounds, 102 N.M. 482, 697 P.2d 482 (1985).

Legislative power to determine appealability. — The legislature has the power to determine in what district court cases, civil and criminal, the supreme court shall exercise appellate jurisdiction, except for those cases in which the district court has imposed a sentence of death or life imprisonment, for which the constitution has directly conferred appellate jurisdiction. Ammerman v. Hubbard Broadcasting, Inc., 89 N.M. 307, 551 P.2d 1354 (1976), cert. denied, 436 U.S. 906, 98 S. Ct. 2237, 56 L. Ed. 2d 404 (1978).

Tort Claims Act constitutional. — The legislature acted constitutionally in enacting the Tort Claims Act following judicial abolition of sovereign immunity. Ferguson v. New Mexico State Hwy. Comm'n, 99 N.M. 194, 656 P.2d 244 (Ct. App. 1982).

Authorization of rule-making. — Laws 1933, ch. 84, §§ 1, 2 (38-1-1, 38-1-2 NMSA 1978), having authorized the supreme court to promulgate court rules, such rules do not delegate an exclusive legislative function to the courts. State v. Roy, 40 N.M. 397, 60 P.2d 646, 110 A.L.R. 1 (1936).

Legislative review of administrative regulations proper. — Legislative review of administrative rules and regulations promulgated under delegated rule-making powers is consistent with the constitutional doctrine of separation of powers, and does not interfere with judicial prerogative. 1977 Op. Att'y Gen. No. 77-12.

Receiver appointment provision directory, not mandatory. — Provision in former 48-7-8, 1953 Comp., dealing with insolvency and involuntary liquidation of state banks, that the court should appoint the state bank examiner as receiver amounted to no more than a recommendation to the judiciary to appoint him, as otherwise, the enactment would be unconstitutional in view of this section and N.M. Const., art. VI, § 13. Cooper v. Otero, 38 N.M. 164, 29 P.2d 341 (1934).

Judicial power validly conferred by Conservancy Act. — Powers and duties conferred upon district court by Conservancy Act (73-17-1 to 73-17-24 NMSA 1978) are essentially judicial, and do not violate this section. Gutierrez v. Middle Rio Grande Conservancy Dist., 34 N.M. 346, 282 P. 1, 70 A.L.R. 1261 (1929), cert. denied, 280 U.S. 610, 50 S. Ct. 158, 74 L. Ed. 653 (1930).

And by Drainage District Law. — Drainage District Law of 1912, ch. 84 (73-6-1 to 73-7-56 NMSA 1978), providing for creation of drainage districts by petition filed in proper district court, did not violate this section, the duties imposed by the act being judicial in character. In re Dexter-Greenfield Drainage Dist., 21 N.M. 286, 154 P. 382 (1915).

Applicability of motor pool provisions to judiciary. — Procedures adopted under Laws 1968, ch. 43, § 11 (15-3-25 NMSA 1978) for operating the state motor pool are binding upon the judicial branch of the government unless the supreme court determines that such compliance would unreasonably impede or impair the functions of the judiciary. 1967-68 Op. Att'y Gen. No. 68-64.

Filling municipal court vacancies. — A municipal ordinance establishing a procedure for filling a temporary vacancy on the municipal court did not violate this section. Aguilar v. City Comm'n, 1997-NMCA-045, 123 N.M. 333, 940 P.2d 181.

B. LEGISLATION IMPROPERLY CONFERRING POWERS ON COURTS.

Placing of original administrative jurisdiction in courts invalid. — A statutory amendment to 72-12-3 NMSA 1978 which permitted removal of application for use of underground water from the jurisdiction of the state engineer to be placed within the original jurisdiction of the courts was unconstitutional as violative of the separation of powers doctrine of this section. City of Hobbs v. State ex rel. Reynolds, 82 N.M. 102, 476 P.2d 500 (1970).

The 1967 amendment to 72-12-7 NMSA 1978, purporting to remove proceeding relating to change in location of well or use of water from administrative jurisdiction, and is within original jurisdiction of the courts, violated separation of powers doctrine. Fellows v. Shultz, 81 N.M. 496, 469 P.2d 141 (1970).

De novo review of commission's decisions by courts unconstitutional. — Insofar as 70-2-25 NMSA 1978 purports to allow the district court, on appeal from order or decision of the oil conservation commission, to consider new evidence, to base its decision on the preponderance of the evidence or to modify the orders of the

commission, it is void as an unconstitutional delegation of power, contravening this provision of the New Mexico Constitution. Continental Oil Co. v. Oil Conservation Comm'n, 70 N.M. 310, 373 P.2d 809 (1962).

Review of engineer's decision limited. — Section 72-7-1 NMSA 1978 does not permit the district court, in reviewing a decision of the state engineer, to hear new or additional evidence; review by the court is limited to questions of law and restricted to whether, based upon the legal evidence produced at the hearing before the state engineer, that officer acted fraudulently, arbitrarily or capriciously, whether his action was in accordance with the law and the evidence, and whether it was within the scope of his authority. Kelley v. Carlsbad Irrigation Dist., 71 N.M. 464, 379 P.2d 763 (1963).

Courts generally not to perform administrative functions. — Just as a commission cannot perform a judicial function, neither can the court perform an administrative one. Fellows v. Shultz, 81 N.M. 496, 469 P.2d 141 (1970); Kelley v. Carlsbad Irrigation Dist., 71 N.M. 464, 379 P.2d 763 (1963).

Prerequisites to exercise by courts of administrative functions. — Before a court may exercise an administrative function, such as granting an extension of time to pay taxes and waiving penalty and interest for delinquency in payment, belonging inherently to another department of the government, it must appear that an appropriate attempt has been made to delegate such function to the courts, and that the attempt is not repugnant to this section. State v. Fifth Judicial Dist. Court, 36 N.M. 151, 9 P.2d 691 (1932).

Granting liquor permits not for court. — The district court does not have the administrative function of determining whether or not a liquor permit should be granted. Baca v. Grisolano, 57 N.M. 176, 256 P.2d 792 (1953); Floeck v. Bureau of Revenue, 44 N.M. 194, 100 P.2d 225 (1940).

Nor cancellation of licenses. — The Liquor Control Act (former 60-3-1 NMSA 1978 et seq.) gave the court authority only to determine whether upon the facts and law, the action of the official in cancelling a license was based upon an error of law or was unsupported by substantial evidence or clearly arbitrary or capricious; otherwise it would be a delegation of administrative authority to the district court in violation of the constitution. Baca v. Grisolano, 57 N.M. 176, 256 P.2d 792 (1953); Floeck v. Bureau of Revenue, 44 N.M. 194, 100 P.2d 225 (1940).

Impermissible for courts to zone. — To the extent that Laws 1927, ch. 27, § 8 (now repealed) purports to allow the district court to zone land, it is void as an unconstitutional delegation of power to the judiciary, contravening this section. Coe v. City of Albuquerque, 76 N.M. 771, 418 P.2d 545 (1966), appeal after remand, 79 N.M. 92, 440 P.2d 130 (1968).

C. IMPROPER INTERFERENCE WITH JUDICIARY BY LEGISLATURE.

Infringement upon judiciary by state or local government barred. — This article bars any infringement upon the power and the authority of the judiciary by the executive and legislative branches at any level of state or local government. Mowrer v. Rusk, 95 N.M. 48, 618 P.2d 886 (1980).

Legislative enactments on procedure. — The distinction between substantive law and those rules of pleading, practice and procedure which are essential to the performance of the constitutional duties imposed upon the courts is not always clearly defined. There may be areas in which procedural matters so closely border upon substantive rights and remedies that legislative enactments with respect thereto would be proper. Southwest Underwriters v. Montoya, 80 N.M. 107, 452 P.2d 176 (1969).

Attempts to regulate pleading, practice and procedure invalid. — The supreme court's constitutional power under this section and N.M. Const., art. VI, § 3, of superintending control over all inferior courts carries with it the inherent power to regulate all pleading, practice and procedure affecting the judicial branch of government, and statutes purporting to regulate practice and procedure in the courts cannot be made binding, for the constitutional power is vested exclusively in the supreme court. Ammerman v. Hubbard Broadcasting, Inc., 89 N.M. 307, 551 P.2d 1354 (1976), cert. denied, 436 U.S. 906, 98 S. Ct. 2237, 56 L. Ed. 2d 404 (1978); State ex rel. Anaya v. McBride, 88 N.M. 244, 539 P.2d 1006 (1975).

In the absence of the clearest language to the contrary in the constitution, the powers essential to the functioning of the courts are to be taken as committed solely to the supreme court to avoid a confusion in the methods of procedure and to provide uniform rules of pleading and practice. Ammerman v. Hubbard Broadcasting, Inc., 89 N.M. 307, 551 P.2d 1354 (1976).

Court has the power to regulate pleading, practice and procedure within the courts so that, on procedural matters such as time limitations for appeals, a rule adopted by the supreme court governs over an inconsistent statute. AAA v. SCC, 102 N.M. 527, 697 P.2d 946 (1985).

Procedural statute infringing on court's duties. — Statute providing for dismissal of actions not brought to conclusion within three years and exempting cases and proceedings in which there is to be a jury from the dismissal requirement is a procedural statute which infringes on court's completion of its duties under the constitution; the rule of court in effect at that time will prevail. Southwest Underwriters v. Montoya, 80 N.M. 107, 452 P.2d 176 (1969).

Creation of journalist's privilege invalid. — In view of the clear and unambiguous assertion of the supreme court in Rule 501, N.M.R. Evid. (see now Rule 11-501 NMRA) that no person has a privilege, except as provided by constitution or rule of the court, and since under the New Mexico constitution the legislature lacks power to prescribe by statute rules of evidence and procedure, which power is vested exclusively in the supreme court, the journalist's privilege purportedly created by Subsection A of 38-6-7

NMSA 1978 is constitutionally invalid and cannot be relied upon or enforced in judicial proceedings. Ammerman v. Hubbard Broadcasting, Inc., 89 N.M. 307, 551 P.2d 1354 (1976), cert. denied, 436 U.S. 906, 98 S. Ct. 2237, 56 L. Ed. 2d 404 (1978).

Expedition of criminal cases for courts. — Under the doctrine of separation of powers, the matter of expediting the flow of criminal cases through the courts is a peculiarly judicial function. State ex rel. Delgado v. Stanley, 83 N.M. 626, 495 P.2d 1073 (1972).

Legislative interference with quo warranto improper. — Since the constitution provides for separate and equal branches of government in New Mexico, any legislative measure which affects pleading, practice or procedure in relation to a power expressly vested by the constitution in the judiciary, such as quo warranto, cannot be deemed binding. State ex rel. Anaya v. McBride, 88 N.M. 244, 539 P.2d 1006 (1975).

Portion of 44-3-6 NMSA 1978 which requires the name of the person rightfully entitled to the office involved in a quo warranto proceeding to be set forth in the complaint is invalid. State ex rel. Anaya v. McBride, 88 N.M. 244, 539 P.2d 1006 (1975).

Legislature not to interfere with appellate procedure. — It would be utterly impossible for the court to live up to its responsibilities and to properly and expeditiously handle the matters which come before it on appeal and otherwise, if the legislature could determine and define the nature of the appellate process, establish the procedures to be followed in that process and fix time limitations within which the court must act. Ammerman v. Hubbard Broadcasting, Inc., 89 N.M. 307, 551 P.2d 1354 (1976), cert. denied, 436 U.S. 906, 98 S. Ct. 2237, 56 L. Ed. 2d 404 (1978).

Time of hearing appeals for court. — The time within which the supreme court must consider a matter before it is for that court to determine; it is purely a procedural matter. Ammerman v. Hubbard Broadcasting, Inc., 89 N.M. 307, 551 P.2d 1354 (1976), cert. denied, 436 U.S. 906, 98 S. Ct. 2237, 56 L. Ed. 2d 404 (1978).

Substitution of de novo hearing for appeal improper. — Legislature has no power to substitute a de novo hearing for an appeal from a judgment or order of the district court. Ammerman v. Hubbard Broadcasting, Inc., 89 N.M. 307, 551 P.2d 1354 (1976), cert. denied, 436 U.S. 906, 98 S. Ct. 2237, 56 L. Ed. 2d 404 (1978).

Legislature not to control practice of law. — Legislative attempts to confer any power over the control of the practice of law, including the power of suspension or disbarment, are violative of this section. In re Patton, 86 N.M. 52, 519 P.2d 288 (1974).

Bar admission requirements. — The legislature may enact valid laws in fixing minimum but not maximum requirements for admission to the bar, but it may not require admission on standards other than as accepted or established by the courts; any legislation which attempts to do so is an invasion of the judicial power and violative of the constitutional provisions establishing the separate branches of government and

prohibiting the legislature from invading the judiciary. In re Sedillo, 66 N.M. 267, 347 P.2d 162 (1959).

Conflict of interest laws not regulation of law practice. — The application to former executive branch attorneys of Subsection C of 10-16-8 NMSA 1978, prohibiting former public officers and employees from representing persons for pay before their former government agency employer, is not an attempt by the legislature to regulate the practice of law and the provision does not violate separation of powers. Ortiz v. Taxation & Revenue Dep't, 1998-NMCA-027, 124 N.M. 677, 954 P.2d 109.

Legislative grant of water rights invasion of judiciary's function. — Where exclusive jurisdiction has been given to the judiciary to determine water rights, the separation of powers doctrine forbids the legislature from granting such rights; therefore, proposed bill which would grant a water right of two-acre inches per acre foot to those holding water rights in the artesian basins would be unconstitutional. 1971-72 Op. Att'y Gen. No. 71-23.

IV. JUDICIAL REVIEW OVER LEGISLATIVE AFFAIRS.

Power to make law is reserved exclusively to legislature, and any attempt to abdicate it in any particular field, though valid in form, must necessarily be held void. State v. Roy, 40 N.M. 397, 60 P.2d 646, 110 A.L.R. 1 (1936).

Emergency clause for legislature. — It is exclusive function of legislature to determine whether legislation should carry an emergency clause precluding a referendum. Hutchens v. Jackson, 37 N.M. 325, 23 P.2d 355 (1933).

Review of legislative action. — The legislature is a coordinate branch of our state government; its prerogative in the matter of legislation is to be questioned solely from the standpoint of our federal or state constitutional limitations. Fellows v. Shultz, 81 N.M. 496, 469 P.2d 141 (1970); State v. Armstrong, 31 N.M. 220, 243 P. 333 (1924).

The function of the courts in scrutinizing acts of the legislature is not to raise possible doubt nor to listen to captious criticism, since as the legislature possesses the sole power of enacting law, it will not be presumed that the people have intended to limit its power or practice by unreasonable or arbitrary restrictions. Every presumption is ordinarily to be indulged in favor of the validity and regularity of legislative acts and procedure. Fellows v. Shultz, 81 N.M. 496, 469 P.2d 141 (1970); State v. Armstrong, 31 N.M. 220, 243 P. 333 (1924).

Legislature to determine public need. — 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. State v. Collins, 61 N.M. 184, 297 P.2d 325 (1956).

Judiciary determines rules of procedure for cases within the judicial system, pursuant to its authority under the separation of powers doctrine. Angel Fire Corp. v. C.S. Cattle Co., 96 N.M. 651, 634 P.2d 202 (1981).

Establishment of penalties for criminal behavior is solely within the province of the legislature. State v. Mabry, 96 N.M. 317, 630 P.2d 269 (1981).

Courts may not inquire into statutory policy. — Under the separation of powers doctrine, the courts may not inquire into statutory policy and may not substitute their views in the formulation of legislative provisions or classifications for those of the legislature. Gallegos v. Homestake Mining Co., 97 N.M. 717, 643 P.2d 281 (Ct. App. 1982).

Mandatory sentencing under Chapter 31 NMSA 1978 does not violate the doctrine of separation of powers. State v. Mabry, 96 N.M. 317, 630 P.2d 269 (1981).

No power in court to stay corporation commission (now public regulation commission) order. — A district court had no power to stay an order of state corporation commission (now public regulation commission) (an administrative board exercising a legislative function) pending a determination of whether the order was lawful and reasonable, in view of separation of powers doctrine. State ex rel. SCC v. McCulloh, 63 N.M. 436, 321 P.2d 207 (1957).

Divestment of office by judicial action of questionable validity. — There is a very serious question as to whether a person can be divested of his legislative office by judicial action pursuant to a constitutional provision which on the face of it would disqualify him from holding office, because this presents a question of separation of power, and the courts will not interfere with the organization of one of the other equal branches of government. 1955-56 Op. Att'y Gen. No. 6400.

Attorney general not to interfere with legislative qualifications. — The attorney general has been granted no statutory authority to intervene in a determination by the legislature of whether public school teachers are qualified to serve, and, in fact, is barred from doing so by the separation of powers doctrine. 1975-76 Op. Att'y Gen. No. 75-21.

Old Abe Co. v. New Mexico Mining Comm'n, 121 N.M. 83, 908 P.2d 776 (Ct. App. 1995).

V. POWERS OF EXECUTIVE DEPARTMENT.

Judicial standards commission. — Because the judicial standards commission plays no role in the traditional functions of the judiciary, the governor’s actions in removing the executive appointees to the commission did not infringe on the judiciary’s performance of those functions. State ex rel. New Mexico Judicial Standards Comm’n v. Espinosa, 2003-NMSC-017, 134 N.M. 59, 73 P.3d 197.

Public service commission's order unconstitutional. — Orders of the public service commission that effectively deregulated the retail side of the electric power industry in New Mexico in the absence of a statutory mandate from the legislature exceeded the commission's authority and violated the separation of powers doctrine. State ex rel. Sandel v. New Mexico Pub. Util. Comm'n, 1999-NMSC-019, 127 N.M. 272, 980 P.2d 55.

Executive created public assistance policy unconstitutional. — Governor's implementation of public assistance policy through the Human Services Department violated the separation of powers doctrine, because in changing eligibility requirements, it was an executive creation of substantive law. State ex rel. Taylor v. Johnson, 1998-NMSC-015, 125 N.M. 343, 961 P.2d 768.

Cease and desist order against executive officers. — Cease and desist order was proper contempt sanction against governor and executive agency that continued implementation of public assistance program for several months following issuance of writ of mandamus by Supreme Court ordering the cessation of the program. State ex rel. Taylor v. Johnson, 1998-NMSC-015, 125 N.M. 343, 961 P.2d 768.

Granting power to mining director constitutional. — Regulations of the mining commission granting power to the director, an employee of the commission, were not violative of the separation of powers doctrine. Old Abe Co. v. New Mexico Mining Comm'n, 121 N.M. 83, 908 P.2d 776 (Ct. App. 1995).

Executive privilege recognized. — Recognition of an executive privilege is required by the constitution of the state of New Mexico. State ex rel. Attorney Gen. v. First Judicial Dist. Court, 96 N.M. 254, 629 P.2d 330 (1981).

Executive privilege is a recognition by one branch of government, the judiciary, that another coequal branch of government, the executive, has the right not to be unduly subjected to scrutiny in a judicial proceeding where information in its possession is being sought by a litigant. The legislative and judicial branches of state government enjoy similar privileges which are required to be recognized by the supreme court under the constitution. State ex rel. Attorney Gen. v. First Judicial Dist. Court, 96 N.M. 254, 629 P.2d 330 (1981).

Purposes of privilege. — Inherent in the successful functioning of an independent executive is the valid need for protection of communications between its members. The purposes of the executive privilege are to safeguard the decision-making process of the government by fostering candid expression of recommendations and advice and to protect this process from disclosure. State ex rel. Attorney Gen. v. First Judicial Dist. Court, 96 N.M. 254, 629 P.2d 330 (1981).

Limitation on privilege. — Executive privilege does not protect communications, whether intended as confidential or not, between the executive department and

members of the public or others not employed in the executive department. State ex rel. Attorney Gen. v. First Judicial Dist. Court, 96 N.M. 254, 629 P.2d 330 (1981).

Privilege not absolute. — The mere fact that the executive department holds information and claims executive privilege does not of itself render the information exempt from judicial process. Nor does the fact that the privilege is of constitutional origin make the privilege absolute. State ex rel. Attorney Gen. v. First Judicial Dist. Court, 96 N.M. 254, 629 P.2d 330 (1981).

Balancing test applied to determine disclosure. — Trial courts are required to determine whether the claim of executive privilege has been properly invoked in each situation. Once it is found that the privilege applies, the trial court must balance the public's interest in preserving confidentiality to promote intra-governmental candor with the individual's need for disclosure of the particular information sought. State ex rel. Attorney Gen. v. First Judicial Dist. Court, 96 N.M. 254, 629 P.2d 330 (1981).

ARTICLE IV
Legislative Department

Section 1. [Vesting of legislative power; location of sessions; referendum on legislation.]

The legislative power shall be vested in a senate and house of representatives which shall be designated the legislature of the state of New Mexico, and shall hold its sessions at the seat of government.

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. Petitions disapproving any law other than those above excepted, enacted at the last preceding session of the legislature, shall be filed with the secretary of state not less than four months prior to the next general election. Such petitions shall be signed by not less than ten per centum of the qualified electors of each of three-fourths of the counties and in the aggregate by not less than ten per centum of the qualified electors of the state, as shown by the total number of votes cast at the last preceding general election. The question of the approval or rejection of such law shall be submitted by the secretary of state to the electorate at the next general election; and if a majority of the legal votes cast thereon, and not less than forty per centum of the total number of legal votes cast at such general election, be cast for the rejection of such law, it shall be annulled and thereby repealed with the same effect as if the legislature had then repealed it, and such repeal shall revive any law repealed by the act so annulled; otherwise, it shall remain in force unless subsequently repealed by the legislature. If such petition or petitions be signed by not less than twenty-five per centum of the qualified electors

under each of the foregoing conditions, and be filed with the secretary of state within ninety days after the adjournment of the session of the legislature at which such law was enacted, the operation thereof shall be thereupon suspended and the question of its approval or rejection shall be likewise submitted to a vote at the next ensuing general election. If a majority of the votes cast thereon and not less than forty per centum of the total number of votes cast at such general election be cast for its rejection, it shall be thereby annulled; otherwise, it shall go into effect upon publication of the certificate of the secretary of state declaring the result of the vote thereon. It shall be a felony for any person to sign any such petition with any name other than his own, or to sign his name more than once for the same measure, or to sign such petition when he is not a qualified elector in the county specified in such petition; provided, that nothing herein shall be construed to prohibit the writing thereon of the name of any person who cannot write, and who signs the same with his mark. The legislature shall enact laws necessary for the effective exercise of the power hereby reserved.

ANNOTATIONS

I. GENERAL CONSIDERATION.

Cross references. — As to referendum petitions, see 1-17-1 to 1-17-14 NMSA 1978.

Section is self-executing. State v. Perrault, 34 N.M. 438, 283 P. 902 (1929).

Right of referendum narrow. — The omission by the framers of our constitution of the words "necessary" and "immediate" in the language of the exemption clause results in allowing the people of this state a much narrower right of referendum than is allowed in any other state in which the right is reserved. Otto v. Buck, 61 N.M. 123, 295 P.2d 1028 (1956).

Effect of county calling voluntary referendum, absent authority. — In the absence of a constitutional reservation of the right of the people to hold referendum on county ordinances, and in the absence of a specific statutory authority requiring a referendum on ordinances, there is no authority for a county to call a voluntary referendum. Should such a referendum be held, it would not, regardless of its outcome, affect the adoption or validity of the ordinance. 1979 Op. Att'y Gen. No. 79-35.

Legislature not bound to appropriation. — None of the actions taken by a local board of education, the board of educational finance, the voters in a local school district or the regents of the university of New Mexico can bind the legislature to an appropriation. 1980 Op. Att'y Gen. No. 80-3.

Under this section the people have retained limited veto power closely akin to that of governor, but with difference that his power is general over all legislation. State ex rel. Hughes v. Cleveland, 47 N.M. 230, 141 P.2d 192 (1943).

Comparable provisions. — Idaho Const., art. III, § 1.

Montana Const., art. V, § 1.

Utah Const., art. VI, § 1.

Law reviews. — For article, "Rape Law: The Need For Reform," see 5 N.M. L. Rev. 279 (1975).

For article, "Separation of Powers and the Judicial Rule-Making Power in New Mexico: The Need for Prudential Restraints," see 15 N.M.L. Rev. 407 (1985).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 16 Am. Jur. 2d Constitutional Law §§ 318 to 331, 335 to 359; 42 Am. Jur. 2d Initiative and Referendum §§ 3 to 20; 72 Am. Jur. 2d States, Territories and Dependencies §§ 35 to 61.

Encroachment of legislative department upon judiciary, 3 A.L.R. 450, 4 A.L.R. 1552, 5 A.L.R. 94, 9 A.L.R. 1341, 15 A.L.R. 331, 25 A.L.R. 1136, 27 A.L.R. 411, 29 A.L.R. 1287, 35 A.L.R. 460, 46 A.L.R. 1179, 65 A.L.R. 525, 66 A.L.R. 1466, 67 A.L.R. 1451, 74 A.L.R. 579, 77 A.L.R. 629, 78 A.L.R. 1323, 79 A.L.R. 323, 86 A.L.R. 179, 92 A.L.R. 1258, 97 A.L.R. 1333, 101 A.L.R. 1215, 106 A.L.R. 361, 107 A.L.R. 1431, 120 A.L.R. 316, 124 A.L.R. 751, 127 A.L.R. 868, 144 A.L.R. 150, 162 A.L.R. 495, 171 A.L.R. 1352.

Declaring an act an emergency without specifying that it shall not be subject to referendum, 7 A.L.R. 530.

Constitutional requirements as to legislation or constitutional requirements, applicability of, to statutes or constitutional amendments under initiative or referendum powers, 62 A.L.R. 1349.

Initiative statute as in effect constitutional amendment, 62 A.L.R. 1352.

Referendum of question of repeal of statute in absence of constitutional amendment, 76 A.L.R. 1062.

Judicial decisions relating to adoption or repeal of amendments to federal constitution, 83 A.L.R. 1374, 87 A.L.R. 1321, 122 A.L.R. 717.

Delegation to judiciary of power to regulate motor vehicles, 87 A.L.R. 546.

Inclusion in single initiative or referendum petition of proposed constitutional or statutory enactments covering different and distinct subjects, 90 A.L.R. 572.

Time within which officer must perform duty to pass upon sufficiency of initiative, referendum or recall petition, 102 A.L.R. 51.

Construction and application of constitutional or statutory requirement as to short title, ballot title or explanation of nature of proposal in initiative, referendum or recall petition, 106 A.L.R. 555.

Withdrawal of names from initiative or referendum petition, 126 A.L.R. 1031, 27 A.L.R.2d 604.

Basis for computing majority essential to the adoption of a constitutional or other special proposition submitted to voters, 131 A.L.R. 1382.

Adoption by or under authority of state statute without specific enactment or reenactment of prospective federal legislation or federal administrative rules as unconstitutional delegation of legislative power, 133 A.L.R. 401.

Exception of certain laws from referendum, construction and application of express constitutional or statutory provision for, 146 A.L.R. 284, 100 A.L.R.2d 314.

Delegating authority to county or municipal corporation to make violation of ordinance crime or to provide criminal punishment, 174 A.L.R. 1343.

Taxpayer's capacity to maintain suit to enjoin submission of initiative, referendum or recall measure to voters, 6 A.L.R.2d 557.

Injunctive relief against submission of constitutional amendment, statute, municipal charter or municipal ordinance, on ground that proposed action would be unconstitutional, 19 A.L.R.2d 519.

Power of legislative body to amend, repeal or abrogate initiative or referendum measure, or to enact measure defeated on referendum, 33 A.L.R.2d 1118.

Legislative power to prescribe qualifications for or conditions of eligibility to constitutional office, 34 A.L.R.2d 155.

Legislative power to exempt from taxation property, purposes or uses additional to those specified in constitution, 61 A.L.R.2d 1031.

Construction and application of constitutional or statutory provisions expressly excepting certain laws from referendum, 100 A.L.R.2d 314.

16 C.J.S. Constitutional Law §§ 113 to 168; 81A C.J.S. States § 40; 82 C.J.S. Statutes §§ 4, 117, 121.

II. POWERS OF LEGISLATURE.

Legislature has plenary legislative authority limited only by the state and federal constitutions. Daniels v. Watson, 75 N.M. 661, 410 P.2d 193 (1966).

Legislature's plenary authority is limited only by the state and federal constitutions. Court decisions may be modified by legislative enactment in any manner and to any degree decided by the legislature, so long as the legislation conforms to constitutional standards. Ferguson v. New Mexico State Hwy. Comm'n, 99 N.M. 194, 656 P.2d 244 (Ct. App. 1982).

The legislature acted constitutionally in enacting the Tort Claims Act following judicial abolition of sovereign immunity. Ferguson v. New Mexico State Hwy. Comm'n, 99 N.M. 194, 656 P.2d 244 (Ct. App. 1982).

Power to enact statutes of limitation is legislative power, and the sovereign generally has the right to lay down any conditions, even if harsh or arbitrary, with which creditors must comply, as a condition of payment of their demands. 1957-58 Op. Att'y Gen. No. 58-5.

Legislature to define crimes and punishments. — The legislature is the proper branch of government to determine what behavior should be proscribed under the police power, and to define crimes and provide for their punishment. State v. Dennis, 80 N.M. 262, 454 P.2d 276 (Ct. App. 1969).

Power to define crimes and provide the punishment is a legislative function. State v. Allen, 77 N.M. 433, 423 P.2d 867 (1967). See also, State v. Jiminez, 89 N.M. 652, 556 P.2d 60 (Ct. App. 1976).

Legislature may provide criminal penalties for violation of rules and regulations under proper circumstances. State v. Allen, 77 N.M. 433, 423 P.2d 867 (1967).

Unnecessary restrictions not permissible. — Legislatures may not, under the guise of the police power, impose restrictions that are unnecessary and unreasonable upon the use of private property or the pursuit of useful activities. State v. Dennis, 80 N.M. 262, 454 P.2d 276 (Ct. App. 1969).

Anticipatory legislation permissible. — The legislature may pass a statute in anticipation of adoption of an amendment to the constitution and to take effect thereon. In re Thaxton, 78 N.M. 668, 437 P.2d 129 (1968).

Legislature may amend existing law for clarification purposes just as effectively and certainly as for purposes of change. State ex rel. Dickson v. Aldridge, 66 N.M. 390, 348 P.2d 1002 (1960).

Full control over public revenue. — A state legislature has full control, not only over the levy of taxes but over the disposition of all public revenue; this power extends to such funds as are acquired by a political subdivision of the state, subject only to constitutional restrictions. 1957-58 Op. Att'y Gen. No. 57-219.

Delegation for carrying out legislative purposes valid. — Where a valid statute complete in itself enacts the general outlines of a governmental scheme, policy or purpose, and confers upon officials charged with the duty of assisting in administering the law and authority to make, within designated limitations to judicial review, rules and regulations, or to ascertain facts, upon which the statute by its own terms operates in carrying out the legislative purpose, such authority is not an unconstitutional delegation of legislative power. State v. Spears, 57 N.M. 400, 259 P.2d 356 (1953).

Standards to be given agency. — A legislative body may not vest unbridled or arbitrary power in an administrative agency but must furnish reasonably adequate standards to guide it, broad standards being permissible so long as they are capable of reasonable application and are sufficient to limit and define the agency's discretionary powers. State v. Pina, 90 N.M. 181, 561 P.2d 43 (Ct. App. 1977).

Delegation of power to board. — Laws 1951, ch. 224 (now repealed), relating to licensing of real estate brokers, was not unconstitutional as a delegation of legislative power to an administrative board. State v. Spears, 57 N.M. 400, 259 P.2d 356 (1953).

Rule-making powers delegable. — While the legislature may not delegate its power to make laws, it may vest in administrative officers and bodies a large measure of discretionary authority especially to make rules and regulations relating to the enforcement of the law. State v. Spears, 57 N.M. 400, 259 P.2d 356 (1953).

So long as underlying statute not abrogated. — Legislature may not delegate authority to a board or commission to adopt rules or regulations which abridge, enlarge, extend or modify the statute creating the right or imposing the duty. State ex rel. McCulloch v. Ashby, 73 N.M. 267, 387 P.2d 588 (1963).

Delegation to outside agency impermissible. — A state legislature has no power to delegate any of its legislative powers to an outside agency. 1953-54 Op. Att'y Gen. No. 5645.

Adoption by reference to prospective federal legislation unconstitutional. — By the weight of authority when an act adopts by reference future or prospective federal legislation an unconstitutional delegation of legislative authority results. 1953-54 Op. Att'y Gen. No. 5645. But see second paragraph of N.M. Const., art. IV, § 18, permitting reference to federal law for measure of taxes.

But adoption by reference to existing law valid. — A state does not invalidly delegate its legislative authority by adopting a law of the United States or another state, if such law is already in existence or operative. 1953-54 Op. Att'y Gen. No. 5645.

Authority in legislature to abolish or merge departments. — The legislature, having the power to create former departments of public health and of public welfare, was sole authority, absent constitutional amendment, authorized to abolish, merge or consolidate the two departments. 1953-54 Op. Att'y Gen. No. 5943.

Workmen's compensation settlements by court. — Provisions in 52-1-30 and 52-1-56 NMSA 1978 authorizing court to direct or approve settlement of workmen's compensation claim, in installment payments or as a lump sum, guided by claimant's best interests, did not involve an unconstitutional delegation of authority. Livingston v. Loffland Bros., 86 N.M. 375, 524 P.2d 991 (Ct. App.), cert. denied, 86 N.M. 372, 524 P.2d 988 (1974).

Promulgation of collective bargaining rules by personnel board. — The words "among other things" at the beginning of 10-9-13 NMSA 1978 do not constitute a valid delegation of legislative power, authorizing the personnel board to promulgate rules allowing state employees to bargain collectively with state agencies, since the state constitution commits New Mexico to the doctrine of separation of powers and also vests the legislative powers in the legislature. It is fundamental that no one of the three branches can delegate effectively any of the powers which belong to it. 1987 Op. Att'y Gen. No. 87-41.

Even if the legislature could delegate its power to make law concerning public sector collective bargaining, and even if it intended to do so in the Personnel Act, it failed to do so properly, and the Rules for Labor-Management Relations (RLMR) promulgated by the personnel board are therefore void and a nullity, since the Personnel Act does not mention collective bargaining, much less any standards to guide the board in fashioning the RLMR. 1987 Op. Att'y Gen. No. 87-41.

Petition by users of underground water. — Section 5 of Laws 1927, ch. 182 (now repealed), providing for administration of the act as to any underground waters upon petition signed by 10% of the users of such waters, did not delegate legislative power to the petitioners in violation of this section. Yeo v. Tweedy, 34 N.M. 611, 286 P. 970 (1929).

Each house of legislature has full power to prescribe rules which it desires. 1953-54 Op. Att'y Gen. No. 5633.

Legislature by law can create investigating committee to investigate anything which concerns the legislature and which may by subject to legislation. 1955-56 Op. Att'y Gen. No. 6319.

Legislative committees to cease upon adjournment. — To allow a committee of one house of the legislature to function after adjournment of the body which created it would be allowing that house to pass a resolution having the effect of law, which power can only be exercised by the concurrence of both houses. 1959-60 Op. Att'y Gen. No. 59-65.

Challenge to constitutionality of law. — In determining the constitutionality of a law, the presumption is that the legislature has performed its duty and kept within the bounds fixed by the constitution; and the judiciary will, if possible, give effect to the legislative

intent, unless it clearly appears to be in conflict with the constitution. Seidenberg v. New Mexico Bd. of Medical Exmrs., 80 N.M. 135, 452 P.2d 469 (1969).

Every presumption is to be indulged in favor of validity and regularity of legislative enactments. In re Estate of Welch, 80 N.M. 448, 457 P.2d 380 (1969).

Doubts resolved in favor of constitutionality. — Legislative acts should not be held unconstitutional unless no other conclusion can reasonably be reached and all doubts must be resolved in favor of constitutionality. Peyton v. Nord, 78 N.M. 717, 437 P.2d 716 (1968).

Standing to challenge legislation. — The constitutionality of a legislative act is open to attack only by a person whose rights are affected thereby. State v. Kasakoff, 84 N.M. 404, 503 P.2d 1182 (Ct. App. 1972); State v. Hines, 78 N.M. 471, 432 P.2d 827 (1967).

See also cases under analysis line II, "Legislative Delegation of Power," in notes to N.M. Const., art. III, § 1.

III. EXEMPTIONS FROM REFERENDUM POWER.

Question of referability is one of "judicial" fact, in the sense that the court examines the enactment of the legislature in the light of the history thereof, including previous extant or repealed legislation on the subject, contemporaneous declarations of the legislature, the condition sought to be remedied by the act, and the consequences of any particular interpretation to be given it. Otto v. Buck, 61 N.M. 123, 295 P.2d 1028 (1956).

Initiation of constitutional amendment not subject to referendum. — Authority reposed in legislature to initiate constitutional amendments is different than its power to legislate, and is not subject to referendum. Hutcheson v. Gonzales, 41 N.M. 474, 71 P.2d 140 (1937).

Procedure provided by legislature, in session as a convention to amend the constitution, which directs submission to the voters in order to effectuate the proposal for amendment, is a law, but not the kind of a law against which referendum may be directed under this article. Hutcheson v. Gonzales, 41 N.M. 474, 71 P.2d 140 (1937).

Enactment calling for special election to approve or reject proposed amendments to state constitution was not subject to referendum. Hutcheson v. Gonzales, 41 N.M. 474, 71 P.2d 140 (1937).

Ratification of amendment to federal constitution not referable. — A joint resolution ratifying a proposed amendment to the United States constitution is not a law to be submitted to the people. 1919-20 Op. Att'y Gen. 50.

Valid relationship to police power sufficient for exemption. — All that is required to exempt a questioned law from popular referendum is that it bear a valid relationship to some permissible object for the exercise of the police power. State ex rel. Hughes v. Cleveland, 47 N.M. 230, 141 P.2d 192 (1943). See also, 1965-66 Op. Att'y Gen. No. 65-49.

The question to be determined is whether an act reasonably provides for the preservation of the public peace, health or safety, which involves a determination of whether a valid relationship exists between the enactment and the preservation of either the public peace, health or safety. Otto v. Buck, 61 N.M. 123, 295 P.2d 1028 (1956).

Law need not be "necessary". — A law need only reasonably provide for one of three subjects of public peace, health or safety to be exempt from referendum; it does not have to be necessary for the preservation of one of these subjects. 1965-66 Op. Att'y Gen. No. 65-67.

Legislative declarations in classifying respected. — Unless patently untrue or absurd, legislative declarations in classifying for purposes of legislation will be respected by the courts. State ex rel. Hughes v. Cleveland, 47 N.M. 230, 141 P.2d 192 (1943).

Though not necessarily followed. — A legislative declaration that a law provides for one of the subjects listed under this section as exempt from popular referendum is entitled to great respect, but is not necessarily binding on the courts. 1965-66 Op. Att'y Gen. No. 65-67.

But declaration by legislature unnecessary. — It is not necessary that a law expressly declare the relation if it is by its terms reasonably calculated to provide for one of the subjects exempted hereunder from popular referendum. 1965-66 Op. Att'y Gen. No. 65-67.

Inclusiveness of public health measure. — Character of legislation as public health measure is not defeated by its failure to affect all or even a major percentage of people of state. State ex rel. Hughes v. Cleveland, 47 N.M. 230, 141 P.2d 192 (1943).

The fact that a measure does not affect all or even a major portion of the people of the state does not deny it character as a measure providing for preservation of public peace, health or safety. Otto v. Buck, 61 N.M. 123, 295 P.2d 1028 (1956).

Unreasonable restrictions impermissible. — Legislatures may not, under the guise of the police power, impose restrictions that are unnecessary and unreasonable upon the use of private property or the pursuit of useful activities. State v. Dennis, 80 N.M. 262, 454 P.2d 276 (Ct. App. 1969).

Hospital care for indigents. — While Laws 1965, ch. 234, (27-5-1 NMSA 1978 et seq.) does not expressly declare that it provides for the public peace, health or safety, it

reasonably provides for the public health by providing hospital care in that it encourages the treatment of indigents in the county; it is, therefore, exempt from referendum. 1965-66 Op. Att'y Gen. No. 65-67.

Former cigarette tax act exempt. — Laws 1943, ch. 95 (72-14-1, 1953 Comp. et seq., now repealed), which levied an excise tax on cigars and cigarettes to provide funds for needy aged so that they might have "a reasonable subsistence compatible with decency and health," was exempt from referendum since it reasonably provided for preservation of public peace, health or safety. State ex rel. Hughes v. Cleveland, 47 N.M. 230, 141 P.2d 192 (1943).

Highway debentures as "public debt". — Gasoline Tax Act enacted by Laws 1949, ch. 42 (64-26-2, 64-26-3, 64-26-5 to 64-26-7, 1953 Comp., now repealed) was excepted from referendum as highway debentures were evidences of public debts in sense words "public debt" are used in this section. State ex rel. Linn v. Romero, 53 N.M. 402, 209 P.2d 179 (1949).

Fines. — Under N.M. Const., art. XII, § 4, all fines collected by the state go to the maintenance of the public schools, thus falling within the exemption provided in this section. 1955-56 Op. Att'y Gen. No. 6268.

Law not subject to referendum not suspended by petitions. — Laws 1933, ch. 171 (later repealed) was not subject to a referendum and was not suspended by filing of purported petitions for referendum as the act was necessary for the preservation of the public peace, health and safety, and the maintenance of the public schools. 1933-34 Op. Att'y Gen. 55.

IV. REFERENDUM PROCEEDINGS.

Laws from last preceding section only referable. — This section specifically requires that any law which can be submitted to the electorate as a referendum measure must have been enacted at the last preceding legislative session; laws enacted in 1939 are no longer referable in 1965. 1965-66 Op. Att'y Gen. No. 65-49.

Two referendum proceedings distinguished. — Proceedings for referendum initiated within 90 days after adjournment of the legislature, if successful, repeal no law, but annul it, while those initiated with a 10% petition or after the 90-day period, if successful, repeal the law as though the legislature had then repealed it. In the first instance there was no operative act, while in the second the act, while inoperative, was a valid existing law. Todd v. Tierney, 38 N.M. 15, 27 P.2d 991 (1933).

Meaning of percentage requirement. — The 40% total vote requirement in this section refers not to the votes cast on the proposition but to the total vote cast for the office of governor. 1963-64 Op. Att'y Gen. No. 64-137.

Laws in effect not suspended by referendum. — A referendum petition which is filed after the laws of a legislative session have gone into effect will not suspend the law. 1949-50 Op. Att'y Gen. No. 5220.

Legislative declaration of emergency contained in act is final, and is conclusive and binding upon the courts. Hutchens v. Jackson, 37 N.M. 325, 23 P.2d 355 (1933).

And emergency legislation not suspendable by referendum petition. — Where a law became effective immediately upon its passage by reason of an emergency declaration, it is not suspended by a referendum petition having the requisite number of signatures filed within 90 days after adjournment. Todd v. Tierney, 38 N.M. 15, 27 P.2d 991 (1933).

If a law has immediate effect, its nonreferable character is conclusively established, insofar as the 90-day clause is concerned. Todd v. Tierney, 38 N.M. 15, 27 P.2d 991 (1933).

Filing with secretary of state of referendum petition bearing required signatures of 25% of the qualified electors of the state does not have effect of suspending operation of a law already in effect by reason of an emergency clause, even though the law should be one subject to referendum. Flynn, Welch & Yates, Inc. v. State Tax Comm'n, 38 N.M. 131, 28 P.2d 889 (1934); Todd v. Tierney, 38 N.M. 15, 27 P.2d 991 (1933).

But designation as emergency measure does not affect referability. Flynn, Welch & Yates, Inc. v. State Tax Comm'n, 38 N.M. 131, 28 P.2d 889 (1934).

Annulment by referendum equivalent to legislative repeal. — In substance this section says that the effect of annulment of a law by referendum is the same as though it had been repealed by the legislature and such repeal shall revive any law repealed by the act so annulled. 1965-66 Op. Att'y Gen. No. 66-4.

Duties of secretary of state in handling referendum petitions. — In checking signatures on a referendum petition, the secretary of state has authority only to reject typewritten, printed or incomplete names and has a duty to file the petitions as received within the time prescribed. 1949-50 Op. Att'y Gen. No. 5232.

Determination of whether signers of petition are genuine and duly qualified is a judicial function and not the duty of the secretary of state. 1937-38 Op. Att'y Gen. 116.

Form of ballot. — The ballot for voting upon a referred act should bear the following instructions at the top: "Instructions to voters. If you desire to vote for the retention of the act, mark X in square opposite the words 'FOR APPROVAL OF THE ACT.' If you desire to vote against the retention of the act, mark X in the square opposite the words 'FOR REJECTION OF THE ACT.' " 1949-50 Op. Att'y Gen. No. 5315.

Review of legislation effectuating referendum rights. — When legislature has passed such laws as it deems necessary to effective exercise of referendum, under duty imposed upon it by this section, this court will consider only whether something indispensable to such effective exercise is lacking. State v. Perrault, 34 N.M. 438, 283 P. 902 (1929).

Judicial notice of convention committee's report. — Court took judicial notice of fact that minority report of committee on legislative department at constitutional convention, proposing an initiative and referendum provision as a substitute for the language actually incorporated in the constitution, was rejected. State ex rel. Hughes v. Cleveland, 47 N.M. 230, 141 P.2d 192 (1943).

Sec. 2. [Powers generally; disaster emergency procedure.]

In addition to the powers herein enumerated, the legislature shall have all powers necessary to the legislature of a free state, including the power to enact reasonable and appropriate laws to guarantee the continuity and effective operation of state and local government by providing emergency procedure for use only during periods of disaster emergency. A disaster emergency is defined as a period when damage or injury to persons or property in this state, caused by enemy attack, is of such magnitude that a state of martial law is declared to exist in the state, and a disaster emergency is declared by the chief executive officer of the United States and the chief executive officer of this state, and the legislature has not declared by joint resolution that the disaster emergency is ended. Upon the declaration of a disaster emergency the chief executive of the state shall within seven days call a special session of the legislature which shall remain in continuous session during the disaster emergency, and may recess from time to time for [not] more than three days. (As amended November 8, 1960.)

ANNOTATIONS

The 1960 amendment, which was proposed by H.J.R. No. 24 (Laws 1959) and adopted at the general election held on November 8, 1960, with a vote of 83,742 for and 37,591 against, added everything after "legislature of a free state."

Power to legislatively modify court decisions. — The legislature's plenary authority is limited only by the state and federal constitutions. Court decisions may be modified by legislative enactment in any manner and to any degree decided by the legislature, so long as the legislation conforms to constitutional standards. Ferguson v. New Mexico State Hwy. Comm'n, 99 N.M. 194, 656 P.2d 244 (Ct. App. 1982).

Unreasonable restrictions impermissible. — Legislatures may not, under the guise of the police power, impose restrictions that are unnecessary and unreasonable upon the use of private property or the pursuit of useful activities. State v. Dennis, 80 N.M. 262, 454 P.2d 276 (Ct. App. 1969).

Misuse of police power invalid. — Former 40A-17-5, 1953 Comp. (now repealed), defining arson to include any "intentional" burning of property, was an unreasonable exercise of the police power as it could be used to punish innocent and beneficial destruction of property, and was therefore invalid. State v. Dennis, 80 N.M. 262, 454 P.2d 276 (Ct. App. 1969).

Hearing on bribery charges. — In the matter of bribery charges by the legislature, members of the press appearing before its committee may be compelled to divulge the source of their information, but no person shall be compelled to be a witness against himself in any criminal case which perhaps includes such charges, and each house of the legislature may determine its rules of procedure and punish its members for contempt or disorderly conduct in its presence. 1937-38 Op. Att'y Gen. 266.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 72 Am. Jur. 2d States, Territories and Dependencies §§ 41, 42; 78 Am. Jur. 2d War § 19.

Power of legislative body or committee to compel attendance of nonmember as witness, 50 A.L.R. 21, 65 A.L.R. 1518.

Subpoena duces tecum in proceeding before legislative committee, testing validity or scope of command of, 130 A.L.R. 339.

War conditions, power of legislature to relieve parties from public contracts because of, 137 A.L.R. 1256.

Legislative power to prescribe qualifications for or conditions of eligibility to constitutional office, 34 A.L.R.2d 155.

Legislative power to exempt from taxation property, purposes or uses additional to those specified in constitution, 61 A.L.R.2d 1031.

81A C.J.S. States § 40; 93 C.J.S. War and National Defense § 62.

Sec. 3. [Number and qualifications of members; single-member districts; reapportionment.]

A. Senators shall not be less than twenty-five years of age and representatives not less than twenty-one years of age at the time of their election. If any senator or representative permanently removes his residence from or maintains no residence in the district from which he was elected, then he shall be deemed to have resigned and his successor shall be selected as provided in Section 4 of this article. No person shall be eligible to serve in the legislature who, at the time of qualifying, holds any office of trust or profit with the state, county or national governments, except notaries public and officers of the militia who receive no salary.

B. The senate shall be composed of no more than forty-two members elected from single-member districts.

C. The house of representatives shall be composed of no more than seventy members elected from single-member districts.

D. Once following publication of the official report of each federal decennial census hereafter conducted, the legislature may by statute reapportion its membership. (As repealed and reenacted November 2, 1976.)

ANNOTATIONS

Cross references. — For constitutional provision prohibiting appointment of legislator to civil office during or within one year after his term, see N.M. Const., art. IV, § 28.

The 1976 amendment, which was proposed by S.J.R. No. 4 (Laws 1976) and adopted at the general election held on November 2, 1976, with a vote of 130,364 for and 115,684 against, repealed and reenacted this section, which formerly read: "a. Senators shall not be less than twenty-five years of age and representatives not less than twenty-one years of age at the time of their election. If any senator or representative permanently removes his residence from or maintains no residence in the county from which he was elected, then he shall be deemed to have resigned and his successor shall be selected as provided in Section 4 of this article. No person shall be eligible to serve in the legislature who, at the time of qualifying, holds any office of trust or profit with the state, county or national governments, except notaries public and officers of the militia who receive no salary.

"b. The senate shall consist of one senator from each county of the state. In the event the number of counties is hereafter increased or decreased, the number of senators shall be increased or decreased accordingly at the next election thereafter at which members of the senate are to be elected.

"c. Until changed as provided herein, the house of representatives shall consist of sixty-six members, composed of at least one member elected from each county of the state, provided that the county of Bernalillo shall elect a total of nine members; the counties of Chaves, Dona Ana, Eddy, Lea, McKinley, Rio Arriba, San Juan, San Miguel and Santa Fe shall elect a total of three members each; and the counties of Colfax, Curry, Grant, Otero, Quay, Roosevelt, Taos and Valencia shall elect a total of two members each.

"d. For the purpose only of selection in each county entitled to elect more than one member of the house of representatives, there shall be designated by the officer issuing the election proclamation as many places, consecutively numbered, as there shall be representatives to be elected in such county, and only one member of the house of representatives shall be elected for each place designated. No county shall be geographically divided for the purpose of designating places in the election of such members of the house of representatives. Each candidate shall designate, upon filing

his petition, the position number for which he is a candidate, and the county clerk shall so designate him upon the ballot.

"e. Upon the creation of any new county, it shall be entitled to elect one member of the house of representatives at the next general election following its creation.

"f. Once following publication of the official report of each federal decennial census hereafter conducted, the legislature may by statute reapportion among the various counties the number of members of the house of representatives to be elected from each county, provided that each county shall be entitled to elect at least one member of the house of representatives, and that no member of the house of representatives shall represent or be elected by the voters of more than one county," and enacted a new Section 3 providing for a maximum limitation on the size of the legislature of no more than 42 members for the senate and 70 for the house of representatives and requiring that members be elected from single member districts. See catchline, "Former section unconstitutional," in notes below.

Former section unconstitutional. — Under the fourteenth amendment to the federal constitution, Subsection b of former art. IV, § 3, providing for one senator from each county, along with parts of the 1966 Senate Reapportionment Act (Laws 1966, ch. 27, §§ 1 to 51, now repealed), was invalid. Beauchamp v. Campbell, Civ. No. 5778 (D.N.M. 1966) (unreported); 1963-64 Op. Att'y Gen. No. 63-153.

Residence requirement explained. — At the time of qualification for office of representative or senator the person in question must maintain a residence within the county, that is to say, have place of abode therein, which place of abode must be maintained as a residence either full or part time; any failure to do so would constitute an abandonment of the office and resignation would be automatic. 1955-56 Op. Att'y Gen. No. 6400.

Though a state senator or representative actually maintains a house (and lives in it most of the time) outside of the district in which he by intention maintains his legal residence as further evidenced by his voting registration, he is properly qualified under our statutes as a resident of the district in which he maintains his residence by intention and his voting registration, and he may properly be elected from such district to the legislature. 1951-52 Op. Att'y Gen. No. 5490. But see 1955-56 Op. Att'y Gen. No. 6400, distinguishing prior opinions which had equated residence with domicile, due to new residence language in 1955 amendment rewriting former N.M. Const., art. IV, § 3.

Failure to maintain county residence deemed resignation. — As prescribed in this section, whenever a state representative no longer maintains his residence in the county from which he was elected, then he is deemed to have resigned from such office, and his successor is to be selected as prescribed in N.M. Const., art. IV, § 4. 1961-62 Op. Att'y Gen. No. 61-119.

Nature of absence to be considered. — The question of whether or not a senator or representative has actually permanently removed his residence from the county wherein he was elected, or whether such absence is merely temporary in character and not permanent, so as to create a vacancy in such legislative office, must necessarily be considered by the board of county commissioners as a prerequisite to their appointing a successor to fill such vacancy. 1961-62 Op. Att'y Gen. No. 61-119.

Only legislature is judge of qualifications of its members. 1961-62 Op. Att'y Gen. No. 61-131.

Final determination of the eligibility of individuals for legislative office is within the exclusive power of the particular legislative body itself to rule upon. 1961-62 Op. Att'y Gen. No. 61-119.

Los Alamos county. — Since, in adopting the 1949 amendment to former art. IV, § 3, no proposition to remove Los Alamos county from the 28th representative district was submitted, nor any proposal made for its annexation to another contiguous district, the county remained in the district designated by the act which created it. State ex rel. Craig v. Mabry, 54 N.M. 158, 216 P.2d 694 (1950).

Section is concerned primarily with conflicts of interest involved in serving in the legislature while receiving other compensation. 1969 Op. Att'y Gen. No. 69-111.

Uniform state law commissioner does not hold office of trust or profit within the contemplation of the constitution, and may serve as a legislator. 1967 Op. Att'y Gen. No. 67-4.

Legislator may serve as delegate to western interstate nuclear board, which is not an office of trust or of profit since no provision is made for payment to such delegates. 1970 Op. Att'y Gen. No. 70-37.

Legislator may serve as elected local school board member. — A member of the state legislature is not precluded by state law from serving as an elected local school board member. 1991 Op. Att'y Gen. No. 91-02.

Professors. — A teaching professor in one of the state universities does not exercise any portion of sovereign power and is not in a post created by law; and while it may be said that a retired person holding emeritus status is occupying a position created by law, no portion of the sovereign power is exercised and such a status is not that of a civil officer. 1957-58 Op. Att'y Gen. No. 58-39.

School board. — A state senator cannot also hold office on the county board of education. 1919-20 Op. Att'y Gen. 186.

Commission in national guard. — One may not serve as a member of the legislature while holding a commission in the national guard, although temporarily relieved from duties and without pay. 1925-26 Op. Att'y Gen. 2.

Federal position. — Based on the applicable constitutional and statutory provisions, whether a state legislator may hold a position with the federal government depends upon whether that legislator at the time of qualifying holds an "office" or is simply an employee; the latter is permissible, the former not, if the office is one for trust or profit. 1972 Op. Att'y Gen. No. 72-61.

Acting postmaster holds office of trust or profit under the national government. 1957-58 Op. Att'y Gen. No. 58-233.

Selective service director. — Legislator appointed to the position of state director of selective service may not also continue in his legislative capacity, since the office is one of trust and profit of the national government. 1967 Op. Att'y Gen. No. 67-46.

Appointment as notary impermissible. — Under N.M. Const., art. IV, § 28, a member of the legislature may not be appointed a notary public, notwithstanding the fact that a notary public may be elected to the legislature under this section. 1917-18 Op. Att'y Gen. 32.

Comparable provisions. — Idaho Const., art. III, §§ 4 to 6.

Iowa Const., art. III, §§ 4, 5, 22; amendment 26.

Montana Const., art. V, §§ 4, 9, 14.

Utah Const., art. VI, §§ 5, 6; art. IX, § 2.

Wyoming Const., art. III, §§ 2, 3, 8.

Law reviews. — For note, "Redistricting: Easley v. Cromartie, 532 U.S. 234 (2001): Race-Based Redistricting and Unequal Protection," see 32 N.M.L. Rev. 491 (2002).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 25 Am. Jur. 2d Elections §§ 7, 8, 9, 13, 16, 17, 21 et seq., 28, 37, 51; 72 Am. Jur. 2d States, Territories and Dependencies § 44.

Civil responsibility of member of legislative body for his vote therein, 22 A.L.R. 125.

Incompatibility, under common-law doctrine, of office of state legislator and position or post in local political subdivision, 89 A.L.R.2d 632.

81A C.J.S. States §§ 42, 44, 62 to 78.

Sec. 4. [Terms of office of members; time of election; filling of vacancies.]

Members of the legislature shall be elected as follows: those senators from Bernalillo, Chaves, Curry, DeBaca, Grant, Lea, Lincoln, Luna, Sandoval, San Juan, San Miguel, Socorro, Taos, Torrance, Union and Valencia counties for a term of six years starting January 1, 1961, and after serving such terms shall be elected for a term of four years thereafter; those senators from all other counties for the terms of four years, and members of the house of representatives for a term of two years. They shall be elected on the day provided by law for holding the general election of state officers or representatives in congress. If a vacancy occurs in the office of senator or member of the house of representatives, for any reason, the county commissioners of the county wherein the vacancy occurs shall fill such vacancy by appointment.

Such legislative appointments as provided in this section shall be for a term ending on December 31, subsequent to the next succeeding general election. (As amended September 15, 1953, and November 8, 1960.)

ANNOTATIONS

The 1953 amendment, which was proposed by H.J.R. No. 1 (Laws 1953) and adopted at a special election September 15, 1953, with a vote of 16,749 for and 10,758 against, changed the method of filling vacancies occurring in either house, vacancies formerly being filled by election held as designated by the governor, and added the last paragraph providing for the term of such appointments.

The 1960 amendment, which was proposed by S.J.R. No. 1 (Laws 1959) and adopted at the general election held November 8, 1960, with a vote of 61,842 for and 61,522 against, rewrote the first paragraph, which prior to amendment, read: "Members of the legislature shall be elected as follows: senators for the term of four years, and members of the house of representatives for the term of two years. They shall be elected on the day provided by law for holding the general election of state officers or representatives in congress. If a vacancy occurs in the office of senator or member of the house of representatives, for any reason, the county commissioners of the county wherein the vacancy occurs shall fill such vacancy by appointment; provided, however, that if a vacancy occurs in a legislative district composed of more than one (1) county, then the county commissioners of each county in the legislative district shall submit one name to the governor, who shall appoint the representative to fill such vacancy from the list of names so submitted by the respective county commissions." See catchline, "Unconstitutionality," in notes below.

Unconstitutionality. — First paragraph of this section is unconstitutional insofar as it refers to or pertains to the senate or senators, as are parts of the 1966 Senate Reapportionment Act (Laws 1966, ch. 27, §§ 1 to 51, now repealed), being violative of the fourteenth amendment to the United States constitution. Beauchamp v. Campbell, Civ. No. 5778 (D.N.M. 1966) (unreported).

This section is valid insofar as it relates to the filling of vacancies in single county legislative districts. 1969 Op. Att'y Gen. No. 69-57.

First paragraph of section has been held invalid under fourteenth amendment to the United States constitution insofar as it refers to or pertains to the senate or senators. 1978 Op. Att'y Gen. No. 78-5; 1988 Op. Att'y Gen. No. 88-06. See Beauchamp v. Campbell, Civ. No. 5778 (D.N.M. 1966) (unreported).

Staggered terms for senators. — We are of the opinion that the Beauchamp case invalidated the staggered terms requirement in the first paragraph of this section and that there is thus no enforceable provision in the Constitution of New Mexico that requires staggered terms for senators. 1988 Op. Att'y Gen. No. 88-06.

Terms for representatives. — The two-year term for members of the house of representatives, which was not declared unconstitutional, is still an operative part of the state constitution, and a constitutional amendment would be necessary to provide four-year terms for members of the house. 1973 Op. Att'y Gen. No. 73-11.

Phrase "next succeeding general election" as used in 2-8-9 NMSA 1978 (since repealed) and this section means the next election in time at which the office may be voted upon. 1978 Op. Att'y Gen. No. 78-5.

Board of commissioners to fill vacancies. — State constitution requires that when a vacancy occurs by reason of a change in a legislator's residence, the board of county commissioners must, upon determining that such vacancy exists, act to appoint a successor to such office. 1961-62 Op. Att'y Gen. No. 61-119.

In case of a vacancy during the term of a state senator and before a general election in midterm, the vacancy is filled by the county commissioners and the ballot vacancy is filled by the county committee. 1957-58 Op. Att'y Gen. No. 58-175.

Appointment method for multi-county senatorial districts. — Former 2-9-20 D(2), 1953 Comp., provided a method of appointment for multi-county senatorial districts in which a vacancy occurred, and was valid as carrying out the intent of this section. 1969 Op. Att'y Gen. No. 69-57.

Time of appointment. — After notification by newly elected legislator that he does not intend to qualify, and following expiration of the term of the incumbent representative, the county commissioners in regular or special session may appoint representative to fill the vacancy and certify the appointment to the secretary of state. 1961-62 Op. Att'y Gen. No. 62-145.

After election, qualification and subsequent resignation of a member of the twenty-seventh legislature, a vacancy occurred which was filled by appointment of the appropriate county commissioner, the appointee being entitled to continue in office until

election and qualification of his successor at the next regular election for such office. 1965-66 Op. Att'y Gen. No. 65-47.

Mode of special election. — Prior to the 1953 amendment to this section, the governor was vested with plenary power as to the manner and procedure to be followed at a special election to fill vacancies contemplated by this section, provided only that such action be reasonable and gives adequate and timely notice to the electors involved. 1949-50 Op. Att'y Gen. No. 5325.

Acceptance of resignations. — Neither this section nor any statute authorizes the governor to accept the resignation of a member of the legislature. 1914 Op. Att'y Gen. 175; 1917-18 Op. Att'y Gen. 162.

Law reviews. — For article, "The Executive," see 7 Nat. Resources J. 267 (1967).

For article, "The Legislature," see 8 Nat. Resources J. 148 (1968).

For comment on State ex rel. Palmer v. Miller, 74 N.M. 129, 391 P.2d 416 (1964), see 4 Nat. Resources J. 606 (1964).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 72 Am. Jur. 2d States, Territories and Dependencies § 44.

Age, sex, residence, etc., validity of statute requiring information as to, as condition of right to vote, 14 A.L.R. 260.

Violation of law as regards time for keeping polls open as affecting election results, 66 A.L.R. 1159.

Constitutionality and construction of statutes providing for proportional representation, or other systems of preferential voting, in public elections, 110 A.L.R. 1521, 123 A.L.R. 252.

Validity of public election as affected by fact that it was held at time other than that fixed by law, 121 A.L.R. 987.

Voting by persons in military service, 140 A.L.R. 1100, 147 A.L.R. 1443, 148 A.L.R. 1402, 149 A.L.R. 1466, 150 A.L.R. 1460, 151 A.L.R. 1464, 152 A.L.R. 1459, 153 A.L.R. 1434, 154 A.L.R. 1459, 155 A.L.R. 1459.

Validity of governmental requirement of oath of allegiance or loyalty, 18 A.L.R.2d 268.

Voting rights in state elections of residents of military establishments, 34 A.L.R.2d 1193.

Effect of conviction under federal law, or law of another state or country, on right to vote or hold public office, 39 A.L.R.3d 303.

81 C.J.S. States § 33.

Sec. 5. [Time and length of sessions; items considered in even-numbered years.]

A. Each regular session of the legislature shall begin annually at 12:00 noon on the third Tuesday of January. Every regular session of the legislature convening during an odd-numbered year shall remain in session not to exceed sixty days, and every regular session of the legislature convening during an even-numbered year shall remain in session not to exceed thirty days. No special session of the legislature shall exceed thirty days.

B. Every regular session of the legislature convening during an even-numbered year shall consider only the following:

(1) budgets, appropriations and revenue bills;

(2) bills drawn pursuant to special messages of the governor; and

(3) bills of the last previous regular session vetoed by the governor.

(As amended November 5, 1940, November 5, 1946, and November 3, 1964.)

ANNOTATIONS

I. GENERAL CONSIDERATION.

Cross references. — As to calculation of end of legislative session, see 12-2A-7 NMSA 1978.

The 1940 amendment, which was proposed by H.J.R. No. 12 (Laws 1939) and adopted at the election held on November 5, 1940, with a vote of 31,490 for and 28,415 against, amended this section, which formerly had read: "The first session of the legislature shall begin at twelve o'clock, noon, on the day specified in the proclamation of the governor. Subsequent sessions shall begin at twelve o'clock, noon, on the second Tuesday of January next after each general election. No regular session shall exceed sixty days, except the first, which may be ninety days, and no special session shall exceed thirty days," to read: "Each regular session of the legislature shall begin at 12:00 noon on the second Tuesday of January next after each general election and shall remain in session not to exceed sixty days. Such session shall be divided into a first term of thirty days and a second term of thirty days, with a recess of thirty days between such terms. During the first term, all bills to be considered at the session shall be introduced, read not more than twice by title or in full, printed and referred to the appropriate committee. No bill shall be placed upon its third reading or finally passed during its first term, except appropriations for expenses of the legislature and such measures as shall be submitted for immediate legislative action by the governor

accompanied by a special message setting forth the facts making such action necessary for the general welfare.

"During the second term of such session, all bills introduced at the first term shall stand for final action at the second term. Notwithstanding any provision of any section of this constitution to the contrary, no bill shall be introduced at the second term except appropriations for expenses of the legislature, the general appropriations bill, bills to provide for the current expenses of the government, committee substitutes for bills introduced at the first term and such measures as may be submitted by the governor, accompanied by a special message showing necessity for legislative action. The members of the legislature shall be allowed their mileage for attending both the first and second terms of the legislature. No special session of the legislature shall exceed thirty days."

The 1946 amendment, which was proposed by H.J.R. No. 15 (Laws 1945) and adopted at the general election held on November 5, 1946, with a vote of 15,915 for and 6,925 against, amended the section to read: "Each regular session of the legislature shall begin at 12:00 noon on the second Tuesday of January next after each general election and shall remain in session not to exceed sixty days. No special session of the legislature shall exceed thirty days."

The 1964 amendment, which was proposed by S.J.R. No. 4, § 1 (Laws 1963) and adopted at the general election held on November 3, 1964, with a vote of 71,499 for and 50,785 against, amended the section to provide that regular sessions would begin on the third Tuesday of January and should remain in session no more than 60 days in odd-numbered years and 30 days in even-numbered years, as should special sessions, and to limit the matters to be considered by regular sessions convening during even-numbered years.

Compiler's notes. — An amendment to this section proposed by S.J.R. No. 3 (Laws 1959), which would have provided for regular sessions of the legislature, was submitted to the people at the general election held on November 8, 1960. It failed to pass because it did not receive the necessary majority.

An amendment to this section proposed by S.J.R. No. 15, § 1 (Laws 1961), which would have provided for regular and special sessions of the legislature, was submitted to the people at the special election held on September 19, 1961. It was defeated by a vote of 20,880 for and 28,178 against.

An amendment to this section was proposed by House Memorial 32 (Laws 1969), which requested the constitutional convention to increase the length of the regular session to be held in odd-numbered years from 60 to 90 days and the session held in even-numbered years from 30 to 45 days. The proposed constitution was submitted to the people at the special election held on December 9, 1969, and defeated by a vote of 59,695 for and 63,331 against.

Election for representatives in congress is general election, and a session of the legislature in 1913 following the general election in November, 1912 was a regular session. 1912-13, Op. Att'y Gen. 47.

Proposed constitutional amendments. — When the legislature acts to put a proposed constitutional amendment before the people, it does so pursuant to Article XIX, not Article IV. Therefore, its authority to consider the subject of constitutional amendments is not affected by the list of legislative topics in subsection B. State ex rel. Chavez v. Vigil-Giron, 108 N.M. 45, 766 P.2d 305 (1988).

The purpose and intent of the framers of the constitution was to limit introduction of amendments to regular as opposed to special sessions, rather than to limit amendments to odd-numbered rather than even-numbered years or to unrestricted rather than restricted regular sessions. State ex rel. Chavez v. Vigil-Giron, 108 N.M. 45, 766 P.2d 305 (1988).

Comparable provisions. — Idaho Const., art. III, § 8.

Iowa Const., amendment 36.

Montana Const., art. V, § 6.

Utah Const., art. VI, § 16.

Wyoming Const., art. III, § 6.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 72 Am. Jur. 2d States, Territories and Dependencies §§ 41, 57, 59.

Power of legislature or branch thereof as to time of assembling and length of session, 56 A.L.R. 721.

81A C.J.S. States §§ 48, 49.

II. LENGTH OF SESSIONS.

Section delimits time during which legislature may exercise legislative prerogative of enacting laws. Dillon v. King, 87 N.M. 79, 529 P.2d 745 (1974).

Law passed too late void. — On direct attack, inquiry may be made into the question of whether or not act or bill purportedly passed by the legislature within constitutional time limitation was in fact passed within that limitation. A law passed in contravention thereof would be void since the legislature would have ceased to be a legislative body by operation of the constitution and would therefore have been without authority to perform any lawmaking function. Dillon v. King, 87 N.M. 79, 529 P.2d 745 (1974).

Enrolled bill rule inapplicable. — Enrolled bill rule should not be applicable when a law is challenged as being passed in violation of this section. Dillon v. King, 87 N.M. 79, 529 P.2d 745 (1974).

But nondiscretionary and incidental duties not affected. — This section does not restrain legislature from complying fully with definitely imposed nondiscretionary lawmaking duties. It should not be construed to defeat the performance of mandatory incidental duties that are indispensable to effectuate lawmaking power already exercised in due and proper season. Dillon v. King, 87 N.M. 79, 529 P.2d 745 (1974).

Calculating effective date of new act. — In calculating effective date of a new act, the day of the event is to be excluded and the last day of the number constituting the specific period is included, so that statute becomes effective at the first moment of the applicable day after the event, such as first moment of ninetieth day after adjournment of legislature which enacted it. Garcia v. J.C. Penney Co., 52 N.M. 410, 200 P.2d 372 (1948).

III. LIMITATIONS IN EVEN-NUMBERED YEARS.

Meaning of "budget". — The word "budget" may be defined for purposes of this section as a plan or method by means of which expenditures and revenues are controlled for a definite period by some budgetary authority so as to effect a balance between income and expenditures. 1966 Op. Att'y Gen. No. 66-8.

Meaning of "appropriation bill". — An appropriation bill is one which has as its primary and specific aim the setting apart of a certain sum of public money for a specified purpose. 1966 Op. Att'y Gen. No. 66-8.

An "appropriation bill," as defined for purposes of this section, is one which authorizes the expenditure of public moneys and stipulates the amount, manner and purpose of the various items of expenditure. 1966 Op. Att'y Gen. No. 66-8.

Disbursements distinguished. — There is a pronounced distinction between the "appropriation" or setting aside of a sum of money for a particular purpose and the actual "disbursement" of funds to meet the object of such an "appropriation." 1966 Op. Att'y Gen. No. 66-8.

General legislation carrying appropriation not included. — An "appropriation bill," for purposes of this section, does not include an act of general legislation; and a bill proposing such general legislation is not converted into an appropriation bill simply because it has had engrafted upon it a section making an appropriation, or because it carries an appropriation as an incident to the general legislation contained therein. 1966 Op. Att'y Gen. No. 66-8.

Meaning of "revenue bill". — Revenue bill is one which has for its principal purpose the raising of revenue, which fact appears in the bill. 1966 Op. Att'y Gen. No. 66-8.

The term "revenue bill" designates legislation providing for the assessment and collection of taxes to defray the expenses of government. 1966 Op. Att'y Gen. No. 66-8.

Principal object to be production of revenue. — A bill is not a revenue measure if production of revenue is not its principal object, even if production of revenue is incidental to its enforcement; bills enacted pursuant to the state's police power, even if they incidentally levy or impose a tax or license fee, are not revenue bills, but regulatory measures. 1966 Op. Att'y Gen. No. 66-8.

Amendment beyond governor's bill. — Where sole purpose of a bill submitted by the governor in a special message was to provide for the issuance of liquor licenses to public facilities as defined in the bill, an amendment on such bill providing for repeal of the fair-trade law would go far beyond the purpose of the bill as expressed in the governor's message and would be beyond the scope of Subsection B. (2). 1966 Op. Att'y Gen. No. 66-25.

What vetoed bills to be considered. — This section does not require the legislature to consider all bills of the last regular session vetoed by the governor; as to partially vetoed bills, only the portion partially vetoed is to be considered. 1965 Op. Att'y Gen. No. 65-140.

Procedure for overriding veto. — Legislature has power, absent constitutional provisions governing the subject, to decide the procedure to be used in considering a vetoed bill not acted upon before adjournment of first session. 1969 Op. Att'y Gen. No. 69-147.

Legislature has authority to promulgate rules governing procedure for reconsidering vote to override chief executive's veto. 1969 Op. Att'y Gen. No. 69-147.

Legislature has authority to determine whether the house of origin must again vote to override the governor's veto at the next even-year session, when during the odd-year session the house of origin voted to override the veto but the other house either failed to override or failed to take any action before adjournment. 1969 Op. Att'y Gen. No. 69-147.

Scope of limitations. — The limitations in Subsection B of this section applies only to the legislative function of the legislature. 1969-70 Op. Att'y Gen. No. 70-10.

Confirmatory function not limited. — Giving of advice and consent to appointments made by the governor is an administrative function given to the senate as part of the system of checks and balances in our government; it is a power which exists wherever the senate is in session and may be exercised whether the session is a regular-long, regular-short or special one. 1969-70 Op. Att'y Gen. No. 70-10.

Duty to act on appointments. — The senate has a constitutional duty to act on submitted appointments whenever it is next in session. 1969-70 Op. Att'y Gen. No. 70-10.

Provision, by its terms, applies to entire legislature, not to one of its constituent houses. 1969-70 Op. Att'y Gen. No. 70-10.

Limitation controlling. — Limitation on subjects which may be considered at regular sessions convened during even-numbered years, as found in this section, being the later amendment, controls over N.M. Const., art. XIX, § 1 (providing that any amendment may be proposed at any regular legislative session). 1965 Op. Att'y Gen. No. 65-212. See also, 1969 Op. Att'y Gen. No. 69-151.

Sec. 6. [Special session; extraordinary session.]

Special sessions of the legislature may be called by the governor, but no business shall be transacted except such as relates to the objects specified in this proclamation. Provided, however, that when three-fifths of the members elected to the house of representatives and three-fifths of the members elected to the senate shall have certified to the governor of the state of New Mexico that in their opinion an emergency exists in the affairs of the state of New Mexico, it shall thereupon be the duty of said governor and mandatory upon him, within five days from the receipt of such certificate or certificates, to convene said legislature in extraordinary session for all purposes; and in the event said governor shall, within said time, Sundays excluded, fail or refuse to convene said legislature as aforesaid, then and in that event said legislature may convene itself in extraordinary session, as if convened in regular session, for all purposes, provided that such extraordinary self-convened session shall be limited to a period of thirty days, unless at the expiration of said period, there shall be pending an impeachment trial of some officer of the state government, in which event the legislature shall be authorized to remain in session until such trial shall have been completed. (As amended November 2, 1948.)

ANNOTATIONS

The 1948 amendment, which was proposed by S.J.R. No. 10 (Laws 1947) and adopted at the general election held on November 2, 1948, with a vote of 36,166 for and 24,184 against, amended this section by substituting "this" for "his" near the end of the first sentence and adding everything following the first sentence.

Procedure not alterable by legislature. — Procedure for calling of special sessions provided in this section may not be altered by an act of the legislature. 1953-54 Op. Att'y Gen. No. 5626.

Appropriation of funds for biennium by special session. — Under this section the governor may call a special session of the legislature for the sole purpose of appropriating funds for the second year of a biennium. 1953-54 Op. Att'y Gen. No. 5626

(opinion rendered prior to 1964 amendment to N.M. Const., art. IV, § 5, which now provides for regular sessions during both odd and even-numbered years).

If the regular session appropriated by the biennium and succeeding special session saw fit to change the appropriation for the second year of the biennium at its special session, the later act would govern; and if the later act was complete and covered all the subject matter of the previous general appropriation, it would supersede the appropriation act made at the regular session of the second year. 1953-54 Op. Att'y Gen. No. 5626.

Constitutional amendment may be proposed during an extraordinary session convened pursuant to this section. 2000 Op. Att'y Gen. No. 00-01.

Proposed constitutional amendments. — The purpose and intent of the framers of the constitution was to limit introduction of amendments to regular as opposed to special sessions, rather than to limit amendments to odd-numbered rather than even-numbered years or to unrestricted rather than restricted regular sessions. State ex rel. Chavez v. Vigil-Giron, 108 N.M. 45, 766 P.2d 305 (1988).

Comparable provisions. — Idaho Const., art. III, § 8; art. IV, § 9.

Iowa Const., amendment 36.

Montana Const., art. V, § 6; art. VI, § 11.

Utah Const., art. VII, § 6.

Wyoming Const., art. III, § 7; art. IV, § 4.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 72 Am. Jur. 2d States, Territories and Dependencies § 59.

81A C.J.S. States § 49.

Sec. 7. [Judge of election and qualification of members; quorum.]

Each house shall be the judge of the election and qualifications of its own members. A majority of either house shall constitute a quorum to do business, but a less number may effect a temporary organization, adjourn from day to day and compel the attendance of absent members.

ANNOTATIONS

Only legislature is judge of qualifications of its members. 1961-62 Op. Att'y Gen. No. 61-131.

Legislature judge of seating qualifications of elected candidates. — Once a candidate has been elected the legislature then is the sole judge as to his qualifications for seating, and the courts will not take jurisdiction in such a matter as it is a legislative problem. 1955-56 Op. Att'y Gen. No. 6400.

Unless and until the house of representatives refuses to seat a member who, since his election, has been convicted of a felony, the member will continue to occupy his office and no vacancy exists. 1961-62 Op. Att'y Gen. No. 61-131.

Only the legislature can determine the qualifications of its own members and hence, only the legislature can determine whether public school teachers are qualified to serve. 1975 Op. Att'y Gen. No. 75-21.

Final determination of vacancy for legislature. — The final determination of the eligibility of individuals for legislative office is within the exclusive power of the particular legislative body itself to rule upon; this authority also extends to determining whether or not a vacancy has occurred in the legislature for which a replacement may be seated. 1961-62 Op. Att'y Gen. No. 61-119.

In any instance wherein a question of procedure arises as to the action of the board of county commissioners in making a determination of the fact of vacancy in a legislative office, or in certifying or in evidencing the action taken by such county commission, the ultimate authority to decide such issue rests solely in the particular branch of the legislature wherein the vacancy is alleged to have occurred. 1961-62 Op. Att'y Gen. No. 61-119.

When membership begins. — A person who has been elected to the legislature, but who has not qualified, is not a member of that body for purposes of the constitutional prohibition against being appointed to any other civil office. 1961-62 Op. Att'y Gen. No. 62-145.

A person who was elected to the New Mexico legislature for the first time at the general election in November of 1962 is not a member of the legislature prior to being seated at the session to be convened in January, 1963. 1961-62 Op. Att'y Gen. No. 62-145.

Advice of attorney general. — Although only the legislature can determine the qualifications of its own members, this does not mean that the attorney general cannot or should not opine and advise the legislature what is legal in our constitutional system, so that the members of each house may be better informed when exercising its constitutional role of judging the election and qualifications of its members. 1988 Op. Att'y Gen. No. 88-20.

Comparable provisions. — Idaho Const., art. III, §§ 9, 10.

Iowa Const., art. III, §§ 7, 8.

Montana Const., art. V, § 10.

Utah Const., art. VI, §§ 10, 11.

Wyoming Const., art. III, §§ 10, 11.

Law reviews. — For comment, "The Rise and Demise of the New Mexico Environmental Quality Act, 'Little Nepa' " see 14 Nat. Resources J. 401 (1974).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 72 Am. Jur. 2d States, Territories and Dependencies §§ 37, 44, 58.

Jurisdiction of courts to determine election or qualifications of member of legislative body, and conclusiveness of its decision, as affected by constitutional or statutory provision making legislative body the judge of election and qualification of its own members, 107 A.L.R. 205.

81A C.J.S. States §§ 41, 44, 50, 51.

Sec. 8. [Call to order; presiding officers.]

The senate shall be called to order in the hall of the senate by the lieutenant governor. The senate shall elect a president pro tempore who shall preside in the absence of the lieutenant governor and shall serve until the next session of the legislature. The house of representatives shall be called to order in the hall of said house by the secretary of state. He shall preside until the election of a speaker, who shall be the member receiving the highest number of votes for that office.

ANNOTATIONS

Adoption of rules for election of speaker. — While no specific power is granted the secretary of state, in presiding over the house of representatives, to vote or act other than as presiding officer until the election of the speaker, determination of rules under which an election might be had would be a necessary order of business concerning which the secretary of state would be empowered to accept motions. 1953-54 Op. Att'y Gen. No. 5633.

When secretary of state may break tie vote. — The secretary of state, as presiding officer of the house of representatives, has no authority to cast a vote to break a tie unless some rules are provided therefor. However, the house has the power to adopt a rule giving the secretary of state full power to vote to break a deadlock. 1953-54 Op. Att'y Gen. No. 5633.

Secretary to be notified of intent not to serve. — Since this section provides that the house of representatives shall be called to order by the secretary of state, notice that an

elected individual does not intend to be sworn should be sent to the secretary of state. 1957-58 Op. Att'y Gen. No. 58-233.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 72 Am. Jur. 2d States, Territories and Dependencies §§ 37, 38.

Civil responsibility of member of legislature for his vote therein, 22 A.L.R. 125.

81A C.J.S. States §§ 41, 61.

Sec. 9. [Selection and compensation of officers and employees.]

The legislature shall select its own officers and employees and fix their compensation. Each house shall have one chaplain, one chief clerk and one sergeant at arms; and there shall be one assistant chief clerk and one assistant sergeant at arms for each house; and each house may employ such enrolling clerks, reading clerks, stenographers, janitors and such subordinate employees in addition to those enumerated, as they may reasonably require and their compensation shall be fixed by the said legislature at the beginning of each session. (As amended November 2, 1948.)

ANNOTATIONS

The 1948 amendment, which was proposed by H.J.R. No. 14 (Laws 1947) and adopted at the general election held on November 2, 1948, with a vote of 31,172 for and 28,633 against, deleted provisions fixing the maximum compensation for legislative employees; prior to amendment this section read: "The legislature shall choose its own officers and employees and fix their compensation, but the number and compensation shall never exceed the following: for each house, one chaplain at three dollars per day; one chief clerk and one sergeant-at-arms, each at six dollars per day; one assistant chief clerk and one assistant sergeant-at-arms, each at five dollars per day; two enrolling clerks and two reading clerks, each at five dollars per day; six stenographers for the senate and eight for the house, each at six dollars per day; and such subordinate employees in addition to the above as they may require, but the aggregate compensation of such additional employees shall not exceed twenty dollars per day for the senate and thirty dollars per day for the house."

This section does not constitute continuing appropriation and is not specific enough, without further appropriation, to act as an authorization for the drawing of a warrant against the state treasury, pursuant to N.M. Const., art. IV, § 30. 1985 Op. Att'y Gen. No. 85-2.

Comparable provisions. — Idaho Const., art. III, § 9.

Iowa Const., art. III, § 7.

Montana Const., art. V, § 10.

Utah Const., art. VI, § 12.

Wyoming Const., art. III, § 10.

Law reviews. — For article, "The Legislature," see 8 Nat. Resources J. 148 (1968).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 81A C.J.S. States § 61.

Sec. 10. [Compensation of members.]

Each member of the legislature shall receive:

A. per diem at the internal revenue service per diem rate for the city of Santa Fe for each day's attendance during each session of the legislature and the internal revenue service standard mileage rate for each mile traveled in going to and returning from the seat of government by the usual traveled route, once each session as defined by Article 4, Section 5 of this constitution;

B. per diem expense and mileage at the same rates as provided in Subsection A of this section for service at meetings required by legislative committees established by the legislature to meet in the interim between sessions; and

C. no other compensation, perquisite or allowance. (As amended November 7, 1944, September 15, 1953, November 2, 1971, November 2, 1982 and November 5, 1996.)

ANNOTATIONS

The 1944 amendment, which was proposed by H.J.R. No. 2 (Laws 1943) and adopted at the general election held on November 7, 1944, with a vote of 26,547 for and 23,041 against, amended this section, by increasing from $5.00 to $10.00 per day the compensation of the legislators and substituting "once each term of the session as defined by Section 5, Article IV of this constitution" for "once each session," so that as amended the section read: "Each member of the legislature shall receive as compensation for his services the sum of ten dollars ($10.00) for each days' attendance during each session, and ten cents (10) for each mile traveled in going to and returning from the seat of the government by the usual traveled route, once each term of the session as defined by Section 5, Article IV of this constitution, and he shall receive no other compensation, perquisite or allowance."

The 1953 amendment, which was proposed by S.J.R. No. 10 (Laws 1953) and adopted at a special election held on September 15, 1953, with a vote of 13,822 for and 13,567 against, amended this section by substituting "per diem expense the sum of not more than twenty" for "compensation for his services the sum of ten" and deleting "term of the" preceding "session as defined" and the parenthetical expressions "($10.00)" and "(10¢)."

The 1971 amendment, which was proposed by H.J.R. No. 2 (Laws 1971) and adopted at the special election held on November 2, 1971, with a vote of 41,583 for and 32,992 against, amended this section by breaking the existing language into an introductory phrase and two subsections, A and C, substituting "forty" for "twenty" in Subsection A and adding "as provided by law" near the middle of that subsection, deleting "and he shall receive" preceding "no other compensation" in Subsection C and adding Subsection B.

The 1982 amendment, which was proposed by H.J.R. No. 1 (Laws 1982) and adopted at the general election held on November 2, 1982, by a vote of 148,486 for and 112,763 against, substituted "seventy-five dollars ($75.00)" for "forty dollars," "twenty-five cents ($.25)" for "ten cents" and "Article 4, Section 5" for "Section 5, Article IV" in Subsection A and inserted "of this section" following "Subsection A" in Subsection B.

The 1996 amendment, which was proposed by H.J.R. No. 3 (Laws 1996) and adopted at the general election held November 5, 1996, by a vote of 309,927 for and 155,265 against, substituted the internal revenue service per diem and standard mileage rate for the $75 per diem and the $.25 mileage rate in Subsection A.

Compiler's notes. — An amendment to this section proposed by S.J.R. No. 14 (Laws 1961), which would have provided for compensation of members of the legislature, was submitted to the people at the special election held on September 19, 1961. It was defeated by a vote of 16,411 for and 32,801 against.

An amendment to this section proposed by S.J.R. No. 14 (Laws 1965), which would have provided for increase in compensation of members of the legislature, was submitted to the people at the special election held on September 28, 1965. It was defeated by a vote of 13,087 for and 39,922 against.

An amendment to this section was proposed by House Memorial 32 (Laws 1969), which requested the constitutional convention to provide salaries for legislators of $3,600 per year, per diem and mileage of $20.00 per day and $.10 for each mile traveled in going to and returning from the seat of government by the usual, traveled route once each session. The proposed constitution was submitted to the people at the special election held on December 9, 1969, and defeated by a vote of 59,695 for and 63,331 against.

An amendment to this section proposed by S.J.R. No. 2 (Laws 1974), which would have repealed this section and enacted a new one providing for the appointment of a legislative compensation commission, was submitted to the people at the general election held on November 5, 1974. It was defeated by a vote of 47,104 for and 75,618 against.

An amendment to this section proposed by S.J.R. No. 14 (Laws 1978), which would have provided for a monthly salary of $300 to begin on January 1, 1979, and would have excepted "legislative retirement as established by law" from the present

Subsection C, was submitted to the people at the general election on November 7, 1978. It was defeated by a vote of 90,068 for and 103,213 against.

An amendment to this section, proposed by S.J.R. Nos. 3, 6 and 12 (Laws 1980), which would have substituted "sixty dollars ($60.00)" for "forty dollars ($40.00)" and "twenty cents ($.20)" for "ten cents ($.10)" in Subsection A, was submitted to the people at the general election held on November 4, 1980. It was defeated by a vote of 105,693 for and 138,339 against.

An amendment to this section, proposed by H.J.R. No. 12 (Laws 1988), which would have added a Subsection C providing "annuity benefits in an amount not to exceed six thousand dollars ($6,000) annually under a retirement program as provided by law, provided that this subsection applies to any law providing for legislative retirement enacted after 1962; and" and would have redesignated present Subsection C as Subsection D, was submitted to the people at the general election held on November 8, 1988. It was defeated by a vote of 162,657 for and 207,133 against.

An amendment to this section proposed by S.J.R. No. 15 (Laws 1990), which would have increased legislators' per diem expenses to $100 per day and would have added a Subsection C providing "a salary of not more than five hundred dollars ($500) a month; and" was submitted to the people at the general election held on November 6, 1990. It was defeated by a vote of 78,643 for and 234,497 against.

An amendment to this section proposed by H.J.R. No. 10 (Laws 1992), which would have created a "citizens legislative compensation commission" to determine the salaries and expense allowances of the members of the legislature, was submitted to the people at the general election held on November 3, 1992. It was defeated by a vote of 215,628 for and 245,159 against.

An amendment to this section proposed by H.J.R. 10 (Laws 1994), which would have rewritten Subsection A to provide a legislative per diem and mileage and other expenses as provided by the Internal Revenue Code, was submitted to the people at the general election held on November 8, 1994. It was defeated by a vote of 181,842 for and 212,885 against.

Intent of section. — The intent of this section was to place a limit on the per diem and travel expense legislators could receive for attending legislative sessions. 1971 Op. Att'y Gen. No. 71-11.

Requirement of per diem clause. — The per diem clause of Subsection A requires legislation to give effect to the maximum rate permitted, while the mileage clause is complete in itself. Nonetheless, in 2-1-8 NMSA 1978, the legislature has provided for payment of both rates while it is in session. 1979 Op. Att'y Gen. No. 79-40.

Distinction exists between legislative or governmental and personal expenses; expenses incurred in the performance of official duties are allowable, while purely

personal expenses are considered perquisites of office forbidden by constitutional provision. 1971 Op. Att'y Gen. No. 71-18.

Per diem and travel between sessions. — This section does not prohibit the reimbursement of per diem and travel expenses to legislators when that expense is incurred under appropriate authorizing statutes and at a time when the legislature is not in session; and the legislature may enact a law reimbursing expenses incurred by legislators while performing legislative duties between legislative sessions. 1971 Op. Att'y Gen. No. 71-11 (opinion rendered prior to 1971 amendment to this section).

No reimbursement for actual expenses between sessions. — The state may not, by statute, authorize legislators to receive reimbursement from state funds for their actual expenses incurred in the performance of their official duties between sessions. Legislators are limited to the amounts specified in this section to cover their expenses during and between legislative sessions. 1993 Op. Att'y Gen. No. 93-06.

Legislative retirement plan constitutional. — The retirement benefits for which legislators may be eligible under the legislative retirement plan do not constitute legislative compensation; accordingly, the plan does not violate the Constitution. State ex rel. Udall v. Public Employees Retirement Bd., 120 N.M. 786, 907 P.2d 190 (1995).

No retirement benefits. — New Mexico legislators may not receive legislative retirement benefits: Legislators may receive only per diem and mileage under this section. 1987 Op. Att'y Gen. No. 87-62 (but see State v. Public Employees Retirement Bd., N.M. , 907 P.2d 190 (1995)).

Legislators serving on commissions. — Legislators can serve as members of commissions created by the legislature and are entitled to receive per diem and expenses at the existing rates. 1951-52 Op. Att'y Gen. No. 5364.

Additional expense coverage impermissible. — An act of the legislature providing for payments to its members to cover expenses, in addition to the compensation provided for in the constitution, would violate the constitution and would be invalid if passed. 1949-50 Op. Att'y Gen. No. 5189.

Monthly salary unconstitutional. — A proposed statute providing for each member of the legislature to receive as compensation for legislative services rendered the state $300 for each month during no part of which the legislature is in session would probably be held unconstitutional by the courts. 1971 Op. Att'y Gen. No. 71-18.

Per diem expenses as compensation. — "Per diem" expenses, as authorized in this section, constitute "compensation" as defined in the Public Employees' Retirement Act (10-11-1 NMSA 1978 et seq.). 1959-60 Op. Att'y Gen. No. 59-68.

Comparable provisions. — Idaho Const., art. III, § 23.

Montana Const., art. V, § 5.

Utah Const., art. VI, § 9.

Wyoming Const., art. III, § 6.

Law reviews. — For article, "The Executive," see 7 Nat. Resources J. 267 (1967).

For article, "The Legislature," see 8 Nat. Resources J. 148 (1968).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 72 Am. Jur. 2d States, Territories and Dependencies § 56.

Per diem compensation of members and officers of legislature, 1 A.L.R. 286.

Illegal appointment or election of member of legislature as affecting right to salary, 7 A.L.R. 1682.

Construction and application of constitutional or statutory provision that member of congress or state legislature shall not, during term for which he is elected, be appointed or elected to any civil office which shall have been created or the emoluments of which shall have been increased during term for which he was elected, 118 A.L.R. 182.

Constitutional provision fixing or limiting salary of public officer as precluding allowance for expenses or disbursements, 5 A.L.R.2d 1182.

De facto officer or employee, payment of salary to, as defense to action or proceeding by de jure officer or employee for salary, 64 A.L.R.2d 1375.

81A C.J.S. States §§ 46, 47.

Sec. 11. [Rules of procedure; contempt or disorderly conduct; expulsion of members.]

Each house may determine the rules of its procedure, punish its members or others for contempt or disorderly behavior in its presence and protect its members against violence; and may, with the concurrence of two-thirds of its members, expel a member, but not a second time for the same act. Punishment for contempt or disorderly behavior or by expulsion shall not be a bar to criminal prosecution.

ANNOTATIONS

Senate is ultimate judge of its own rules. 1970 Op. Att'y Gen. No. 70-21.

Rules governing election of speaker. — Secretary of state, while presiding over the house of representatives until the election of the speaker of the house, may accept

motions concerning rules under which election should be had. 1953-54 Op. Att'y Gen. No. 5633.

Authorizing tie-breaking vote. — The house of representatives has the power to adopt a rule giving secretary of state power to vote to break a deadlock. 1953-54 Op. Att'y Gen. No. 5633.

Consideration of vetoed bills. — The legislature may adopt a rule relating to the procedure to be used in considering bills of the last regular session which were vetoed. 1965-66 Op. Att'y Gen. No. 65-140.

A legislature has power, absent constitutional provisions governing the subject, to decide the procedure to be used in considering a vetoed bill not acted upon before adjournment of the first session. 1969 Op. Att'y Gen. No. 69-147.

A legislature has authority to promulgate rules governing procedure for reconsidering a vote to override chief executive's veto. 1969 Op. Att'y Gen. No. 69-147.

The legislature has authority to determine whether the house of origin must again vote to override the governor's veto at the next even-year session, when during the odd-year session the house of origin voted to override the veto but the other house either failed to override or failed to take any action before adjournment. 1969 Op. Att'y Gen. No. 69-147.

Comparable provisions. — Idaho Const., art. III, §§ 9, 11.

Montana Const., art. V, § 10.

Utah Const., art. VI, §§ 10, 12.

Wyoming Const., art. III, § 12.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 72 Am. Jur. 2d States, Territories and Dependencies §§ 43 to 45, 48, 49.

Power of legislature or branch thereof as to time of assembly and length of session, 56 A.L.R. 721.

81A C.J.S. States §§ 43, 52, 59, 60.

Sec. 12. [Public sessions; journals.]

All sessions of each house shall be public. Each house shall keep a journal of its proceedings and the yeas and nays on any questions shall, at the request of one-fifth of the members present, be entered thereon. The original thereof shall be filed with the

secretary of state at the close of the session, and shall be printed and published under his authority.

ANNOTATIONS

Phrase "members present," as used in the constitution, means physical presence. 1971 Op. Att'y Gen. No. 71-12.

Word "shall" makes this section mandatory. 1955-56 Op. Att'y Gen. No. 6167.

Journal to be published despite lack of appropriation. — The secretary of state should print and publish the journal as the law says he shall do, despite the fact that no appropriation has been made therefor; no action of the legislature is necessary to pay the cost of printing. 1955-56 Op. Att'y Gen. No. 6167.

Court took judicial notice of journal of senate, despite fact that it was not on file in office of secretary of state by reason of his refusal to receive and file it, where chief clerk of senate produced the same and testified that it was the senate journal in the same form as when he signed it. Earnest v. Sargent, 20 N.M. 427, 150 P. 1018 (1915), overruled on other grounds, Dillon v. King, 87 N.M. 79, 529 P.2d 745 (1974).

Supreme court would take judicial notice of 1953 Senate Journal. Clary v. Denman Drilling Co., 58 N.M. 723, 276 P.2d 499 (1954).

Engrossed bill not generally contradicted by journal. — When a bill has been engrossed, enrolled and signed, the court will not look to the journal to ascertain whether it received a majority vote, except in case of measures passed over veto. Kelley v. Marron, 21 N.M. 239, 153 P. 262 (1915). But see, Dillon v. King, 87 N.M. 79, 529 P.2d 745 (1974).

Where journal shows that a proposed constitutional amendment resolution received less votes than the constitution requires, but the resolution was enrolled, engrossed and signed as required by N.M. Const., art. IV, § 20, the enrolled and engrossed resolution will be given controlling force. Smith v. Lucero, 23 N.M. 411, 168 P. 709 (1917). But see, Dillon v. King, 87 N.M. 79, 529 P.2d 745 (1974).

Even to prevent frustration of legislative intent. — Although journal entries reflected passage of an amendment to a bill amending workman's compensation statute, where this amendment was omitted from the enrolled and engrossed bill, apparently through error or neglect, the supreme court would not accept the journal entries as record of the bill actually passed, regardless of the fact that such record was made under constitutional provision, and even though such refusal would result in injustice to the injured workman and frustration of the legislative will. Clary v. Denman Drilling Co., 58 N.M. 723, 276 P.2d 499 (1954).

Except for bill overriding veto. — Since there is no provision for certification of a bill which is passed over a gubernatorial veto, use probably may be made of the journal to determine whether the bill received the required two-thirds vote. 1964 Op. Att'y Gen. No. 64-40.

Comparable provisions. — Idaho Const., art. IV, §§ 12, 13.

Montana Const., art. V, § 10.

Utah Const., art. VI, §§ 14, 15.

Wyoming Const., art. III, §§ 13, 14.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 72 Am. Jur. 2d States, Territories and Dependencies § 46.

81A C.J.S. States § 54.

Sec. 13. [Privileges and immunities.]

Members of the legislature shall, in all cases except treason, felony and breach of the peace, be privileged from arrest during their attendance at the sessions of their respective houses, and on going to and returning from the same. And they shall not be questioned in any other place for any speech or debate or for any vote cast in either house.

ANNOTATIONS

Origin of privilege. — The privilege for legislators first appeared in unequivocal form in the English bill of rights of 1689. 1969 Op. Att'y Gen. No. 69-83.

No license to commit crimes. — The privilege or immunity granted to members of the legislature does not grant any license to commit crimes. 1969 Op. Att'y Gen. No. 69-83.

Breach of peace. — The privileges and immunities clause protects legislators only from civil arrest. Thus, a state senator or representative who violates any criminal statute, including a misdemeanor statute, commits a "breach of the peace" and is not immune from arrest. 1993 Op. Att'y Gen. No. 93-4.

No immunity from service of civil process or subpoena. — Specific immunity from arrests for misdemeanors does not grant immunity from civil process, nor does it prevent the service of subpoenas on members of the deliberative body. 1969 Op. Att'y Gen. No. 69-83.

"Session." — A special committee session or interim committee session which occurs at a place and time other than regular and special legislative sessions constitutes a

"session" as contemplated by the privileges and immunities clause, art. IV, § 13 of the New Mexico constitution. 1993 Op. Att'y Gen. No. 93-4.

Delegates to constitutional convention have privileges and immunities similar to those of the legislators although the privileges and immunities are less well defined and may not have the same broad scope as those granted to the legislators by this section. 1969 Op. Att'y Gen. No. 69-83.

Comparable provisions. — Idaho Const., art. III, § 7.

Iowa Const., art. III, § 11.

Montana Const., art. V, § 8.

Utah Const., art. VI, § 8.

Wyoming Const., art. III, § 16.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 72 Am. Jur. 2d States, Territories and Dependencies § 55.

Immunity of public officers from criminal arrest, 1 A.L.R. 1156.

Immunity of legislators from civil process, 94 A.L.R. 1470.

Defamation: nature and extent of privilege accorded public statements, relating to subject of legislative business or concern, made by member of state or local legislature or council outside of formal proceedings, 41 A.L.R.4th 1116.

81A C.J.S. States § 45.

Sec. 14. [Adjournment.]

Neither house shall, without the consent of the other, adjourn for more than three days, Sundays excepted; nor to any other place than that where the two houses are sitting; and on the day of the final adjournment they shall adjourn at twelve o'clock, noon.

ANNOTATIONS

Cross references. — For computation of time, see 12-2A-7 NMSA 1978.

Length of adjournment proper. — An adjournment from Saturday, January 17th, until Thursday, January 22nd, is not a violation of this section. 1925-26 Op. Att'y Gen. 3.

Longer adjournment authorized by concurrence. — Since neither house shall adjourn for more than three days without the other's consent under this section, it appears that if both houses concur, an adjournment for a longer period may be effected. 1943-44 Op. Att'y Gen. No. 4207.

Comparable provisions. — Iowa Const., art. III, § 14.

Montana Const., art. V, § 10.

Utah Const., art. VI, § 15.

Wyoming Const., art. III, § 15.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 72 Am. Jur. 2d States, Territories and Dependencies § 58.

Committee created by joint or concurrent resolution to function after adjournment of legislature, 28 A.L.R. 1158.

81A C.J.S. States § 50.

Sec. 15. [Laws to be passed by bill; alteration of bill; enacting clause; printing and reading of bill.]

No law shall be passed except by bill, and no bill shall be so altered or amended on its passage through either house as to change its original purpose. The enacting clause of all bills shall be: "Be it enacted by the legislature of the state of New Mexico." Any bill may originate in either house. No bill, except bills to provide for the public peace, health and safety, and the codification or revision of the laws, shall become a law unless it has been printed, and read three different times in each house, not more than two of which readings shall be on the same day, and the third of which shall be in full.

ANNOTATIONS

Purpose of section is solely to prohibit amendments not germane to subject of legislation expressed in the title of the act purported to be amended. 1978 Op. Att'y Gen. No. 78-4.

Declaration directory. — Declaration of constitution that "no law shall be passed except by bill," can be considered merely as directory, as long as the legislative intent is clearly expressed. 1915-16 Op. Att'y Gen. 55.

Legislature can appropriate money by joint resolution. 1915-16 Op. Att'y Gen. 55.

Broadening of act. — The purpose of an act is not so changed as to violate this section merely by broadening the act and making it more comprehensive as to details. Black Hawk Consol. Mines Co. v. Gallegos, 52 N.M. 74, 191 P.2d 996 (1948).

Reference statute. — Laws 1923, ch. 118 (since repealed), referring to intoxicating liquors, was a "reference statute," and the declaratory portion thereof was sufficient to meet the requirements of this section. State v. Armstrong, 31 N.M. 220, 243 P. 333 (1924).

Multigraphed bill is a printed bill. 1923-24 Op. Att'y Gen. 16.

House journal and bills are public records and should be open to public inspection at reasonable hours. 1925-26 Op. Att'y Gen. 10.

Comparable provisions. — Idaho Const., art. III, §§ 14, 15.

Iowa Const., art. III, § 15.

Utah Const., art. VI, § 22.

Law reviews. — For article, "The Legislature," see 8 Nat. Resources J. 148 (1968).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 73 Am. Jur. 2d Statutes §§ 50, 53, 56, 57, 59, 67.

Civil responsibility of member of legislative body for his vote therein, 22 A.L.R. 125.

Previous statute as affected by attempted but unconstitutional amendment, 66 A.L.R. 1483.

Applicability of constitutional provision requiring reenactment of altered or amended statute to one which leaves intact terms of original statute but transfers or extends its operation to another field, 67 A.L.R. 564.

Stage at which statute or ordinance passes beyond power of legislative body to reconsider or recall, 96 A.L.R. 1309.

Presumption of regular passage of statute as affected by legislative records showing that bill was defeated, 119 A.L.R. 460.

Applicability of constitutional requirement that repealing or amendatory statute refer to statute repealed or amended, to repeal or amendment by implication, 5 A.L.R.2d 1270.

Adoption of compiled or revised statutes as giving effect to former repealed or suspended provisions therein, 12 A.L.R.2d 423.

Simultaneous repeal and reenactment of all, or part, of legislative act, 77 A.L.R.2d 336.

82 C.J.S. Statutes §§ 18, 19, 24 to 27.

Sec. 16. [Subject of bill in title; appropriation bills.]

The subject of every bill shall be clearly expressed in its title, and no bill embracing more than one subject shall be passed except general appropriation bills and bills for the codification or revision of the laws; but if any subject is embraced in any act which is not expressed in its title, only so much of the act as is not so expressed shall be void. General appropriation bills shall embrace nothing but appropriations for the expense of the executive, legislative and judiciary departments, interest, sinking fund, payments on the public debt, public schools and other expenses required by existing laws; but if any such bill contain any other matter, only so much thereof as is hereby forbidden to be placed therein shall be void. All other appropriations shall be made by separate bills.

ANNOTATIONS

I. GENERAL CONSIDERATION.

When constitutionality considered. — Constitutional questions raised under this or any other section of constitution will be decided only when necessary to a disposition of the case at hand. Ratliff v. Wingfield, 55 N.M. 494, 236 P.2d 725 (1951).

Objections to be grave. — This section will not be broadened in its operation by the court, as the objections to a statute should be grave, and the conflict between the statute and the constitution palpable, before the judiciary should disregard a legislative enactment upon the sole ground that it embraced more than one object, or if but one object, that it was not sufficiently expressed by the title. City of Albuquerque v. Garcia, 84 N.M. 776, 508 P.2d 585 (1973).

Section has no retroactive effect and does not invalidate territorial acts not conforming to its requirements. State v. Elder, 19 N.M. 393, 143 P. 482 (1914).

Section does not apply to municipal ordinances. State ex rel. Ackerman v. City of Carlsbad, 39 N.M. 352, 47 P.2d 865 (1935).

Comparable provisions. — Idaho Const., art. III, § 16.

Montana Const., art. V, § 11.

Utah Const., art. VI, § 22.

Wyoming Const., art. III, § 24.

Law reviews. — For comment, "Legislative Bodies - Conflict of Interest - Legislators Prohibited From Contracting With State," see 7 Nat. Resources J. 296 (1967).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 73 Am. Jur. 2d Statutes §§ 97 to 126.

Sufficiency of title of act licensing or otherwise regulating dealers in securities or other interests or obligations of third persons, 153 A.L.R. 874.

Constitutionality of reforestation or forest conservation legislation, 13 A.L.R.2d 1095.

Validity of legislation relating to publication of legal notices, 26 A.L.R.2d 655.

82 C.J.S. Statutes §§ 212 to 220.

II. SUBJECT IN TITLE.

A. IN GENERAL.

Primary purpose of provision is to prevent fraud or surprise by means of concealed or hidden provisions in an act which the title fails to express. City of Raton v. Sproule, 78 N.M. 138, 429 P.2d 336 (1967); State ex rel. State Park & Recreation Comm'n v. New Mexico State Auth., 76 N.M. 1, 411 P.2d 984 (1966); Ballew v. Denson, 63 N.M. 370, 320 P.2d 382 (1958); Fischer v. Rakagis, 59 N.M. 463, 286 P.2d 312 (1955); State v. Ellenberger, 96 N.M. 287, 629 P.2d 1216 (1981).

One of the primary purposes of the constitutional requirement is to prevent fraud or surprise upon the legislature by means of hidden or concealed provisions of which the title gives no intimation and which, therefore, through inadvertence or carelessness might be unintentionally adopted. Silver City Consol. School Dist. No. 1 v. Board of Regents of N.M.W. College, 75 N.M. 106, 401 P.2d 95 (1965).

Test of adequacy. — The true test expressed in the section is whether the title fairly gives such reasonable notice of the subject matter of the statute itself as to prevent the mischief intended to be guarded against. Bureau of Revenue v. Dale J. Bellamah Corp., 82 N.M. 13, 474 P.2d 499 (1970); State ex rel. State Park & Recreation Comm'n v. New Mexico State Auth., 76 N.M. 1, 411 P.2d 984 (1966); City of Albuquerque v. Campbell, 68 N.M. 75, 358 P.2d 698 (1960); State v. Ingalls, 18 N.M. 211, 135 P. 1177 (1913).

Subject matter of bill to be germane to title. — If the subject matter of the bill is reasonably germane to the title of the act, it is sufficient to be valid under this section. United States Brewers Ass'n v. Director of N.M. Dep't of ABC, 100 N.M. 216, 668 P.2d 1093 (1983), appeal dismissed, 465 U.S. 1093, 104 S. Ct. 1581, 80 L. Ed. 2d 115 (1984).

What mischief to be prevented. — The mischief intended to be prevented by this section includes, hodge-podge or log-rolling legislation, surprise or fraud on the

legislature or not fairly apprising the people of the subjects of legislation so that they would have an opportunity to be heard on the subject. Martinez v. Jaramillo, 86 N.M. 506, 525 P.2d 866 (1974); Bureau of Revenue v. Dale J. Bellamah Corp., 82 N.M. 13, 474 P.2d 499 (1970); City of Albuquerque v. Campbell, 68 N.M. 75, 358 P.2d 698 (1960).

General purpose is accomplished when law has one general object which is fairly indicated by its title. City of Raton v. Sproule, 78 N.M. 138, 429 P.2d 336 (1967).

Provision does not relate to headings of articles in the code. State v. Ellenberger, 96 N.M. 287, 629 P.2d 1216 (1981).

Title of statute need not be an index of everything in the act itself, but need only give notice of the subject matter of the legislation and is sufficient if, applying every reasonable intendment in favor of its validity, it may be said that the subject of the legislative enactment is expressed in its title. In re Estate of Welch, 80 N.M. 448, 457 P.2d 380 (1969); Silver City Consol. School Dist. No. 1 v. Board of Regents of N.M.W. College, 75 N.M. 106, 401 P.2d 95 (1965); Aragon v. Cox, 75 N.M. 537, 407 P.2d 673 (1965); Gallegos v. Wallace, 74 N.M. 760, 398 P.2d 982 (1964).

Nor set forth details of an enactment; however, the details of a statute must be germane or related to the subject matter expressed in the title. City of Albuquerque v. Garcia, 84 N.M. 776, 508 P.2d 585 (1973); Varela v. Mounho, 92 N.M. 147, 584 P.2d 194 (Ct. App.), cert. denied, 92 N.M. 180, 585 P.2d 324 (1978).

It is not necessary that a title specifically set forth all of the matters included in the body of an enactment. 1969 Op. Att'y Gen. No. 69-131.

Where the "subject" of an act is children and that subject is clearly expressed, provisions within the act authorizing a change in the custody of a neglected child is a detail provided for accomplishing the legislative purpose of protecting children; such detail need not be set forth in the title of the bill, to comply with the requirements of this section that the subject of every bill be clearly expressed in its title. State ex rel. Health & Social Servs. Dep't v. Natural Father, 93 N.M. 222, 598 P.2d 1182 (Ct. App. 1979).

Nor disclose means and instrumentalities provided in the body of the act for accomplishing its purpose. Provisions reasonably necessary for attaining the object of the act embraced in the title are considered as included in the title. City of Albuquerque v. Garcia, 84 N.M. 776, 508 P.2d 585 (1973); Grant v. State, 33 N.M. 633, 275 P. 95 (1929).

Scope of title of act is within discretion of legislature; it may be made broad and comprehensive, in which case the legislation under such title may be equally broad, or it may be narrow and restricted, in which case the body of the act must likewise be narrow and restricted. Gallegos v. Wallace, 74 N.M. 760, 398 P.2d 982 (1964).

It is primarily for the legislature to determine whether the title of an act shall be broad and general or narrow and restricted. City of Raton v. Sproule, 78 N.M. 138, 429 P.2d 336 (1967).

Courts cannot enlarge scope of title; they are vested with no dispensing power. Gallegos v. Wallace, 74 N.M. 760, 398 P.2d 982 (1964).

Generality of title is no objection to it so long as it is not made a cover to legislation incongruous in itself, and which by no fair intendment could be considered as having a necessary or proper connection. City of Raton v. Sproule, 78 N.M. 138, 429 P.2d 336 (1967).

Broader title may embrace more. — The greater and broader the title, the greater the number of particulars or of subordinate subjects which may be embraced within it. City of Raton v. Sproule, 78 N.M. 138, 429 P.2d 336 (1967).

Effect of detailed title. — Where the title of an act begins with a general descriptive phrase, then goes on to describe the contents in more detail, the scope of the act is limited by the more detailed description, so that a provision not contained within the detailed description is void even though it falls within the general description contained in the first phase of the title. 1973 Op. Att'y Gen. No. 73-12.

Amendatory act to be germane to earlier law. — Where an intention to amend a specific section of a prior act is announced in the title of an amendatory act, that amendatory act must be germane to the subject matter of the section sought to be amended. Bureau of Revenue v. Dale J. Bellamah Corp., 82 N.M. 13, 474 P.2d 499 (1970).

Scrutinizing title of amended act. — Where an act is merely an amendment of an earlier one, the title of the earlier act is subject to scrutiny in determining whether there is compliance with the constitutional provision. State v. Sifford, 51 N.M. 430, 187 P.2d 540 (1947).

What body of amending act to contain. — When it appears from title of act that certain specific provisions of another act are to be amended, body of amending act may contain only matter which is reasonably germane to subject matter of sections which are stated by title to be subject of amendment. State ex rel. Salazar v. Humble Oil & Ref. Co., 55 N.M. 395, 234 P.2d 339 (1951).

Title provision of this section must be liberally construed; it is primarily for legislature to decide whether title of an act should be in broad and general terms or whether it should be narrow and restrictive. Albuquerque Bus Co. v. Everly, 53 N.M. 460, 211 P.2d 127 (1949).

Presumption of validity. — In applying this test, every presumption is indulged in favor of the validity of the act. Martinez v. Jaramillo, 86 N.M. 506, 525 P.2d 866 (1974); Bureau of Revenue v. Dale J. Bellamah Corp., 82 N.M. 13, 474 P.2d 499 (1970).

Case by case consideration. — Each case wherein the sufficiency of the title to a legislative act is questioned must be decided on its own set of facts and circumstances. Martinez v. Jaramillo, 86 N.M. 506, 525 P.2d 866 (1974); Bureau of Revenue v. Dale J. Bellamah Corp., 82 N.M. 13, 474 P.2d 499 (1970).

Savings clause compared. — Constitutional enjoinder that only so much of the act as is not so expressed in the title shall be void has equal, if not greater, force than a savings clause passed as a part of a legislative act. Romero v. Tilton, 78 N.M. 696, 437 P.2d 157 (Ct. App. 1967), cert. denied, 78 N.M. 704, 437 P.2d 165 (1968), overruled on other grounds, McGeehan v. Bunch, 88 N.M. 308, 540 P.2d 238 (1975).

Section inapplicable to ordinances. — Ordinances of a city operating under the commission form of government enacted under authority of 14-11-22, 1953 Comp., as those of cities operating under the mayor-council form, need not be entitled under the provisions of this section. City of Clovis v. North, 64 N.M. 229, 327 P.2d 305 (1958).

Determining legislative intent by title. — For the purpose of determining legislative intent, court may look to the title, and ordinarily it may be considered as a part of the act if necessary to its construction. State v. Richardson, 48 N.M. 544, 154 P.2d 224 (1944).

But not to exclusion of statute proper. — Legislation should not be interpreted in the light of the title to the complete exclusion of words used in enactment proper. State ex rel. State Corp. Comm'n v. Old Abe Co., 43 N.M. 367, 94 P.2d 105 (1939).

B. TITLE ADEQUATE.

Subject incidentally affected. — As sovereign immunity was not the subject of Laws 1941, ch. 192 (former 64-25-8 and 64-25-9, 1953 Comp.) relating to liability insurance on state vehicles and actions for injuries caused by such vehicles, and was affected only incidentally, failure to mention it in the title of the act did not violate this constitutional provision. City of Albuquerque v. Garcia, 84 N.M. 776, 508 P.2d 585 (1973).

Provisions for suit and trial are incident to annexation proceeding and failure to mention them in title of the act providing for such proceedings does not invalidate the statute. Crosthwait v. White, 55 N.M. 71, 226 P.2d 477 (1951).

Word "appropriation" unnecessary. — Since the title of Laws 1961, ch. 194, (former 64-13-73, 64-13-75.1 and 64-13-75.2, 1953 Comp.) relating to fees for operators' and chauffeurs' licenses, and providing, inter alia, for $.25 of each fee to be retained by the division, mentions "fees," the reader is apprised that in all probability the act will also contain a provision regarding the disposition of such fees, and the act need not be

invalidated for failure to use the word "appropriation" in its title. 1961-62 Op. Att'y Gen. No. 61-122.

"State" as covering political subdivisions. — Use in title of the term "state" when the act covers "political subdivisions" thereof did not result in a failure to clearly express the subject of the legislation in the title, as such usage could not have worked surprise or fraud upon the legislature, nor could the public have failed to take notice that the components that make up the state were included in the term. City of Albuquerque v. Campbell, 68 N.M. 75, 358 P.2d 698 (1960).

Former 5-6-17, 1953 Comp., was not unconstitutional under this section, since governing bodies of local subdivisions may reasonably be included within the term "all governing bodies of the state" if it is considered that "governing bodies of the state" means "governing bodies within the state," rather than "state governing bodies." Raton Pub. Serv. Co. v. Hobbes, 76 N.M. 535, 417 P.2d 32 (1966).

Emergency clause not part of subject. — This provision does not require that the title contain a statement that a bill carries an emergency clause, since the effective date of legislation is not any part of the subject of the law; therefore Laws 1939, ch. 1, § 4, an emergency clause, made that chapter, an appropriation act, effective on its passage and approval. 1939-40 Op. Att'y Gen. 12.

"Unlawful activities". — Sections 30-31-20 to 30-31-25 NMSA 1953, which define unlawful activities relating to controlled substances and provide penalties therefor are not unconstitutional because "unlawful activities" are not mentioned in the title of the act. State v. Atencio, 85 N.M. 484, 513 P.2d 1266 (Ct. App.), cert. denied, 85 N.M. 483, 513 P.2d 1265 (1973).

Abortion. — Provision of Laws 1929, § 35-310, that an attempt to produce abortion which culminates in the death of the woman shall be deemed murder in the second degree, is germane to a title denouncing "abortion." State v. Grissom, 35 N.M. 323, 298 P. 666 (1930).

Aggravated battery. — Section 30-3-5 NMSA 1978 does not violate this section by providing that an aggravated battery may be either a misdemeanor or a felony, as the title clearly shows that the subject of the act is aggravated battery and that more than one penalty is provided. State v. Segura, 83 N.M. 432, 492 P.2d 1295 (Ct. App. 1972).

Drive-up windows selling alcohol. — The title of the act which enacted Subsection F of 60-7A-1 (now G) NMSA 1978 was not unconstitutionally misleading. It fairly gave reasonable notice of the subject matter of the bill - to allow local elections to determine the fate of drive-up windows vending alcohol. Thompson v. McKinley County, 112 N.M. 425, 816 P.2d 494 (1991).

Possession of burglar's tools. — Former 40-9-8, 1953 Comp. (Laws 1925, ch. 63) forbade the making, mending or possession of burglar's tools with criminal intent to use

them or permit them to be used in the commission of a crime, not merely under circumstances evincing such an intent, and the offense prohibited was encompassed in the title of the act. State v. Lawson, 59 N.M. 482, 286 P.2d 1076 (1955).

Trafficking. — Defendant's contention that 30-31-20 NMSA 1978 violated this section because the statute was concerned with trafficking in controlled substances, while the title of the act of which it was a part did not include trafficking, was without merit since the title to an enactment need not set forth details if those details are germane to its subject matter, and prohibition on trafficking was a detail germane to drugs, their administration and penalties. State v. Romero, 86 N.M. 99, 519 P.2d 1180 (Ct. App. 1974).

Unlawful payment or receipt of public funds. — Title of former 41-812, 1941 Comp., reading "An act making it a felony to receive payment from public money purportedly for personal services where such services have not been rendered; providing penalties for the commission of said felony by receipt of or disbursement of such payments" gave sufficient notice to one reading it that in the act they could expect to find a provision denouncing as a felony the paying out of public funds, or causing them to be paid out, when services were not rendered by the parties paid. State v. Aragon, 55 N.M. 423, 234 P.2d 358 (1951).

Word "racketeering" did not need to appear in title to Laws 1977, ch. 215, amending the Organized Crime Act (29-9-1 to 29-9-17 NMSA 1978), nor did the title violate this section even though the 1977 amendment for the first time authorized the commission to investigate racketeering, since racketeering is reasonably germane to the subject matter of organized crime. In re Governor's Organized Crime Prevention Comm'n, 91 N.M. 516, 577 P.2d 414 (1978).

Place of serving sentence. — The title to the 1961 amendment to Laws 1961, ch. 146 (54-7-15, 1953 Comp.) is sufficiently broad to give notice that the legislation prohibits the service of a part of the minimum sentence prescribed by law outside the penitentiary. Aragon v. Cox, 75 N.M. 537, 407 P.2d 673 (1965).

Restriction of "good time" credit. — Title to Laws 1961, ch. 146 (54-7-15, 1953 Comp.), did not fail to give adequate notice of the subject of the legislation nor offend the constitution as containing more than one subject; in phrase "to prohibit suspension or deferral of execution or imposition of sentence under certain conditions" the word "suspension" applied equally to suspension of imposition of sentence by court and suspension of its execution by the executive, and gave notice that credit for "good time" might likewise be restricted under certain conditions. Martinez v. Cox, 75 N.M. 417, 405 P.2d 659 (1965).

Rights to penitentiary property. — Title to Laws 1939, ch. 55 (33-2-2 NMSA 1978 et seq.) gave ample notice that it was concerned with "titles and rights" to penitentiary property, and it was not necessary for the title of the act to set forth the source of the

titles to the property which it directed to be transferred to the penitentiary. State v. Thomson, 79 N.M. 748, 449 P.2d 656 (1969).

Liquor prohibition. — The title of Laws 1923, ch. 118 (since repealed), relating to prohibition of liquors, expressed the subject of that enactment with sufficient clearness to comply with this section. State v. Armstrong, 31 N.M. 220, 243 P. 333 (1924).

Regulation of beer sales. — Titles of statutes regulating the sale of beer containing not more than 3.2% of alcohol, referring only to intoxicating liquors and not to nonintoxicating beverages, did not violate this section. State v. Hamm, 37 N.M. 437, 24 P.2d 282 (1933). (Laws 1927, ch. 89 and Laws 1929, ch. 37, both repealed).

License photographs. — Failure to mention in the title of Laws 1961, ch. 194 (amending 64-13-73, 64-13-75.1 and 64-13-75.2, 1953 Comp. relating to operators' and chauffeurs' licenses), that photographs are to be placed on drivers' licenses does not render the provision violate of this section; the photograph provision is simply a detail in the general licensing scheme and has a rational and logical connection therewith. 1961-62 Op. Att'y Gen. No. 61-122.

County salaries. — The purview or contents of Laws 1949, ch. 90 (former 15-43-4, 1953 Comp. relating to county officers' salaries), were germane to the title of the act. 1951-52 Op. Att'y Gen. No. 5474.

Amendment relating to municipal powers. — Amendatory act (former 14-39-1, 1953 Comp.), pertaining to powers of municipality to grant franchises to public utilities, which fulfilled object of constitutional provision of enabling public and legislators to form competent opinion on merits of proposed change did not violate this provision by failing to set out as a part thereof all the powers of cities as enumerated in the original act. Albuquerque Bus Co. v. Everly, 53 N.M. 460, 211 P.2d 127 (1949).

Irrigation districts. — The title "An act in relation to irrigation districts" clearly expressed the subject of Laws 1919, ch. 41 (73-9-1 NMSA 1978 et seq.). Davy v. McNeill, 31 N.M. 7, 240 P. 482 (1925).

Banking act. — Title 48 of former State Banking Act (Laws 1915, ch. 67) was broad and did not violate this section. First Thrift & Loan Ass'n v. State ex rel. Robinson, 62 N.M. 61, 304 P.2d 582 (1956).

Oil Conservation Act. — The Oil Conservation Act of 1935 as amended in 1937, 1941 and 1949 was not violative of this section for failure to have the subject matter expressed clearly in the title. 1951-52 Op. Att'y Gen. No. 5397.

Revenue Bond Act. — Title of former Revenue Bond Act (11-10-1, 1953 Comp. et seq.) gave reasonable notice of the subject matter of the statute and did not violate this section of the constitution. State v. New Mexico State Auth., 76 N.M. 1, 411 P.2d 984 (1966).

Foreclosure suits. — Laws 1933, ch. 7 (39-4-13 to 39-4-16 NMSA 1978, relating to foreclosures on judgments) is not unconstitutional on the ground that its title does not clearly express the subject of the bill and that it embraces more than one subject, contrary to the provisions of this section. Ballew v. Denson, 63 N.M. 370, 320 P.2d 382 (1958).

Claims against estate. — Sections 31-8-2 and 31-8-3, 1953 Comp., relating to claims against an estate, did not offend this section. In re Estate of Welch, 80 N.M. 448, 457 P.2d 380 (1969).

Cigarette tax. — Laws 1951, ch. 92, §§ 1 to 6 (now repealed), did not violate this section by failing to express the subject of the act; the "subject" of the act had to do with a tax upon the sale of cigarettes in municipalities, and the fact that the levy, collection and enforcement of the tax were given to municipalities did not change the subject of the legislation, but merely provided the machinery under which the tax might be effected. Beatty v. City of Santa Fe, 57 N.M. 759, 263 P.2d 697 (1953).

Succession tax. — Argument that title to Laws 1921, ch. 179, insofar as Section 17 (31-16-20, 1953 Comp.) is concerned, offends against provisions of this section because the tax provided for is a "succession tax," which would not include inter vivos transfers, even though possession and enjoyment were postponed until death, was without merit, since the legislative intent was to make the vesting of the benefits or the succession the event giving rise to the tax, and not the transfer of title. Harvey v. Vigil, 78 N.M. 303, 430 P.2d 874 (1967).

Tax on property transfers. — Laws 1919, ch. 122 (since repealed), relating to taxation of property transfers, did not violate this section. State v. Gomez, 34 N.M. 250, 280 P. 251 (1929).

Tax for work of commission. — The title "An act to amend Section 4 of Chapter 114 of the session laws of 1949 (46-12-4, 1953 Comp. now repealed) relating to funds for the commission on alcoholism," read against the background of the act it amends, is sufficient to advise the reader that one is going to find in it provision for levy of a tax for carrying on the work of the commission on alcoholism. Fowler v. Corlett, 56 N.M. 430, 244 P.2d 1122 (1952).

Limitations on tax collection. — A time limitation on the collection of tax may be an incident to its collection and administration and need not be expressed in its title. Bureau of Revenue v. Dale J. Bellamah Corp., 82 N.M. 13, 474 P.2d 499 (1970).

Veterans' tax exemption. — The title to the 1957 amendment to 72-1-14, 1953 Comp., reading: "List of soldiers entitled to exemption; Preparation by assessor; Additions," did not violate this section, since the amendment dealt only with the subject of the property tax exemption of veterans, and the method and time of obtaining such was germane to the title. 1969 Op. Att'y Gen. No. 69-131.

Limitations on action. — The no action provision in 37-1-27 NMSA 1978, relating to limitations on actions for defective or unsafe conditions of improvements to real property, literally is a limitation on actions that may be brought, to which the reference in the title to "limitation on actions" logically and naturally connects, providing reasonable notice of the subject matter. Howell v. Burk, 90 N.M. 688, 568 P.2d 214 (Ct. App.), cert. denied, 91 N.M. 3, 569 P.2d 413 (1977).

Time for tax appeal. — Laws 1921, ch. 133, § 436 (since repealed), limiting time for appeal from tax judgment, did not violate this section. Grant v. State, 33 N.M. 633, 275 P. 95 (1929).

Appeals procedure. — The title of Laws 1919, ch. 40 (16-4-19 to 16-4-21, 1953 Comp.), relating to procedure in appeals from probate court to district court, is sufficient to comply with this section. In re Ortiz's Estate, 31 N.M. 427, 246 P. 908 (1926).

C. TITLE INADEQUATE.

Only part of law embraced in title given effect. — Section 13-4-5 NMSA 1978, giving preference to materials produced within the state of New Mexico, where such materials are practicable in the construction and maintenance of public works, does not conflict with this section, even though the body of the act is broader than its title, but only so much of the act as is embraced in the title will be given effect. 1933-34 Op. Att'y Gen. 109.

Only part omitted from title stricken. — Even in event something has been improperly omitted from the title of an act, the saving clause in this constitutional provision, indicating that only so much of the act as is not mentioned in the title shall be void, will save the act providing for annexation of portions of counties (4-3-1 NMSA 1978 et seq.). Crosthwait v. White, 55 N.M. 71, 226 P.2d 477 (1951).

Act purporting to make wholesale repeal violative of section. — The title to Laws 1947, ch. 175, reading "An act to repeal obsolete and superseded laws which are not included in the New Mexico 1941 compilation, as shown in parallel reference table volume 6 of the 1941 compilation," violated this section in that it did not clearly set out the subject of the bill. Tindall v. Bryan, 54 N.M. 112, 215 P.2d 354 (1949).

Failure to underlineate. — This section may be violated in a case where new material, not mentioned in the title, is written into an amendatory bill with the underlineation required by Senate Rule 50, as was done in Laws 1939, ch. 173, § 1, which amended the law concerning the control of rural schools (73-9-7, 1953 Comp.), when the words "which supervisor shall be nominated by the county superintendent of schools" was inserted without being underlined. 1939-40 Op. Att'y Gen. 37.

Amendments not pinpointed by title. — Though title of an amendatory act could have been in general terms and yet sufficient, where there is an attempt to amend specifically by pinpointing in title of amending act the sections of the earlier act to be changed, the

amendment of sections not mentioned in the title is void. State ex rel. Salazar v. Humble Oil & Ref. Co., 55 N.M. 395, 234 P.2d 339 (1951).

Abolishment of committee ineffective. — Because the title of Laws 1969, ch. 226, failed to contain language indicating that it was abolishing the committee on children and youth, the enactment violated the requirements of this section, and hence its attempt to repeal sections relating to that committee was void. 1969 Op. Att'y Gen. No. 69-45.

Stripping corporation commission (now public regulation commission) of control over aircraft. — Laws 1939, ch. 199, § 5 (64-1-18 NMSA 1978) violates this section since there is nothing in the title of the act of which it is a part to intimate in the least that the corporation commission (now public regulation commission) is to be stripped of its power over all aircraft. 1939-40 Op. Att'y Gen. 99.

Applicability of former guest statute to guests. — Former 64-24-1, 1953 Comp., the "guest statute," did not violate this section, which required the subject of every bill to be expressed in the title; although "guest" was not referred to in the title, reference to "passengers" gave reasonable notice of the subject, since guests in an automobile are passengers. Mwijage v. Kipkemei, 85 N.M. 360, 512 P.2d 688 (Ct. App. 1973).

Application restricted to owner drivers. — Title of the guest statute, 64-24-1, 1953 Comp., is not phrased in broad or comprehensive terms, but restricts its application to owners of motor vehicles; therefore, insofar as the body of the statute limits the responsibility of nonowner drivers, it contravenes the restriction of this section. Gallegos v. Wallace, 74 N.M. 760, 398 P.2d 982 (1964).

Selection of jurors. — Laws 1923, ch. 131, relating to the selection of jurors, violated this section in that the title did not clearly express the subject of the act. State v. Candelaria, 28 N.M. 573, 215 P. 816 (1923).

Protection of animals. — Statute entitled "An act for the protection of game and fish" cannot be transformed into an act for the protection of animals which cannot be included under the name of "game." 1915-16 Op. Att'y Gen. 273.

Local alcohol option. — Where the title of Laws 1971, ch. 30, which act purported in part to provide for local option elections concerning the sale of alcoholic beverages on Sunday, recited that it related to alcoholic liquors, that it repealed certain statutory provisions (unrelated to such local option elections) and pertained to "hours and days of business," the title was restrictive in nature, and as it contained nothing germane to the elections contemplated, that portion (Subsection D of former 60-10-30 NMSA 1978) was unconstitutional under this section. Martinez v. Jaramillo, 86 N.M. 506, 525 P.2d 866 (1974).

County salaries. — Laws 1937, ch. 98 (since repealed), relating to county salaries, was unconstitutional because, inter alia, its title was probably not sufficient to cover its provisions. 1937-38 Op. Att'y Gen. 104.

School boards. — Laws 1933, ch. 74 (later repealed), relating to boards of education, could not be workable in or operative for 1933, and it was unworkable and its title not sufficiently broad to meet this constitutional requirement. 1933-34 Op. Att'y Gen. 47.

School not covered in title. — The title of Laws 1921, ch. 48 (operative sections of which are now compiled as 4-11-1 to 4-11-3 NMSA 1978), creating a county and providing for bonds in aid thereof, is not broad enough to cover § 19 thereof providing for a high school, and the section is therefore void. State ex rel. Board of Educ. v. Saint, 28 N.M. 165, 210 P. 573 (1922).

Limitation on collection of different tax improper. — In a bill providing for separate administration of the privilege tax on producers of oil and gas, and eliminating such producers from former Emergency School Tax Act, an attempt to place a five-year limitation on the collection of taxes under both the Oil and Gas Emergency School Tax Act (7-31-1 NMSA 1978 et seq.) and the Emergency School Tax Act was improper since such a provision was not germane to either the general subject of the bill or the express wording of its title. Bureau of Revenue v. Dale J. Bellamah Corp., 82 N.M. 13, 474 P.2d 499 (1970).

Removal from ratemaking proceedings limited. — Section 63-9-14 NMSA 1978, by its terms, seems broad enough to cover removals from ratemaking proceedings, but it is part of the Telephone and Telegraph Company Certification Act and therefore can only apply to certification proceedings. Mountain States Tel. & Tel. Co. v. Corporation Comm'n, 99 N.M. 1, 653 P.2d 501 (1982).

III. SUBJECT OF BILL.

Term "subject" is to be given broad and extended meaning so as to authorize the legislature to include in one act all matters having a logical or natural connection. Silver City Consol. School Dist. No. 1 v. Board of Regents of N.M.W. College, 75 N.M. 106, 401 P.2d 95 (1965).

In considering whether a statute embraces more than one subject, the term "subject" is to be given broad and extended meaning so as to allow the legislature full scope to include in one act all matters having a logical or natural connection. Kilburn v. Jacobs, 44 N.M. 239, 101 P.2d 189 (1940); Johnson v. Greiner, 44 N.M. 230, 101 P.2d 183 (1940). See also, 1973 Op. Att'y Gen. No. 73-12.

More than one subject germane to issue. — When more than one subject in the act is germane to the main issue, it is constitutional. State v. Miller, 33 N.M. 200, 263 P. 510 (1927).

What constitutes duplicity. — To constitute duplicity of subject, an act must embrace two or more dissimilar and discordant subjects that by no fair intendment can be considered as having any legitimate connection with or relation to each other; thus, all that is necessary under this section is that the act should embrace some one general subject. 1973 Op. Att'y Gen. No. 73-12.

Purpose of limitation. — This constitutional limitation was designed for the exclusion of discordant provisions having no rational or logical relation to each other. State v. Roybal, 66 N.M. 416, 349 P.2d 332 (1960).

Titles liberally construed. — The court is firmly committed to the policy of applying a liberal construction to a specific title as well as to one containing broad and comprehensive language. Silver City Consol. School Dist. No. 1 v. Board of Regents of N.M.W. College, 75 N.M. 106, 401 P.2d 95 (1965).

Wholesale repeal of laws. — Laws 1947, ch. 175, entitled "An act to repeal obsolete and superseded laws which are not included in the New Mexico 1941 compilation, as shown in parallel reference table volume 6 of the 1941 compilation," violated this section because it contained more than one subject. Tindall v. Bryan, 54 N.M. 112, 215 P.2d 354 (1949).

Specific tuition schedules for institutions of higher education are proper subjects of an appropriations act. 1985 Op. Att'y Gen. No. 85-2.

Abortion statute. — Statute denouncing attempt to produce abortion, and making such attempt, followed by death, murder in the second degree contained but one subject which was clearly expressed in its title. State v. Grissom, 35 N.M. 323, 298 P. 666 (1930).

Amendment of drug and cosmetic act. — Claim that statute of which 30-31-20 NMSA 1978 is a part violated this section, because the title of the act amended sections of drug and cosmetic act and, therefore, embraced both drugs and cosmetics, was without merit. The amendments were concerned with drugs, and under the broad and extended meaning given to word "subject," statute would not be held invalid. State v. Romero, 86 N.M. 99, 519 P.2d 1180 (Ct. App. 1974).

Drug penalties. — Section 54-7-15, 1953 Comp., relating to penalties for drug offenses did not embrace more than one subject. Aragon v. Cox, 75 N.M. 537, 407 P.2d 673 (1965); Martinez v. Cox, 75 N.M. 417, 405 P.2d 659 (1965).

Immunity from gambling penalties. — Section 44-5-14 NMSA 1978, providing immunity from punishment for gamblers who file a claim for recovery of gambling losses, does not violate this section of the constitution on grounds that more than one subject is embraced within the act. State v. Schwartz, 70 N.M. 436, 374 P.2d 418 (1962).

Transportation and handling of explosives. — Statute penalizing, in one section, certain methods of transportation of explosives, and, in another section, the handling of explosives maliciously in, at or near "any building, railroad or any train or car, or any depot, stable, carhouse, theater, school, church, dwelling house or other place where human beings usually frequent, inhabit, assemble or pass" was not unconstitutional as embracing more than one subject. State v. Ornelas, 42 N.M. 17, 74 P.2d 723 (1937).

Explosives and deadly weapons in penal institutions. — Laws 1941, ch. 59, § 2 (40-41-4, 1953 Comp.) was not repugnant to this section for allegedly embracing more than one subject, by prohibiting the carrying of explosives or deadly weapons within area used for confinement of prisoners, since "explosives" and "deadly weapons" were not separate subjects of the act; rather, the prohibition against introduction of explosives and deadly weapons within such institutions was a means designed to carry general purpose of the act. State v. Williams, 71 N.M. 210, 377 P.2d 513 (1962).

Automobile licenses. — Laws 1912, ch. 28, repealed by Laws 1913, ch. 19, § 18, relating to automobile licenses, did not contain more than one general subject, or at least the subject was germane to that expressed in the title assuming that two subjects were included in the act. State v. Ingalls, 18 N.M. 211, 135 P. 1177 (1913).

Motor vehicles and trailers. — Laws 1925, ch. 82 (since repealed), relating to motor vehicles and trailers, was not unconstitutional on ground that title embraced more than one subject, the subjects mentioned being germane to the main subject. State ex rel. Taylor v. Mirabal, 33 N.M. 553, 273 P. 928, 62 A.L.R. 296 (1928).

Motor Vehicle Act. — Former Motor Vehicle Act (64-1-1, 1953 Comp. et seq.) is not constitutionally objectionable under this section in assertedly containing more than one subject; its subject was motor vehicles, and the mere inclusion of other provisions logically within the scope of the title and relating to the general subject did not violate the "one subject" restriction. State v. Roybal, 66 N.M. 416, 349 P.2d 332 (1960).

Capitol building and state parks. — Laws 1939, ch. 112, § 13, relating to the capitol building and state parks, contravenes this provision. Kilburn v. Jacobs, 44 N.M. 239, 101 P.2d 189 (1940); Johnson v. Greiner, 44 N.M. 230, 101 P.2d 183 (1940).

Drainage law. — Drainage law (73-6-1 to 73-7-56 NMSA 1978) is not unconstitutional on the theory that Section 82 thereof (73-7-56 NMSA 1978), dealing with eminent domain relates to a different subject than the remainder of the act. In re Dexter-Greenfield Drainage Dist., 21 N.M. 286, 154 P. 382 (1915).

"Codification" explained. — Real codification is to take greater latitude, and, without changing the existing system of laws, to add new laws, and to repeal old laws, both in harmony with it, so that the code will meet present exigencies and, so far as possible provide for the future. City of Raton v. Sproule, 78 N.M. 138, 429 P.2d 336 (1967).

Elements of revision. — A revision of statutes implies one, more or all of the following: (1) A reexamination of existing statutes; (2) a restatement of existing statutes in a corrected or improved form; (3) the restatement may or may not include material changes; (4) all parts and provisions of the former statute or statutes that are omitted are repealed; and (5) the revision displaces and repeals the former law as it stood relating to the subject or subjects within its purview. City of Raton v. Sproule, 78 N.M. 138, 429 P.2d 336 (1967). See also, 1973 Op. Att'y Gen. No. 73-12.

Revision of statutes implies reexamination of them, the word being applied to a restatement of the law in a corrected or improved form, with or without material change. City of Raton v. Sproule, 78 N.M. 138, 429 P.2d 336 (1967).

Codification and revision of laws governing municipalities. — An amendment which codifies and revises the laws relating to cities, towns and villages into a municipal code as expressly stated in the title, and which in addition to collecting and rearranging prior statutes make some changes therein, omitting some matters and adding others, was valid. City of Raton v. Sproule, 78 N.M. 138, 429 P.2d 336 (1967).

IV. APPROPRIATIONS.

Making of appropriations for legislature. — The state constitutional procedures applicable to the expenditure of state funds vests the authority to make appropriations in the legislature; therefore, the governor may not spend federal revenue-sharing funds without a legislative appropriation. 1973 Op. Att'y Gen. No. 73-9.

Appropriation to be for "public" purpose. — Question of whether an item of appropriation meets the "expense" test is ordinarily considered in terms of whether or not the proposed expenditure is for a "public," as distinguished from a "private" purpose; on this question, the legislature is vested with a large discretion and its determination will not be disturbed unless clearly arbitrary. 1959-60 Op. Att'y Gen. No. 59-79.

More than bare appropriation permissible. — This article does not require that the general appropriations bill be restricted to bare appropriations; it may contain language covering matters which are germane to and naturally and logically connected with the expenditures of the moneys provided in the bill, and only such matters as are foreign, not related to nor connected with such subject, are forbidden. 1977 Op. Att'y Gen. No. 77-11.

General appropriations bill may not reduce appropriation to administrative agency. — The legislature may not use a general appropriations bill to reduce the appropriation to an administrative agency so as to put it out of business. 1980 Op. Att'y Gen. No. 80-3.

Details of spending may be included. — This section is not to be construed to mean that nothing but bare appropriations shall be incorporated in a general appropriation bill; the details of expending the money so appropriated, which are necessarily connected

with and related to the matter of providing the expenses of the government, and are so related, connected with and incidental to the subject of appropriations that they do not violate the constitution if incorporated in such general appropriation bill, may properly be included therein. State ex rel. Holmes v. State Bd. of Fin., 69 N.M. 430, 367 P.2d 925 (1961).

Provisions for accounting, expenditure, and issuance of certificates not precluded. — This provision does not preclude insertion in general appropriation bill of provisions for the accounting and expenditure of the money appropriated; this would include authorization for the issue and sale of certificates of indebtedness. State ex rel. Lucero v. Marron, 17 N.M. 304, 128 P. 485 (1912).

This section is not violated by Laws 1912, ch. 83, § 24, which provides for certificates of indebtedness to provide funds for other sections of the appropriation act. 1912-13 Op. Att'y Gen. 77, 84.

So long as incident to appropriation. — With a general appropriation may be included all matters germane thereto and directly connected therewith, such as provisions for the expenditure and accounting for the money, but such provisions are to have application only to matters incident to the main fact of the appropriation, and may not be considered as general legislation affecting matters not necessarily or directly connected with the appropriation legally made. 1961-62 Op. Att'y Gen. No. 62-88.

If the provision in the general appropriations act is so related, connected with and incidental to the subject of the appropriation and does not attempt to go beyond the current appropriation, the provision is constitutional. 1967 Op. Att'y Gen. No. 67-49.

Repeal by implication of existing general legislation. — Governor properly vetoed provision in appropriation bill requiring the information processing bureau, general services department, to finance capital outlay expenses from internal services funds and specifically prohibiting use of moneys from the equipment replacement fund to fund a statutory five-year funding scheme described in the Information Systems Act (15-1-1 to 15-1-13 NMSA 1978). Such provision amounted to general legislation which, if left unchallenged, would repeal by implication similar funding provisions in existing general legislation. State ex rel. Coll v. Carruthers, 107 N.M. 439, 759 P.2d 1380 (1988).

Legislative intent determinative. — Where the legislature clearly intended the expenditure of the amount appropriated to the state board of finance to be for public purposes only, vulnerability of some particular determination by the board would be a challenge to the application of the provision in particular circumstances, and not a challenge to the constitutionality of the provision. 1959-60 Op. Att'y Gen. No. 59-79.

Appropriation for emergency and necessary expenses lawful. — Appropriation of $300,000 in 1959 general appropriation bill to state board of finance "for emergencies and necessary expenditures affecting the public welfare" was lawful. 1959-60 Op. Att'y Gen. No. 59-79.

Expenses for state educational institutions may be included in the general appropriation bill, under the authority contained in the phrase "and other expenses required by existing laws." 1912-13 Op. Att'y Gen. 20.

Allowing participation in public school insurance authority. — The language in Laws 1988, ch. 13, § 4 (p. 235), part of the 1988 General Appropriation Act, which allows Albuquerque public schools to participate in the public school insurance authority, clearly violates this section, which restricts the contents of general appropriation acts. 1988 Op. Att'y Gen. No. 88-58.

Limit on per diem and subsistence. — An appropriation bill which contains a limitation on per diem and subsistence for officials does not violate this section. State ex rel. Whittier v. Safford, 28 N.M. 531, 214 P. 759 (1923).

Directive to relocate agency permissible. — Legislature's directive, ordering the vocational rehabilitation division of state board of education to relocate its Albuquerque office to a site more accessible to its clients, was a matter germane to and naturally connected with the expenditures of moneys, and there was no violation of the provisions of this section by including such provision in the general appropriations act. National Bldg. v. State Bd. of Educ., 85 N.M. 186, 510 P.2d 510 (1973).

Appropriation to regulatory board not general legislation. — Appropriation to barber's board in 1953 general appropriation act had effect of temporarily superseding the appropriation contained the in Barbering Act (61-17-1 NMSA 1978, et seq.) for the biennium in question; it did not constitute general legislation in an appropriation bill, as prohibited by this section. State ex rel. Prater v. State Bd. of Fin., 59 N.M. 121, 279 P.2d 1042 (1955).

Inclusion of permanent policy in appropriation improper. — Part of Laws 1912, ch. 83, § 18, relating to accounting for public funds, while it bore some relation to the general appropriation act of which it was a part, provided a permanent policy thereafter to be pursued and was general legislation rendering it violative of the constitution. State ex rel. Delgado v. Sargent, 18 N.M. 131, 134 P. 218 (1913).

Disposition of funds beyond biennium unlawful. — Provision of 1953 general appropriation act that "all balances remaining to the credit of any above named boards shall revert to the general fund at the end of any fiscal year" contravened this section insofar as it attempted to speak for disposition of balances remaining with the boards beyond the biennium. State ex rel. Prater v. State Bd. of Fin., 59 N.M. 121, 279 P.2d 1042 (1955).

Legislature cannot exercise control over funds not appropriated by the general appropriations act by means of language in that act. 1967 Op. Att'y Gen. No. 67-49.

Legislature cannot impose conditions upon unappropriated funds. — The legislature does not have the power to impose conditions upon the expenditure of funds which it does not appropriate. 1980 Op. Att'y Gen. No. 80-40.

And provision referring to disposition of federal funds void. — The provision of the General Appropriations Act of 1980, Laws 1980, ch. 155, which refers to the disposition of federal funds received by the state auditor is a matter unrelated to an appropriation and is void. 1980 Op. Att'y Gen. No. 80-40.

Section not applicable to administration of federal funds. — This section, along with N.M. Const., art. IV, §§ 30 and 31, are restrictions in the objects, forms and disbursements of legislative appropriations of state funds; they have no application to a department's administration of federal or nonstate funds. 1975 Op. Att'y Gen. No. 75-10.

Nor to agency's disposition of appropriation. — This section, along with N.M. Const., art. IV, §§ 30 and 31, imposes limits on the legislature's power to appropriate money and the treasurer's power to disburse it, but has nothing to do with an administrative agency's disposition of its appropriation. 1975 Op. Att'y Gen. No. 75-10.

Highway Beautification Act not appropriation. — Laws 1966, ch. 65 (67-12-1 NMSA 1978 et seq.), the Highway Beautification Act, is neither an appropriations bill nor a bill appropriating money within the meaning of this and other sections of article IV, as neither the title nor the body of the bill relates to the appropriation of funds; it is devoid of an appropriation. 1966 Op. Att'y Gen. No. 66-133.

Separate bill necessary. — As this section declares that, except for the purposes which may be embraced in general appropriation bills, the moneys in the state treasury may be appropriated only by separate bills, and under N.M. Const., art. IV, § 30, such separate bill must distinctly specify the sum appropriated and the object to which it is to be applied, former 19-1-15 NMSA 1978 was unconstitutional insofar as it assumed to authorize repayment of money covered into the treasury and funded, as the property of the state, on the mere say-so of an administrative officer. McAdoo Petroleum Corp. v. Pankey, 35 N.M. 246, 294 P. 322 (1930).

Appropriation to several unrelated institutions unconstitutional. — A bill (not the general appropriations bill) appropriating money to three different types of institutions or associations which are not related is unconstitutional. 1937-38 Op. Att'y Gen. 62.

Amendments to 22-2-8.2 NMSA 1978 made in the General Appropriations Act of 1989 were not proper, where the 1989 appropriations measure changed the effective dates for various actions under the statute and enlarged the authority of the state superintendent to waive class load requirements. The amendments constituted general legislation which, though necessary or desirable, could not constitutionally be included in an appropriations bill. 1989 Op. Att'y Gen. No. 89-26.

Conditions on amounts in miners' hospital base appropriation. — Conditions placed in the General Appropriation Bill of 1988 on the amounts in the miners' hospital base appropriation for personal services and employee benefits were valid because they were reasonably related to the amounts appropriated and did not attempt to control the details of how those amounts were expended after the appropriation was made. 1989 Op. Att'y Gen. No. 89-30.

Sec. 17. [Passage of bills.]

No bill shall be passed except by a vote of a majority of the members present in each house, nor unless on its final passage a vote be taken by yeas and nays, and entered on the journal.

ANNOTATIONS

"Members present". — The phrase "members present," as used in the state constitution, means physical presence. 1971 Op. Att'y Gen. No. 71-12.

Provision mandatory. — Constitutional provisions as to the number of votes required on final passage are mandatory and the validity of legislative enactments is dependent on compliance therewith. 1971 Op. Att'y Gen. No. 71-12.

Use of paired or proxy votes potentially unconstitutional. — The senate and house rules on paired or proxy voting do not automatically violate the constitution, but in the passage of a particular bill, use of such voting procedures could produce an unconstitutional statute, as when the paired or proxy vote was the one needed to pass a bill by a majority vote, which would not be known until after the fact. 1971 Op. Att'y Gen. No. 71-12.

Time limitations. — New Mexico Const., art. IV, § 5, is not a limitation that operates to restrain the legislature from complying fully with definitely imposed nondiscretionary lawmaking duties. Dillon v. King, 87 N.M. 79, 529 P.2d 745 (1974).

Committee of one house not to function after adjournment. — Since the legislative power is vested in both the senate and house of representatives, that power can only be exercised by the concurrence of both houses; to allow a committee established by one house to function after adjournment of the body which created it would be allowing one house of the legislature to pass a resolution having the effect of law. 1959-60 Op. Att'y Gen. No. 59-65.

Comparable provisions. — Idaho Const., art. III, § 15.

Iowa Const., art. III, § 17.

Montana Const., art. V, § 11.

Utah Const., art. VI, § 22.

Wyoming Const., art. III, § 25.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 73 Am. Jur. 2d Statutes §§ 50, 60 to 62, 65.

82 C.J.S. Statutes §§ 18, 42, 43, 45.

Sec. 18. [Amendment of statutes.]

No law shall be revised or amended, or the provisions thereof extended by reference to its title only; but each section thereof as revised, amended or extended shall be set out in full.

Notwithstanding the foregoing or any other provision of this constitution, the legislature, in any law imposing a tax or taxes, may define the amount on, in respect to or by which such tax or taxes are imposed or measured, by reference to any provision of the laws of the United States as the same may be or become effective at any time or from time to time, and may prescribe exceptions or modifications to any such provision. (As amended November 3, 1964.)

ANNOTATIONS

The 1964 amendment, which was proposed by S.J.R. No. 26, § 1 (Laws 1963), and adopted on November 3, 1964, with a vote of 62,129 for and 51,937 against, added the second paragraph of this section.

Repeal as "revising" or "amending". — Action of the legislature in attempting to repeal a portion of an existing law was "revising" or "amending" it. 1969 Op. Att'y Gen. No. 69-15.

Purpose to eradicate "blind legislation". — The purpose of this provision is to eradicate the evil of so-called "blind legislation," that is, legislation which undertakes to revise, amend or extend existing legislation in such manner that the effect of the new statute cannot be determined without resorting to the previous legislation as well. 1957-58 Op. Att'y Gen. No. 58-85.

Section has no retroactive effect and does not invalidate territorial acts not conforming to its requirements. State v. Elder, 19 N.M. 393, 143 P. 482 (1914).

Prohibition of this section of the New Mexico constitution does not apply to legislation in existence at the time the constitution was adopted. State v. Hines, 78 N.M. 471, 432 P.2d 827 (1967), (concerning former 40-24-4, 1953 Comp., former felony murder statute).

Only procedural law may be adopted by reference. Ballew v. Denson, 63 N.M. 370, 320 P.2d 382 (1958); Middle Rio Grande Water Users Ass'n v. Middle Rio Grande Conservancy Dist., 57 N.M. 287, 258 P.2d 391 (1953); Yeo v. Tweedy, 34 N.M. 611, 286 P. 970 (1929); State v. Armstrong, 31 N.M. 220, 243 P. 333 (1924).

Procedure for enforcement of judgment lien. — Laws 1933, ch. 7 (39-4-13 to 39-4-16 NMSA 1978) does not contravene this section; the act grants an optional procedure for the enforcement of judgment liens, and in this jurisdiction procedural law may be adopted by another statute by reference. Ballew v. Denson, 63 N.M. 370, 320 P.2d 382 (1958).

Repeal or amendment by implication. — Fact that an act may amend or repeal certain provisions of other statutes by implication does not offend against this section. State ex rel. Taylor v. Mirabal, 33 N.M. 553, 273 P. 928, 62 A.L.R. 296 (1928).

The limitation in this section that "no law shall be revised or amended," etc., does not absolutely proscribe and prohibit the amendment of an act by implication, but amendment of statutes by implication, like repeal by implication, is not favored and will not be upheld in doubtful cases. In order to find an amendment by implication there must be an irreconcilable inconsistency between the preexisting law and the statute being construed; if both provisions can coexist and be given effect, the courts will not find an amendment by implication. 1963-64 Op. Att'y Gen. No. 63-71.

Clause making "inconsistent" laws inapplicable. — Former State Revenue Bond Act, Laws 1963, ch. 271 (11-10-1 to 11-10-26, 1953 Comp.), did not contravene this section by providing in 11-10-26, 1953 Comp., that all other laws inconsistent therewith should be inapplicable to the act; the court could find no preceding provisions so repugnant or inconsistent with the act that they were repealed thereby, the Bond Act being, as it provided in 11-10-24, 1953 Comp., supplemental and additional to powers conferred by other laws. State ex rel. State Park & Recreation Comm'n v. New Mexico State Auth., 76 N.M. 1, 411 P.2d 984 (1966).

Amendment of original law without reference to intermediate amendment. — Amendatory language of 1955 act, which amended Laws 1951, ch. 212, § 3 (former 54-3-3, 1953 Comp.), relating to permits and fees for food establishments, was to be considered as a part of, and existing with, the earlier statute, such that 1957 act further amending the 1951 law while making no reference to previous amendment in 1955 was to be given effect, applying also to the intermediate and disregarded 1955 amendment. 1957-58 Op. Att'y Gen. No. 57-130.

Amendment constitutional. — The amendment of Laws 1915, § 550 (77-17-13 NMSA 1978) by Laws 1919, ch. 53, providing penalty for failure to keep hides of bovine animals, complies fully with this section. State v. Knight, 34 N.M. 217, 279 P. 947 (1929).

Denial of remedy not amendment by reference. — Former 67-16-16, 1953 Comp., which enacted penalties, including denial of the mechanic's lien as a remedy, for failure of contractor to be licensed, does not violate this section as an attempt to amend the Mechanic's Lien Law by reference. Fischer v. Rakagis, 59 N.M. 463, 286 P.2d 312 (1955).

Authorization to approve bonds. — Former 21-13-14 NMSA 1978 of the Junior College Act, authorizing the attorney general to approve or disapprove bonds, was not legislation by reference and not in violation of this section. Daniels v. Watson, 75 N.M. 661, 410 P.2d 193 (1966).

Reference to manner of tax collection. — A statutory amendment (Laws 1951, ch. 218, now repealed) directing the collection of a tax levied thereby "in the manner now required by law for alcoholic beverages" is not invalid as an attempted extension of the Liquor Control Act by reference "not to a title but to a chapter number," etc. Fowler v. Corlett, 56 N.M. 430, 244 P.2d 1122 (1952).

Extension of general revenue provisions over conservancy district assessments. — Sections 73-16-15 and 73-16-17 NMSA 1978, of the Conservancy Act (Laws 1927, ch. 45), extending general provisions of revenue acts to cover conservancy district assessments, when considered with other portions of such act, were not obnoxious to provisions of this section. Tondre v. Garcia, 45 N.M. 433, 116 P.2d 584 (1941).

Enhanced sentence provisions. — No new crime was created by the combined use of 30-16-2 and former 31-18-4 NMSA 1978 in an indictment, nor was any law revised or extended by reference; 30-16-2 NMSA 1978 defines robbery with a deadly weapon, the crime of which defendant was convicted, while former 31-18-4 NMSA 1978 specified various consequences if a finding was made that the deadly weapon used in the robbery was a firearm, and served no other purpose in the indictment than to alert the defendant to possible sentencing consequences following a conviction. State v. Sanchez, 87 N.M. 140, 530 P.2d 404 (Ct. App. 1974).

Blind legislation void. — Laws 1927, ch. 182 (since repealed), making other laws apply to underground waters without designating such law, was void as in contravention of this section, since it was "blind legislation." Yeo v. Tweedy, 34 N.M. 611, 286 P. 970 (1929).

Extension of Prohibition Act by reference to title. — Laws 1923, ch. 118, §§ 1, 2 (since repealed), violated this section in that they attempted to extend provisions of National Prohibition Act by reference to its title only without setting same out in full. State v. Armstrong, 31 N.M. 220, 243 P. 333 (1924).

Attempted repeal ineffective. — Legislature's attempt in Laws 1923, ch. 148, § 1431, to repeal portion of an existing law (so much of former 72-4-9 and 72-4-10, 1953 Comp., as referred to schools) by reference to the title of the law only violated this section and was of no force and effect. 1969 Op. Att'y Gen. No. 69-15.

Effect of amendment on unchanged portions of statute. — Where a statute is amended, the portions of the amended statute which are merely copied without change are not to be considered as repealed and again enacted, but to have been the law all along, while the new parts are not to be taken as to have been the law prior to the passage of the amended statute. 1957-58 Op. Att'y Gen. No. 57-20.

Amending constitution. — Whatever legal consequences follow from the requirement that an ordinary law be set out in full must also follow where a constitutional provision is sought to be amended, and, under the established practice, is also set out in full. 1957-58 Op. Att'y Gen. No. 57-20.

Unamended portions of provision continued as law. — The first paragraph of N.M. Const., art. V, § 14, creating the highway commission, was not repealed and reenacted by the 1955 amendment thereof, which set the section out in full, underlining the changes made; thus the commission which was appointed prior to the latest amendment is still the lawful and duly appointed commission since the members thereof were appointed under a constitutional provision which has continued uninterrupted since its original enactment. 1957-58 Op. Att'y Gen. No. 57-20.

Reference to federal act as mere surplusage. — Reference to title of federal Reclamation Act in reclamation statutes (73-18-2, 73-18-12 to 73-18-14 NMSA 1978) did not violate this section, as reference was mere surplusage since the secretary of the interior was necessarily limited by the Reclamation Act in making the contract with the district, and once the contract was entered into, these statutes became an integral part thereof. Middle Rio Grande Water Users Ass'n v. Middle Rio Grande Conservancy Dist., 57 N.M. 287, 258 P.2d 391 (1953).

Measuring state tax as percentage of federal tax. — Proposed amendment to former 72-15-21, 1953 Comp., providing that resident individuals with an adjusted gross income of $10,000 or under, in lieu of personal exemptions and all other deductions, should pay a tax equal to 3% of the income tax payable to the United States under the Internal Revenue Code, would violate this section. 1953-54 Op. Att'y Gen. No. 5645 (opinion rendered prior to 1964 amendment to this section).

Comparable provisions. — Idaho Const., art. III, § 18.

Wyoming Const., art. III, § 26.

Law reviews. — For article, "The Writ of Prohibition in New Mexico," see 5 N.M. L. Rev. 91 (1974).

For survey, "The Uniform Owner-Resident Relations Act," see 6 N.M. L. Rev. 293 (1976).

For article, "New Mexico Antitrust Law," see 9 N.M.L. Rev. 339 (1979).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 73 Am. Jur. 2d Statutes § 57.

Construction and application of constitutional provision against changing purpose of bill during passage, 158 A.L.R. 421.

Power of state legislature to limit the powers of a state constitutional convention, 158 A.L.R. 512.

Effect of modification or repeal of constitutional or statutory provision adopted by reference in another provision, 168 A.L.R. 627.

Constitutional requirement that repealing or amendatory statute refer to statute repealed or amended, to repeal or amendment by implication, 5 A.L.R.2d 1270.

Simultaneous repeal and reenactment of all, or part, of legislative act, 77 A.L.R.2d 336.

82 C.J.S. Statutes § 260.

Sec. 19. [Introduction of bills.]

Time limitation on the introduction of bills at any session of the legislature shall be established by law. (As amended November 8, 1932, and November 8, 1960.)

ANNOTATIONS

Cross references. — For constitutional provision relating to the length of legislative session, see N.M. Const., art. IV, § 5.

As to adjournment of legislature, see N.M. Const., art. IV, § 14.

For limit on time within which bills may be introduced, see 2-6-1 NMSA 1978.

For computation of time, see 12-2A-7 NMSA 1978.

The 1932 amendment, which was proposed by H.J.R. 10 (Laws 1931) and adopted at the general election held on November 8, 1932, with a vote of 34,028 for and 14,739 against, amended this section, which formerly read: "No bill for the appropriation of money, except for the current expenses of the government, and no bill for the increase of compensation of any officer, or for the creation of any lucrative office, shall be introduced after the tenth day prior to the expiration of the session, as provided herein, except by unanimous consent of the house in which it is introduced. No bill shall be acted upon at any session unless introduced at that session," to read: "No bill shall be introduced at any regular session of the legislature subsequent to the forty-fifth legislative day, except the general appropriation bill, bills to provide for the current expenses of the government and such bills as may be referred to the legislature by the

governor by special message specifically setting forth the emergency or necessity requiring such legislation."

The 1960 amendment, which was proposed by S.J.R. No. 4 (Laws 1959) and adopted at the general election held on November 8, 1960, with a vote of 58,840 for and 56,532 against, amended this section to provide that the time limitation for the introduction of bills should be set by law.

"Bill". — The definition of a "bill," liberally construed, refers to that document which when passed by both houses and signed by the governor becomes an act. 1951-52 Op. Att'y Gen. No. 5336.

Challenging bill as late. — Contention that Laws 1917, ch. 111 (former 4-8-1 to 4-8-4, 1953 Comp., relating to the state boundary commission) was unconstitutional because it was introduced late and was actually a new bill for appropriation of money, though purporting to be a substitute for another bill, was not well taken in view of decision in Kelley v. Marron, 21 N.M. 239, 153 P. 262 (1915), holding that courts cannot go behind an enrolled and engrossed bill, properly authenticated and found in office of secretary of state. State ex rel. Clancy v. Hall, 23 N.M. 422, 168 P. 715 (1917). But see, authorizing inquiry into question of whether a challenged act was passed within the constitutional limitation set in N.M. Const., art. IV, § 5.

Memorials and resolutions may be introduced after 45th legislative day set by this section prior to its 1960 amendment as limitation for introduction of bills. 1951-52 Op. Att'y Gen. No. 5336.

Amendments to constitution. — The amendment of this section in 1932 merely amended the original section, and did not in any way amend by implication N.M. Const., art. XIX, § 1, providing that amendment to the constitution may be proposed in either house at any regular session thereof. 1951-52 Op. Att'y Gen. No. 5336.

Law reviews. — For article, "The Executive," see 7 Nat. Resources J. 267 (1967).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 73 Am. Jur. 2d Statutes § 54.

Injunctive relief against submission of constitutional amendment, statute, municipal charter or municipal ordinance on ground that proposed action would be unconstitutional, 19 A.L.R.2d 519.

82 C.J.S. Statutes § 22.

Sec. 20. [Enrollment, engrossment and signing of bills.]

Immediately after the passage of any bill or resolution, it shall be enrolled and engrossed, and read publicly in full in each house, and thereupon shall be signed by the presiding officers of each house in open session, and the fact of such reading and

signing shall be entered on the journal. No interlineation or erasure in a signed bill, shall be effective, unless certified thereon in express terms by the presiding officer of each house quoting the words interlined or erased, nor unless the fact of the making of such interlineation or erasure be publicly announced in each house and entered on the journal.

ANNOTATIONS

Constitutional requirements. — Where a law in the form as enacted by the legislature is enrolled and engrossed and read publicly in full in each house, and deposited with the secretary of state, constitutional requirements are met. State v. Armstrong, 31 N.M. 220, 243 P. 333 (1924).

Section requires enrolling and engrossing of resolution proposing constitutional amendment. Smith v. Lucero, 23 N.M. 411, 168 P. 709 (1917).

Authority of presiding officers. — Presiding officers of the two houses of the legislature have authority to approve interlineations and erasures so the enrolled and engrossed bill may compare exactly with the original measure in the form in which it was finally passed in both houses of the legislature, but they may not make changes in the enrolled and engrossed bill which would modify the original bill. 1951-52 Op. Att'y Gen. No. 5341.

Correction of obvious error. — Where, subsequent to passage of a certain joint resolution proposing a constitutional amendment to N.M. Const., art. VII, § 1, an error appeared in the enrolled and engrossed bill, which referred to § 2 rather than § 1, the secretary of state could correct the obvious error in the joint resolution without the additional signatures of the presiding officers of both houses; however, this opinion does not purport to establish as precedent discretionary authority in the office of the secretary of state for making changes or corrections in enrolled and engrossed legislative enactments which changes have not been previously called to the attention of the attorney general's office for a determination of the nature of the alleged errors. 1957-58 Op. Att'y Gen. No. 58-196.

Effect of time limitations. — While N.M. Const., art. IV, § 5, constitutes the time during which the legislature may exercise its legislative prerogative of enacting laws, this section does not operate to restrain the legislature from complying fully with definitely imposed nondiscretionary lawmaking duties; it should not in reason be construed to defeat the performance of mandatory incidental duties that are indispensable to be performed in order to effectuate the lawmaking power already exercised in due and proper season. Dillon v. King, 87 N.M. 79, 529 P.2d 745 (1974).

Enrolled bill doctrine. — Under "enrolled and engrossed bill" doctrine, adopted by supreme court, an enrolled and engrossed bill, properly signed and authenticated, approved by the governor and deposited with the secretary of state is conclusive as to the regularity of its enactment, and court cannot look behind it to the journals to

ascertain whether constitutional requirements have been met. Thompson v. Saunders, 52 N.M. 1, 189 P.2d 87 (1947); State ex rel. Wood v. King, 93 N.M. 715, 605 P.2d 223 (1979). See also Smith v. Lucero, 23 N.M. 411, 168 P. 709 (1917); Kelley v. Marron, 21 N.M. 239, 153 P. 262 (1915). But see, Dillon v. King, 87 N.M. 79, 529 P.2d 745 (1974), authorizing inquiry into question of whether a challenged act was passed within the constitutional limitation set in N.M. Const., art. IV, § 5.

Section inapplicable to veto. — The significance of the enrolled and engrossed bill attaches to its enactment and approval as a law, not to its veto. State ex rel. Wood v. King, 93 N.M. 715, 605 P.2d 223 (1979).

Comparable provisions. — Idaho Const., art. III, § 21.

Iowa Const., art. III, § 15.

Utah Const., art. VI, § 24.

Wyoming Const., art. III, § 28.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 73 Am. Jur. 2d Statutes §§ 65, 68, 90.

Effect of failure of officers of legislature to sign bills as required by constitutional provisions, 95 A.L.R. 278.

82 C.J.S. Statutes §§ 60, 61.

Sec. 21. [Alteration or theft of bill.]

Any person who shall, without lawful authority, materially change or alter, or make away with, any bill pending in or passed by the legislature, shall be deemed guilty of a felony and upon conviction thereof shall be punished by imprisonment in the penitentiary for not less than one year nor more than five years.

Sec. 22. [Governor's approval or veto of bills.]

Every bill passed by the legislature shall, before it becomes a law, be presented to the governor for approval. If he approves, he shall sign it, and deposit it with the secretary of state; otherwise, he shall return it to the house in which it originated, with his objections, which shall be entered at large upon the journal; and such bill shall not become a law unless thereafter approved by two-thirds of the members present and voting in each house by yea and nay vote entered upon its journal. Any bill not returned by the governor within three days, Sundays excepted, after being presented to him, shall become a law, whether signed by him or not, unless the legislature by adjournment prevent such return. Every bill presented to the governor during the last three days of the session shall be approved by him within twenty days after the adjournment and shall be by him immediately deposited with the secretary of state.

Unless so approved and signed by him such bill shall not become a law. The governor may in like manner approve or disapprove any part or parts, item or items, of any bill appropriating money, and such parts or items approved shall become a law, and such as are disapproved shall be void unless passed over his veto, as herein provided. (As amended September 15, 1953.)

ANNOTATIONS

I. GENERAL CONSIDERATION.

Cross references. — As to consideration by regular sessions of the legislature convening during even-numbered years of bills of the last previous regular session vetoed by the governor, see N.M. Const., art. IV, § 5.

For computation of time, see 12-2A-7 NMSA 1978.

The 1953 amendment, which was proposed by S.J.R. No. 13 (Laws 1953) and adopted at a special election held on September 15, 1953, with a vote of 17,787 for and 10,351 against, substituted "approved by him within twenty days after the adjournment" for "approved or disapproved by him within six days after the adjournment" in the fourth sentence of this section.

Comparable provisions. — Idaho Const., art. IV, § 10.

Iowa Const., art. III, § 16.

Montana Const., art. VI, § 10.

Utah Const., art. VII, § 8.

Wyoming Const., art. IV, § 8.

Law reviews. — For student symposium, "Constitutional Revision - The Executive Branch - Long or Short Ballot?" see 9 Nat. Resources J. 430 (1969).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 73 Am. Jur. 2d Statutes §§ 69, 70, 76, 78, 79.

Vote necessary to pass bill over veto, 2 A.L.R. 1593.

Governor disapproving bill in part or with modifications, 35 A.L.R. 600, 99 A.L.R. 1277.

Unconstitutional veto as protection against civil or criminal responsibility for act or omission in reliance thereon, 53 A.L.R. 268.

Effect of initiative and referendum clause, 62 A.L.R. 1352.

What amounts to adjournment within constitutional provision that bill shall become law if not returned by executive within specified time unless adjournment prevents its return, 64 A.L.R. 1446.

Power of executive to sign bill after adjournment or during recess of legislature, 64 A.L.R. 1468.

Sunday as included in computing time for presentation of bill, 71 A.L.R. 1363.

Effect of failure of officers of legislature to sign bills as required by constitutional amendment, 95 A.L.R. 278.

Stage at which statute passes beyond the power of the legislature to reconsider or recall, 96 A.L.R. 1309.

Validity of veto as affected by failure to give reasons for vetoing or objections to measure vetoed, 119 A.L.R. 1189.

Devolution, in absence of governor, of veto and approval powers, upon lieutenant governor or other officer, 136 A.L.R. 1053.

82 C.J.S. Statutes §§ 47 to 59.

II. GOVERNOR'S APPROVAL OR VETO POWER.

Requirements for bill. — Where a law in the form as enacted by the legislature is enrolled and engrossed, signed and read publicly in full in each house, and deposited with the secretary of state, the constitutional requirement of this section is met. State v. Armstrong, 31 N.M. 220, 243 P. 333 (1924).

Bill carrying emergency clause becomes law upon approval of governor by his signing said bill. 1951-52 Op. Att'y Gen. No. 5338.

Effect of enrolled bill. — An enrolled bill which has been signed by the speaker and president of the respective houses, as required by N.M. Const., art. IV, § 20, and approved by the governor and deposited with the secretary of state, as required by this section, is conclusive upon the courts as to the regularity of its enactment, since the signatures are a solemn declaration by the officers of a coordinate department that the bill as enrolled was enacted and approved. Kelley v. Marron, 21 N.M. 239, 153 P. 262 (1915). But see, Dillon v. King, 87 N.M. 79, 529 P.2d 745 (1974).

Calculation of final three days. — In determining the final three days, Sundays excepted, in which bills are presented to the governor, legislative days are now to be used as opposed to calendar days. 1967 Op. Att'y Gen. No. 67-45.

Calculating 20-day period following adjournment. — In computing time after adjournment for the governor to sign a bill, calendar days must be used; the day of the event is excluded. 1967 Op. Att'y Gen. No. 67-45.

Bills presented to the governor on last three days of session must be approved by him within 20 days following adjournment to become law; in measuring this period, adjournment day is excluded. 1959-60 Op. Att'y Gen. No. 59-28.

The method of computation of this time is as follows: the day of adjournment does not count, and the twentieth day does count. 1957-58 Op. Att'y Gen. No. 57-56.

Veto power strictly construed. — This power has generally been viewed as an executive encroachment on the legislative function (an exception to the doctrine of the separation of powers), and as such it must be strictly construed. 1979 Op. Att'y Gen. No. 79-13.

The provisions of this section prescribing the manner of veto are mandatory, and failure to follow the defined procedure would nullify the veto. 1979 Op. Att'y Gen. No. 79-13.

Veto procedure mandatory. — The provisions of this section prescribing the manner and time of performance of vetoes by the governor are mandatory. 1969 Op. Att'y Gen. No. 69-20.

Deviations fatal to veto. — Deviation from constitutional provisions relating to the veto of bills by the governor, in respect to manner and time of the performance of the acts prescribed, result in the veto becoming a nullity and the vetoed bills become law. 1969 Op. Att'y Gen. No. 69-20.

An attempted veto was invalidated by failure to return the bill to its house of origin within three days as required by this section. 1969 Op. Att'y Gen. No. 69-21.

Unconstitutional veto must be disregarded and bill given effect intended by the legislature. State ex rel. Sego v. Kirkpatrick, 86 N.M. 359, 524 P.2d 975 (1974).

Unnecessary technicalities should not be allowed to frustrate purpose of constitutional veto provisions. 1979 Op. Att'y Gen. No. 79-13.

Partial veto of act not appropriating money invalid. — The governor's veto of Laws 1981, ch. 39, § 129, the severability clause of the Liquor Control Act (see 60-3A-1 NMSA 1978), was unconstitutional under this section because that act does not appropriate money and the governor's power of partial veto is limited to bills appropriating money. Chronis v. State ex rel. Rodriguez, 100 N.M. 342, 670 P.2d 953 (1983).

Purpose satisfied so long as house given opportunity to consider veto. — So long as the legislative body is given the opportunity to consider the executive veto, constitutional purposes are satisfied. 1979 Op. Att'y Gen. No. 79-13.

Return of enrolled and engrossed copy not essential. — The failure of the governor to return the enrolled and engrossed copy of a senate bill to the senate with the veto message does not render the veto invalid under this section. 1979 Op. Att'y Gen. No. 79-13.

Words "the bill" or "it" include original blue jacketed copy of the bill, as well as the enrolled and engrossed copy. State ex rel. Wood v. King, 93 N.M. 715, 605 P.2d 223 (1979).

Resolutions and proposed constitutional amendments not subject to veto. — Resolutions and proposed constitutional amendments do not have to be presented to the governor for approval and are not bills. 1965 Op. Att'y Gen. No. 65-212.

Exercise of veto power requires judgment and discretion on the part of the governor and he cannot be compelled by the legislature or by this court to exercise this power or to exercise it in a particular manner. State ex rel. Sego v. Kirkpatrick, 86 N.M. 359, 524 P.2d 975 (1974).

Use of mandamus to question veto. — The manner in which the governor exercises the veto power is not beyond judicial review or control when its exercise is beyond the governor's constitutional authority, therefore, mandamus is a proper proceeding in which to question the constitutionality of vetoes or attempted vetoes. State ex rel. Sego v. Kirkpatrick, 86 N.M. 359, 524 P.2d 975 (1974).

Procedure for overriding veto. — A legislature has authority to promulgate rules governing the procedure of reconsidering a vote to override a chief executive's veto. 1969 Op. Att'y Gen. No. 69-147.

A legislature has power, absent constitutional provisions governing the subject, to decide the procedure to be used in considering a vetoed bill not acted upon before adjournment of the first session. 1969 Op. Att'y Gen. No. 69-147.

The legislature has authority to determine whether the house of origin must again vote to override the governor's veto at the next even-year session, when during the odd-year session the house of origin voted to override the veto but the other house either failed to override or failed to take any action before adjournment. 1969 Op. Att'y Gen. No. 69-147.

Certificate of two-thirds vote. — Fact that certificates of presiding officers and chief clerks of respective houses showing passage of a bill by two-thirds vote over objections of governor were not attached to enrolled and engrossed bill was immaterial. Earnest v.

Sargent, 20 N.M. 427, 150 P. 1018 (1915), overruled on other grounds, Dillon v. King, 87 N.M. 79, 529 P.2d 745 (1974).

III. BILLS APPROPRIATING MONEY.

Bill appropriating money distinguished from general appropriation. — The language found in the proviso "any bill appropriating money" is not synonymous with the phrase "general appropriation bills." State ex rel. Dickson v. Saiz, 62 N.M. 227, 308 P.2d 205 (1957).

Partial veto power broadened. — Purpose for inclusion of the terms "part or parts," "item or items" and "parts or items" in our constitution was to extend or enlarge the partial veto power thereby conferred beyond the partial veto power conferred by the constitutions of other states; however, this does not mean that there are no limitations on the partial veto of bills appropriating money. State ex rel. Sego v. Kirkpatrick, 86 N.M. 359, 524 P.2d 975 (1974).

Right of partial veto quasi-legislative. — When the governor exercises his right of partial veto he is exercising a quasi-legislative function. State ex rel. Dickson v. Saiz, 62 N.M. 227, 308 P.2d 205 (1957). See also, 1973 Op. Att'y Gen. No. 73-9.

The governor is exercising a legislative function in the use of a line-item veto. 1969 Op. Att'y Gen. No. 69-116.

Power of partial veto is the power to disapprove, a negative power to delete or destroy a part or item, and not a positive power to alter, enlarge or increase the effect of the remaining parts or items or to enact or create new legislation by selective deletions. State ex rel. Sego v. Kirkpatrick, 86 N.M. 359, 524 P.2d 975 (1974); 1981 Op. Att'y Gen. No. 81-12.

Legislature may not abridge governor's veto power by subtle drafting of conditions, limitations or restrictions upon appropriations, and the governor may not properly distort legislative appropriations or arrogate unto himself the power of making appropriations by carefully striking words, phrases or sentences from an item or part of an appropriation. State ex rel. Sego v. Kirkpatrick, 86 N.M. 359, 524 P.2d 975 (1974).

The legislature cannot by putting purpose, subject and amount inseparably together and calling it an "item" coerce the governor to approve all of the appropriation of an agency or nothing. 1969 Op. Att'y Gen. No. 69-25.

Appropriation by resolution usurpation of governor's power. — To appropriate a specific sum for a specific purpose out of any fund by legislative resolution is to deny the governor his constitutional veto power and his line item veto power over bills appropriating money and is an unconstitutional usurpation of the chief executive's constitutional powers. 1971 Op. Att'y Gen. No. 71-22.

Partial veto power not limited to language appropriating money. — The power of partial veto is not limited to language appropriating money but extends to any part of a bill of general legislation which contains incidental items of appropriation. 1981 Op. Att'y Gen. No. 81-12.

Governor may strike entire items within an appropriation act which includes both the amount of money designated and the accompanying language pursuant to this section, but if he wishes to veto either the amount of money or the accompanying language, he must veto both. 1969 Op. Att'y Gen. No. 69-25.

Distribution directions subject to veto. — The governor's power to veto "part or parts" of an appropriation bill allows him to veto specific directions as to the manner and purpose of distribution of an appropriation found in the general appropriation act so long as the appropriation in the approved portions of the act was not made dependent or contingent on the vetoed provision. 1969 Op. Att'y Gen. No. 69-25.

But governor may not defeat legislative purpose. — The legislature has the power to affix reasonable provisions, conditions or limitations upon appropriations and upon the expenditure of the funds appropriated, and the governor may not distort, frustrate or defeat the legislative purpose by a veto of proper legislative conditions, restrictions, limitations or contingencies placed upon an appropriation and permit the appropriation to stand. State ex rel. Sego v. Kirkpatrick, 86 N.M. 359, 524 P.2d 975 (1974); 1981 Op. Att'y Gen. No. 81-12.

A partial veto must be so exercised that it eliminates or destroys the whole of an item or part and does not distort the legislative intent, and in effect create legislation inconsistent with that enacted by the legislature, by the careful striking of words, phrases, clauses or sentences. 1981 Op. Att'y Gen. No. 81-12.

Test for validity of partial veto. — The test of whether a partial veto is valid requires more than a determination that legislative intent has been defeated, for indeed, that would be the result of any partial veto. Rather, the determination must be made whether the remaining language is so distorted by the veto as to create legislation inconsistent with that enacted by the legislature. 1981 Op. Att'y Gen. No. 81-12.

Sections upon which appropriation contingent not to be vetoed. — The governor cannot constitutionally veto provisos or conditions upon which the appropriation in the approved portions of the appropriation act was made dependent or contingent. 1969 Op. Att'y Gen. No. 69-25.

Since under Section 6 of House Bill 300 (general appropriations act), the entire appropriations act is made contingent upon the definitions contained in Section 1, upon Section 5 (repealing a previous appropriation) and upon Section 6 (the contingency clause), the governor could not line item veto Sections 1, 5 or 6 in whole or in part without vetoing all of House Bill 300. 1970 Op. Att'y Gen. No. 70-18.

Act not subject to partial veto. — As laws 1966, ch. 65 (67-12-1 NMSA 1978 et seq.), the Highway Beautification Act, is neither an appropriations bill nor a bill appropriating money, it does not qualify as one of those types of measures upon which the governor can exercise his partial veto power, and the governor did not act within his constitutional authority in attempting to veto portions thereof. 1966 Op. Att'y Gen. No. 66-133.

Reduction of item invalid. — The attempted reduction by the governor of any appropriation, where that result was not full disapproval of such an item, is ineffective and a nullity. 1953-54 Op. Att'y Gen. No. 5738.

Effect of invalid veto attempt. — A legislative enactment is not invalidated by an invalid attempt to partially veto it; rather, the entire bill becomes law. 1966 Op. Att'y Gen. No. 66-133.

Act not nullified by partial veto. — Where governor exercised partial veto as to portion of Liquor Control Act, Laws 1939, ch. 236 (former 60-3-1 NMSA 1978 et seq.) in order to prohibit Sunday sales, such partial veto did not nullify the whole act. State ex rel. Dickson v. Saiz, 62 N.M. 227, 308 P.2d 205 (1957).

Effect of line-item veto on appropriation. — When the governor line-item vetoed one item for $22,400 in the appropriation for the labor and industrial commission (now the employment services division of the human services department) the only reasonable legislative intent discernible was that the commission then had $22,400 of unearmarked funds which could be used for the general purposes of the agency. 1969 Op. Att'y Gen. No. 69-116.

The labor and industrial commission (now the employment services division of the human services department) could spend any of the unallocated $22,400 found in its appropriation after the governor had vetoed a line-item earmarking this amount for any purpose within its statutory powers. 1969 Op. Att'y Gen. No. 69-58.

Various line item vetoes of General Appropriation Act of 1988 upheld as proper and not gubernatorial enactment or creation of new legislation by selective line item veto decisions. State ex rel. Coll v. Carruthers, 107 N.M. 439, 759 P.2d 1380 (1988).

Legislative intent to be considered. — Legislative intent should be considered in examining an appropriation law after the governor has exercised his line-item veto power. 1969 Op. Att'y Gen. No. 69-116.

Total appropriation unchanged. — If the governor were to veto a line item for "salaries" in a state agency's appropriation, vetoing both amount and purpose, the total amount appropriated to the agency would not change, but the agency would be left without an appropriation for any salaries. 1969 Op. Att'y Gen. No. 69-25.

Return of partially vetoed bill to legislature not required. — Nothing in the language of the last sentence calls upon the governor, once he has acted upon a measure

submitted to him, to return the same to the legislature if such action takes place prior to adjournment; he may do so, if he so desires, and in such event it is only the part approved or disapproved which he is called upon to resubmit to the legislature, as the parts of the bill approved become a law without further action upon the part of the legislature. State ex rel. Dickson v. Saiz, 62 N.M. 227, 308 P.2d 205 (1957).

But should be done. — A bill, whether wholly or partially vetoed, during the legislative session which reached the governor during any period prior to the last three calendar days of the legislative session should be physically returned to the house originating the bill accompanied by the governor's veto message. 1959-60 Op. Att'y Gen. No. 59-28 (characterizing contrary language in State ex rel. Dickson v. Saiz, 62 N.M. 227, 308 P.2d 205 (1957), as a "permissive procedure.").

Provisions governing expenditures. — Although only the legislature can make appropriations, and the veto power can only be exercised as provided in the constitution, a distinction is recognized between appropriations and expenditures and there is no inhibition in the constitution to inclusion within the general appropriation law of provisions governing how the amounts appropriated are to be expended. State ex rel. Holmes v. State Bd. of Fin., 69 N.M. 430, 367 P.2d 925 (1961).

Control of expenditures by executive. — The legislature may constitutionally provide in the general appropriation bill for the executive to control the expenditure of amounts appropriated. State ex rel. Holmes v. State Bd. of Fin., 69 N.M. 430, 367 P.2d 925 (1961).

Conditions imposed on purchase of equipment. — Legislation imposing conditions on the purchase of automation and data processing equipment by district attorneys was not an unreasonable injection of the legislature into the executive managerial function, and the governor's veto of such legislation was invalid. State ex rel. Coll v. Carruthers, 107 N.M. 439, 759 P.2d 1380 (1988).

Sec. 23. [Effective date of law; emergency acts.]

Laws shall go into effect ninety days after the adjournment of the legislature enacting them, except general appropriation laws, which shall go into effect immediately upon their passage and approval. Any act necessary for the preservation of the public peace, health or safety, shall take effect immediately upon its passage and approval, provided it be passed by two-thirds vote of each house and such necessity be stated in a separate section.

ANNOTATIONS

Cross references. — For computation of time, see 12-2A-7 NMSA 1978.

Limitation set on shorter but not longer periods. — This section places limitation upon the right of the legislature to provided a shorter period than 90 days within which

laws shall become effective, but does not preclude it from fixing a longer period. State ex rel. New Mexico State Bank v. Montoya, 22 N.M. 215, 160 P. 359 (1916); 1963-64 Op. Att'y Gen. No. 63-54.

Pursuant to this provision the legislature may provide that legislative enactments should go into effect more than 90 days after their enactment, but the legislature cannot make nonemergency legislation effective less than 90 days after enactment. R.H. Fulton, Inc. v. New Mexico Bureau of Revenue, 85 N.M. 583, 514 P.2d 1079 (Ct. App. 1973).

Unauthorized effective date provision null. — The April 1 effective date provision of Laws 1964 (1st S.S.), ch. 17 (17-3-1 NMSA 1978) was a nullity since the legislature adjourned on February 25, and since the act did not pass as an emergency measure, the legislature was proscribed by the constitution from providing that the act would go into effect sooner than 90 days after adjournment. 1963-64 Op. Att'y Gen. No. 64-91.

"Passage of this act". — In Laws 1969, ch. 144, § 66, a temporary provision calling for the commissioner of revenue (now the director of the revenue division of the taxation and revenue department) to provide a system for registration of certain contracts entered into prior to "passage of this act," the quoted phrase is used in its technical sense to mean July 1, 1969, its effective date; to refer to any prior date would violate this section. R.H. Fulton, Inc. v. New Mexico Bureau of Revenue, 85 N.M. 583, 514 P.2d 1079 (Ct. App. 1973).

January effective date. — Laws 1915, ch. 57 (since repealed), by reason of its proviso in § 24 thereof, went into effect on January 1, 1917, though that date was more than the constitutional 90 days after adjournment of legislature. 1915-16 Op. Att'y Gen. 174.

1957 session laws. — The effective date of laws passed by the 1957 session of the legislature which did not bear an emergency clause was June 7, 1957. 1957-58 Op. Att'y Gen. No. 57-50.

Computing 90-day period. — In computing the 90-day time period under this section, the adjournment day is excluded, and the statute begins to operate on the last day of the 90. 1963-64 Op. Att'y Gen. No. 64-91.

In calculating effective date of a new act, the day of the event is to be excluded and the last day of the number constituting the specific period is included, so that statute becomes effective at first moment of applicable day after the event, such as first moment of ninetieth day after adjournment of legislature. Garcia v. J.C. Penney Co., 52 N.M. 410, 200 P.2d 372 (1948).

The rule now supported by nearly all the modern cases is that time is computed by excluding the day, or the day of the event, from which time is to be computed and including the last day of the number constituting the specific period. 1957-58 Op. Att'y Gen. No. 57-50.

"Two-thirds vote" explained. — The provision in regard to the "two-thirds vote of the house" necessary to adopt an emergency clause does not mean two-thirds of all members elected, but, a quorum being present and acting, a concurrence of two-thirds of such members is sufficient. 1923-24 Op. Att'y Gen. 22.

Bill carrying emergency clause becomes law upon approval of governor by his signing said bill. 1951-52 Op. Att'y Gen. No. 5338.

Legislative declaration of emergency contained in act is final, and is conclusive and binding upon the courts. Hutchens v. Jackson, 37 N.M. 325, 23 P.2d 355 (1933).

Effect of emergency clause on referability. — The question of the referable character of a given act is not determined in one way or the other by its designation as an emergency measure. Flynn, Welch & Yates, Inc. v. State Tax Comm'n, 38 N.M. 131, 28 P.2d 889 (1934); Todd v. Tierney, 38 N.M. 15, 27 P.2d 991 (1933).

Comparable provisions. — Idaho Const., art. III, § 22.

Iowa Const., amendment 40.

Utah Const., art. VI, § 25.

Law reviews. — For article, "Attachment in New Mexico - Part II," see 2 Nat. Resources J. 75 (1962).

For comment, "Land Use Planning - New Mexico's Green Belt Law," see 8 Nat. Resources J. 190 (1968).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 72 Am. Jur. 2d Statutes §§ 360, 361, 363 to 373.

Conclusiveness of legislative declaration of emergency requiring statute to take effect immediately, 7 A.L.R. 519, 110 A.L.R. 1435.

Date or event contemplated by term "passage," "enactment," "effective date," etc., employed by statute in fixing time of facts or conditions within its operation, 132 A.L.R. 1048.

Failure of governor to sign bill until after the date at which it is to become effective, 146 A.L.R. 693.

Stock of private corporation, effective date of statute prohibiting municipalities from acquiring or subscribing to, 152 A.L.R. 499.

Removal or suspension of constitutional limitation as affecting effective date of statute previously enacted, 171 A.L.R. 1079.

82 C.J.S. Statutes §§ 399 to 411.

Sec. 24. [Local or special laws.]

The legislature shall not pass local or special laws in any of the following cases: regulating county, precinct or district affairs; the jurisdiction and duties of justices of the peace, police magistrates and constables; the practice in courts of justice; the rate of interest on money; the punishment for crimes and misdemeanors; the assessment or collection of taxes or extending the time of collection thereof; the summoning and impaneling of jurors; the management of public schools; the sale or mortgaging of real estate of minors or others under disability; the change of venue in civil or criminal cases. Nor in the following cases: granting divorces; laying out, opening, altering or working roads or highways, except as to state roads extending into more than one county, and military roads; vacating roads, town plats, streets, alleys or public grounds; locating or changing county seats, or changing county lines, except in creating new counties; incorporating cities, towns or villages, or changing or amending the charter of any city, town or village; the opening or conducting of any election or designating the place of voting; declaring any person of age; chartering or licensing ferries, toll bridges, toll roads, banks, insurance companies or loan and trust companies; remitting fines, penalties, forfeitures or taxes; or refunding money paid into the state treasury, or relinquishing, extending or extinguishing, in whole or in part, any indebtedness or liability of any person or corporation, to the state or any municipality therein; creating, increasing or decreasing fees, percentages or allowances of public officers; changing the laws of descent; granting to any corporation, association or individual the right to lay down railroad tracks or any special or exclusive privilege, immunity or franchise, or amending existing charters for such purpose; changing the rules of evidence in any trial or inquiry; the limitation of actions; giving effect to any informal or invalid deed, will or other instrument; exempting property from taxation; restoring to citizenship any person convicted of an infamous crime; the adoption or legitimizing of children; changing the name of persons or places; and the creation, extension or impairment of liens. In every other case where a general law can be made applicable, no special law shall be enacted.

ANNOTATIONS

I. GENERAL CONSIDERATION.

"General law" defined. — A "general law" is one that relates to a subject of a general nature, or that affects all the people of the state, or all of a particular class. State v. Atchison, T. & S.F. Ry., 20 N.M. 562, 151 P. 305 (1915). See also, 1971 Op. Att'y Gen. No. 71-74.

If a statute is general in its application to a particular class of persons or things and to all of the class within like circumstances, it is a general law. City of Raton v. Sproule, 78 N.M. 138, 429 P.2d 336 (1967).

To be a "general law," it is only necessary that the law be framed in general terms and operate on all objects of legislation distinguished by a reasonable classification. It must be general in its application to a particular class and all of the classes within like circumstances. Davy v. McNeill, 31 N.M. 7, 240 P. 482 (1925).

A law is general in nature if the subject of the statute may apply to, and affect the people of, every political subdivision of the state. Keiderling v. Sanchez, 91 N.M. 198, 572 P.2d 545 (1977).

Meaning of "special law". — A "special law" is one made for individual cases, or for less than a class of persons, or subjects, requiring laws appropriate to peculiar conditions or circumstances. State v. Atchison, T. & S.F. Ry., 20 N.M. 562, 151 P. 305 (1915). See also, 1971 Op. Att'y Gen. No. 71-74 and 1965 Op. Att'y Gen. No. 65-21.

A "special" law is a law relating to particular persons or things within a larger class. 1971 Op. Att'y Gen. No. 71-74.

A special statute is one that relates to particular persons or things of a class, or is made for individual cases, or for less than a class of persons or things requiring laws appropriate to its peculiar condition and circumstances. City of Raton v. Sproule, 78 N.M. 138, 429 P.2d 336 (1967).

A special law is generally defined as legislation written in terms which makes it applicable only to named individuals or determinative situations. Keiderling v. Sanchez, 91 N.M. 198, 572 P.2d 545 (1977); Battaglini v. Town of Red River, 100 N.M. 287, 669 P.2d 1082 (1983).

What special laws proscribed. — It is only local or special laws relating to enumerated subjects, and those to which a general law can be made applicable, that are proscribed by this section. Hutcheson v. Atherton, 44 N.M. 144, 99 P.2d 462 (1940).

Special laws concerning localities. — Prohibition in this section against passage of local or special laws regulating county, precinct and district affairs has reference to such affairs as concern localities in their governmental or corporate capacity. State ex rel. Interstate Stream Comm'n v. Reynolds, 71 N.M. 389, 378 P.2d 622 (1963).

Though a county is created and holds title to its property as a state instrumentality, legislative control over such property cannot be exercised by local or special law. State ex rel. Dow v. Graham, 33 N.M. 504, 270 P. 897 (1928).

Special laws permissible where general law cannot be made. — When a general law cannot be made applicable, but a law is required, special laws are permissible. Albuquerque Metropolitan Arroyo Flood Control Auth. v. Swinburne, 74 N.M. 487, 394 P.2d 998 (1964).

The constitution does not forbid special laws; it states that no special law shall be enacted where a general law can be made applicable. 1971 Op. Att'y Gen. No. 71-74.

There is nothing in the constitution which would invalidate a legislative act merely because it is special in character provided a local situation exists which under particular facts makes a general law inapplicable. Albuquerque Metropolitan Arroyo Flood Control Auth. v. Swinburne, 74 N.M. 487, 394 P.2d 998 (1964).

This section does not exclude special legislation when a law is required and general legislation cannot apply. Thompson v. McKinley County, 112 N.M. 425, 816 P.2d 494 (1991).

Reasonable classification permissible. — Neither the guarantee of equal protection of the laws nor the prohibition against local or special laws denies to the legislature the right to classify along reasonable lines. 969 Op. Att'y Gen. No. 69-8.

Some reasonable basis for the creation of a special class affected by a law must exist before a special law is constitutional. 1967 Op. Att'y Gen. No. 67-48.

What classification authorized. — Statutory or constitutional provisions against special legislation on a subject do not prevent legislature from dividing legislation into classes and applying different rules as to each. But classification must be based on substantial distinctions, and not be arbitrary, and must apply to every member of the class or every subject under similar conditions, embracing all and excluding none whose condition and circumstances render legislation necessary or appropriate to them as a class. State v. Atchison, T. & S.F. Ry., 20 N.M. 562, 151 P. 305 (1915).

Weight given legislature's classification. — Legislative voice upon subject of classification for purposes of legislation is supreme so long as there is to be found any reasonable basis for the distinction employed; fact that it appears unreasonable to the courts is not decisive. Hutcheson v. Atherton, 44 N.M. 144, 99 P.2d 462 (1940).

Correspondence with equal protection clause. — There is a close correspondence in meaning and purpose between the principles underlying the equal protection clauses of the state and federal constitutions and the general versus special law provisions of the Springer Act, 48 U.S.C. § 1471 and of this section. Board of Trustees v. Montano, 82 N.M. 340, 481 P.2d 702 (1971).

Comparable provisions. — Idaho Const., art. III, § 19.

Iowa Const., art. III, § 30.

Montana Const., art. V, § 12.

Utah Const., art. VI, § 26.

Wyoming Const., art. III, § 27.

Law reviews. — For article, "Medical Malpractice Legislation in New Mexico," see 7 N.M. L. Rev. 5 (1976-77).

For article, "Indian Sovereignty and the Tribal Right to Charter a Municipality for Non-Indians: A New Perspective for Jurisdiction on Indian Land," see 7 N.M. L. Rev. 153 (1977).

For note, "Annexation of Unincorporated Territory in New Mexico," see 6 Nat. Resources J. 83 (1966).

For survey, "The Statute of Limitations in Medical Malpractice Actions," see 6 N.M. L. Rev. 271 (1976).

For comment, "The Use of an Information Following the Return of a Grand Jury No Bill: State v. Joe Nestor Chavez," see 10 N.M.L. Rev. 217 (1979-80).

For article, "Separation of Powers and the Judicial Rule-Making Power in New Mexico: The Need for Prudential Restraints," see 15 N.M.L. Rev. 407 (1985).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 73 Am. Jur. 2d Statutes §§ 4 to 10, 32.

Special legislation as affected by distinction between political and nonpolitical nature, 50 A.L.R. 1163.

Statute regulating banks and trust companies as special or class legislation, or as denying the equal protection of the laws, 111 A.L.R. 140.

Construction and application of constitutional provisions against special or local laws regulating practice in courts of justice, 134 A.L.R. 365.

Workmen's Compensation Act as in violation of constitutional provision prohibiting special or local laws regulating practice in courts of justice, 135 A.L.R. 383.

Moratorium statute as special legislation, 137 A.L.R. 1380, 147 A.L.R. 1311.

Constitutional provision prohibiting local or special legislation as applied to statutes relating to juries, 155 A.L.R. 789.

Constitutionality of statute appropriating money to reimburse public officer or employee for money paid or liability incurred by him in consequence of breach of duty, 155 A.L.R. 1438.

Validity of contract by officer with public for rendition of new or special services to be paid for in addition to regular compensation, 159 A.L.R. 606.

What constitutes moral obligation justifying appropriation of public moneys for benefit of an individual, 172 A.L.R. 1407.

Constitutional exemption from taxation as subject to legislative regulation respecting conditions of its assertion, 4 A.L.R.2d 744.

Validity and construction, as to claim alleging design defects, or statute imposing time limitations upon action against architect, 93 A.L.R.3d 1242.

Validity of statutory classifications based on population - jury selection statutes, 97 A.L.R.3d 434.

Validity of statutory classifications based on population - zoning, building, and land use statutes, 98 A.L.R.3d 679.

Validity of statutory classifications based on population - intoxicating liquor statutes, 100 A.L.R.3d 850.

82 C.J.S. Statutes §§ 166, 168.

II. VALID LEGISLATION.

Repeat drug trafficking offenses. — Section 30-31-20B(2) NMSA 1978 applies to all second and subsequent drug trafficking offenses; it does not violate the prohibition against special laws of this section. State v. Bejar, 104 N.M. 138, 717 P.2d 591 (Ct. App. 1985).

Juvenile detention homes in first class counties. — Statute authorizing first class counties to establish and equip juvenile detention homes was not, by reason of its limitation to first class counties, local or special law. Hutcheson v. Atherton, 44 N.M. 144, 99 P.2d 462 (1940).

Appropriation for county bridge. — An appropriation to aid in the construction of a county wagon bridge over the Pecos river is not a special act regulating county affairs and is not prohibited by this section. 1912-13 Op. Att'y Gen. 159.

School district consolidation. — Subsection B of 22-4-3 NMSA 1978 does not contravene the prohibitions imposed by this section, as the statute has applicability to any and all school districts which come within the classification created thereby, the reasons for the classification of school districts are substantial and the classification is clearly reasonable. State ex rel. Apodaca v. New Mexico State Bd. of Educ., 82 N.M. 558, 484 P.2d 1268 (1971).

Community land grants. — In view of the difference in the nature and origin of different community land grants, the long legislative history of enactments relating to control or management of the lands of specific grants, the fact that there is some

discretion in the legislature to determine in which cases special laws should be passed, and in view of the special presumptions indulged in favor of the validity of legislation, the prohibitions against special legislation are not applicable to enactments relating to the governing or managing bodies of specific community land grants or to the manner in which these bodies exercise their powers of control, management and disposition over grant lands. Board of Trustees v. Montano, 82 N.M. 340, 481 P.2d 702 (1971).

Irrigation districts. — Laws 1919, ch. 41 (73-9-1 NMSA 1978 et seq.), relating to irrigation districts, is a general law. Davy v. McNeill, 31 N.M. 7, 240 P. 482 (1925).

Funds for irrigation reservoirs under federal trust grant. — Laws 1961, ch. 181 to 183, appropriating funds for purpose of carrying out terms of a federal trust grant for the establishment of reservoirs for irrigation purposes do not violate this section; in carrying out the purposes of the trust the passage of a general law would be virtually impossible. State ex rel. Interstate Stream Comm'n v. Reynolds, 71 N.M. 389, 378 P.2d 622 (1963).

Arroyo Flood Control Act. — The Arroyo Flood Control Act (72-16-1 NMSA 1978 et seq.) does not violate this section. Albuquerque Metropolitan Arroyo Flood Control Auth. v. Swinburne, 74 N.M. 487, 394 P.2d 998 (1964).

Former Conservancy Act. — The Conservancy Act (Laws 1923, ch. 140, now repealed) is a general law within the purview of this section. In re Proposed Middle Rio Grande Conservancy Dist., 31 N.M. 188, 242 P. 683 (1925).

Prescribing park locations. — Although Laws 1971, ch. 311, a temporary provision containing an appropriation to the state park and recreation commission (now the state parks division of the natural resources department) named specific locations where parks should be constructed, all of which were within the city of Albuquerque or Bernalillo county, the courts' reluctance to find legislative enactments unconstitutional or to "second-guess" the legislature on the need for a special law would probably result in a holding that this section is constitutional, even though it is of very narrow special interest and effect. 1971 Op. Att'y Gen. No. 71-74.

Qualifications for magistrates. — The requirement that magistrates in magistrate districts having a population of 100,000 persons or more be lawyers is a reasonable legislative classification and does not violate N.M. Const., art. II, § 18 or this section. 1969 Op. Att'y Gen. No. 69-8.

Intoxicating liquors. — Laws 1919, ch. 151 (later repealed), relating to intoxicating liquors, was not a special law within prohibition of this section. State v. Foster, 28 N.M. 273, 212 P. 454 (1922).

Larceny of livestock. — Portion of larceny statute (30-16-1 NMSA 1978) making it a felony to steal livestock regardless of the value thereof applies to all persons who steal livestock in this state and does not constitute special legislation contrary to this section. State v. Pacheco, 81 N.M. 97, 463 P.2d 521 (Ct. App. 1969).

Mishandling of certain animals. — Since no one was excluded from operation of Laws 1901, ch. 23, § 4, (40-4-32, 1953 Comp.), providing penalty for mishandling certain animals, it did not violate this section. State v. Brooken, 19 N.M. 404, 143 P. 479, 1915B L.R.A 213 (1914).

Tax for construction of road. — This section does not prohibit enactment of special law levying tax for construction of state road, the assessment and collection being governed by general law. Borrowdale v. Board of County Comm'rs, 23 N.M. 1, 163 P. 721, 1917E L.R.A. 456 (1915).

Tax levies for schools. — Laws 1919, ch. 83 (since repealed), relating to tax levies for schools, was not a local and special law violating this section. McKinley County Bd. of Educ. v. State Tax Comm'n, 28 N.M. 221, 210 P. 565 (1922).

Voluntary reappraisal program. — Laws 1966, ch. 26 (former 72-2-21.1, 1953 Comp. et seq., relating to reappraisal of property) did not violate this section, as the act applied equally to all counties and to all real property within the respective counties, and the fact that participation by a county was optional and that certain incentives were offered to induce participation did not render it special legislation within the meaning of the constitutional prohibition. 1968 Op. Att'y Gen. No. 68-13.

Residency requirements for divorce. — Establishment of different residency requirements for jurisdiction in divorce cases involving the military than for the population in general is not violative of this section as the requirements have a uniform operation throughout the state. Crownover v. Crownover, 58 N.M. 597, 274 P.2d 127 (1954).

Highway construction. — Construction of a Y to become part of a main trunk highway traversing the entire state was not violation of this section. Gallegos v. Conroy, 38 N.M. 154, 29 P.2d 334 (1934).

Laws 1915, ch. 23, creating a designated route for a state highway extending into more than one county, did not violate this section, even though provision was made for working the road in one county only. Borrowdale v. Board of County Comm'rs, 23 N.M. 1, 163 P. 721, 1917E L.R.A 456 (1915).

Creation of county and authorization of bond use. — Laws 1921, ch. 48 (4-11-1 NMSA 1978 et seq.), creating a county and providing for bonds in aid thereof, and authorizing use of bonds for courthouse and jail purposes without submission to vote, was not special legislation. Martinez v. Gallegos, 28 N.M. 170, 210 P. 575 (1922).

Annexation. — Sections 4-33-1 to 4-33-7 NMSA 1978, relating to annexation with or without a contest, do not violate this section. Youree v. Ellis, 58 N.M. 30, 265 P.2d 354 (1954).

Statute (4-33-1 to 4-33-7 NMSA 1978) providing for change of county lines and boundaries and annexation of portion of county by another is available to the inhabitants of any area in state where prescribed conditions obtain and is therefore a general and not a special law. Crosthwait v. White, 55 N.M. 71, 226 P.2d 477 (1951).

Age of Majority Act. — The Age of Majority Act (28-6-1 NMSA 1978) does not contravene this section because it applies to and affects alike, all persons and things of the same class. 1971 Op. Att'y Gen. No. 71-117.

Former Public Moneys Bill. — The "Public Moneys Bill" (Laws 1915, ch. 57, § 12, amended by Laws 1917, ch. 70, § 2, both since repealed) was not violative of this section, but was entirely general in its character, operating in every county throughout the state with like effect. State ex rel. Farmers' & Stockmen's Bank v. Romero, 24 N.M. 649, 175 P. 771 (1918).

Limitations on suit against builders. — Section 37-1-27 NMSA 1978, which limits the time in which actions may be brought against builders, does not violate guarantee of equal protection and is not special legislation under this section, since there is a rational basis for distinguishing between those covered by the statute and owners and tenants (both of whom maintain a greater degree of control over premises) and materialmen (who use more standardized goods). Howell v. Burk, 90 N.M. 688, 568 P.2d 214 (Ct. App.), cert. denied, 91 N.M. 3, 569 P.2d 413 (1977).

Limitation on appeal of tax judgment. — Laws 1921, ch. 133, § 436 (since repealed), limiting time for appeal from tax judgment, did not violate this section. Grant v. State, 33 N.M. 633, 275 P. 95 (1929).

Watercourse name change. — There is nothing in this section to prevent the adoption of legislation to change the name of a watercourse from Whiskey Creek to Rio de Arenas. 1912-13 Op. Att'y Gen. 32.

Lien priorities. — Statutes elevating special assessment liens to parity with liens for general taxes did not violate constitutional provision against the enactment of special or local laws. Waltom v. City of Portales, 42 N.M. 433, 81 P.2d 58 (1938).

Suits against municipalities. — Prohibition against special legislation does not apply to 37-1-24 NMSA 1978, relating to suits against cities, towns and villages, since the statute is framed in general terms and operates on all causes of action distinguished by a reasonable classification. Hoover v. City of Albuquerque, 58 N.M. 250, 270 P.2d 386 (1954).

Moral claims against state. — Moral claims against the state can be recognized only by the legislature; it can, upon proper recommendation of the governor, grant relief to one injured while in the employ of the state. 1923-24 Op. Att'y Gen. 143.

State Bar Act. — State Bar Act (former 36-2-2 NMSA 1978 et seq.) was not void as special legislation, special taxation or relinquishment of indebtedness to state or municipality. In re Gibson, 35 N.M. 550, 4 P.2d 643 (1931).

Grandfather clause in licensing act. — Provisions of former Real Estate Broker's License Act (Laws 1951, ch. 224, now repealed), requiring real estate board to issue a broker's license to all persons who possessed a license under the prior act without regard to whether or not such persons were competent to act as such, while at the same time requiring an examination of all other persons, did not contravene this section. State v. Spears, 57 N.M. 400, 259 P.2d 356, 39 A.L.R.2d 595 (1953).

Special Hospital District Act. — The Special Hospital District Act does not unconstitutionally delegate legislative authority. State ex rel. Angel Fire Home & Land Owners Ass'n, Inc. v. South Central Colfax County Special Hosp. Dist., 110 N.M. 496, 797 P.2d 285 (Ct. App. 1990).

III. INVALID SPECIAL LEGISLATION.

Laws abolishing counties. — The legislature would be prohibited from passing a special law that would in effect or specifically abolish a county. When two or more counties consolidate under a general statute, however, they effectively are abolished, and a new entity would emerge. 1987 Op. Att'y Gen. No. 87-55.

Community ditches in particular counties. — Sections 73-3-1 NMSA 1978 et seq., relating to community ditches and made applicable only to certain counties, were invalid because in conflict with constitutional provision against local or special laws. 1915-16 Op. Att'y Gen. 359.

Discrimination between water right holders. — To provide legislatively for carriage loss allowance only to those with water rights within artesian conservancy districts unconstitutionally discriminates against those with water rights in areas outside of artesian districts, and is precisely the type of legislation which this section was designed to prevent. 1971 Op. Att'y Gen. No. 71-23.

Establishing highway in single county. — Laws 1921, ch. 77, establishing a state highway wholly within one county, violated this section. De Graftenreid v. Strong, 28 N.M. 91, 206 P. 694 (1922).

Changing county lines. — A new county consisting of all territory included in an existing county and portions of another cannot be created by statute, which would be a local or special law, for the result is to change county lines and not to create a new county. 1937-38 Op. Att'y Gen. 51.

Statute attempting to abolish Catron county and to distribute its territory between an existing county and a county to be created violated provision of this section prohibiting

passage of local or special laws changing county lines, except in creating new counties. State ex rel. Dow v. Graham, 33 N.M. 504, 270 P. 897 (1928).

Preferential placement on ballot. — Listing the incumbents first on the primary election ballot and requiring all other candidate positions to be determined by lot is special legislation violative of this section. 1975 Op. Att'y Gen. No. 75-13.

Reimbursement to municipal utilities. — The provisions of Laws 1959, ch. 289, attempting to provide reimbursement of relocation costs for municipally-owned utilities retrospectively to March 29, 1957, were in direct conflict with the section. State ex rel. City of Albuquerque v. Lavender, 69 N.M. 220, 365 P.2d 652 (1961).

Amendment of court rule. — Laws 1965, ch. 132, attempting to amend Rule 41(e), N.M.R. Civ. P. (see now Rule 1-041 E NMRA), to provide for dismissal of actions not brought to conclusion within three years infringed on court's duties and was also void under this section and N.M. Const., art. IV, § 34. Southwest Underwriters v. Montoya, 80 N.M. 107, 452 P.2d 176 (1969).

Payment of particular account. — Passage of a special bill to provide for payment from public funds of an account for supplies sold to the state in good faith but in violation of the State Purchasing Act would probably violate this section, which prohibits enactment of special laws where general law can be made applicable. 1965 Op. Att'y Gen. No. 65-21.

Consent to particular negligence suit. — Laws 1949, ch. 55, granting consent by state to be sued for personal injuries suffered by four minors because of negligence on part of state penitentiary employees, was unconstitutional as a special law inasmuch as a general law could have been made applicable. Vigil v. State, 56 N.M. 411, 244 P.2d 1110 (1952).

Laws 1947, ch. 162, allowing a particular person to sue the state for injuries resulting from its negligence, was a special law; since a general law could have been enacted, the act in question was void. Lucero v. New Mexico State Hwy. Dep't., 55 N.M. 157, 228 P.2d 945 (1951).

Employers mutual company. — Under existing New Mexico case law, the legislation creating the employers mutual company appears to be an unconstitutional special law chartering or licensing an insurance company. Because the company is intended to be operated as a private entity, it is not clear that the exemption from the prohibition against special laws created by other states' courts for public corporations would save the legislation. 1990 Op. Att'y Gen. No. 90-25.

Sec. 25. [Validating unauthorized official acts; fines against officers, etc.]

No law shall be enacted legalizing the unauthorized or invalid act of any officer, remitting any fine, penalty or judgment against any officer or validating any illegal use of public funds.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 73 Am. Jur. 2d Statutes § 50.

Private utility, use of municipal funds, credit or power of taxation to restore or repair, 13 A.L.R. 313.

Constitutionality of statutory plan for financing or refinancing smaller political units by larger political unit, 106 A.L.R. 608.

Encouragement or promotion of industry not in nature of public utility, carried on by private enterprise, as public purpose for which tax may be imposed or public money appropriated, 112 A.L.R. 571.

Constitutionality of appropriation of public funds for benefit of widow or other relative of deceased public officer or employee, 121 A.L.R. 1317.

82 C.J.S. Statutes § 211.

Sec. 26. [Grant of franchise or privilege.]

The legislature shall not grant to any corporation or person, any rights, franchises, privileges, immunities or exemptions, which shall not, upon the same terms and under like conditions, inure equally to all persons or corporations; no exclusive right, franchise, privilege or immunity shall be granted by the legislature or any municipality in this state.

ANNOTATIONS

Purpose. — This provision appears to be part of the determination to prevent unequal and partial legislation or action on the part of government, favoring certain groups or individuals. 1970 Op. Att'y Gen. No. 70-53.

Construction. — This section forbids the granting to any corporation or person of any rights, franchises, privileges, immunities or exemptions which shall not inure equally to all such corporations or persons. State ex rel. Interstate Stream Comm'n v. Reynolds, 71 N.M. 389, 378 P.2d 622 (1963).

Beverage products franchise. — Contract giving a company the exclusive right to sell its beverage products on city premises is permissible under this section. 2000 Op. Att'y Gen. No. 00-04.

Franchises upheld as industry regulation. — There is considerable legislation which may in practice result in an exclusive grant or license being granted by municipalities or executive agencies of the state (e.g., public utility franchises, state park concessions, motor carrier certificates, licenses to conduct parimutual horse racing); generally, these franchises or licenses are upheld and construed as not violating constitutional provisions against the granting of exclusive privileges or franchises on the basis that the public interest is served by the regulation of the industry and that all citizens are afforded an equal opportunity to receive the franchise. 1970 Op. Att'y Gen. No. 70-53.

Award of competitive franchise reserved. — A municipality, as a matter of law, retains the right to grant to any privately operated public utility corporation a franchise to engage in direct competition with any other such corporation operating pursuant to franchise previously granted. 1957-58 Op. Att'y Gen. No. 58-236.

Occupancy of palace by historical society as permissive license. — Since statehood, occupancy by the New Mexico historical society of a portion of the palace of the governors in Santa Fe has been in the nature of a tenancy or permissive license and is revocable at the discretion of the board of directors of the museum of New Mexico (now replaced by the museum division of the educational finance and cultural affairs department) since no special right could be properly invested in a private corporation by law to entitle it to enjoy permanent occupancy of a public building under the control of the state. 1963-64 Op. Att'y Gen. No. 64-41.

Garbage disposal franchise. — Constitutional guaranties against the granting of exclusive privileges to any person or corporation do 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. Gomez v. City of Las Vegas, 61 N.M. 27, 293 P.2d 984 (1956).

Car rental franchise at municipal airport. — Some doubt exists as to the constitutionality of a municipality granting an exclusive franchise or concession for a car rental at an airport funded with local bond money and federal funds; but the courts could uphold these concessions on the theory that the airport is a proprietary function and that the exclusive concession is a managerial prerogative, reasonably incidental to the conduct of an efficient airport operation. 1970 Op. Att'y Gen. No. 70-53.

Public printing bill. — Laws 1937, ch. 168 (former 13-3-1 to 13-3-5 NMSA 1978), which was commonly referred to as the public printing bill, was constitutional. 1937-38 Op. Att'y Gen. 136.

State Bar Act. — State Bar Act (former 36-2-2 NMSA 1978 et seq.) did not violate this section. In re Gibson, 35 N.M. 550, 4 P.2d 643 (1931).

Fishing and hunting privileges. — This section would be violated by treating public waters as part of a privately owned enclosure under licensing statute (43-301(9), 1941 Comp., now repealed) which required holders of fishing and hunting licenses to obtain

owner's consent before fishing or hunting upon the enclosure. State ex rel. State Game Comm'n v. Red River Valley Co., 51 N.M. 207, 182 P.2d 421 (1945).

Limits on carrier's tort liability. — Wrongful death statutes (41-2-1 to 41-2-4 NMSA 1978) which formerly placed ceiling on amount recoverable from common carriers but not on recovery from private persons did not violate this section. De Soto Motor Corp. v. Stewart, 62 F.2d 914 (10th Cir. 1932).

Use of trust funds for irrigation systems. — Appropriation of funds from trust to state engineer for irrigation purposes in systems in certain counties, pursuant to Laws 1961, ch. 181 to 183, did not violate this section. Interstate Stream Comm'n v. Reynolds, 71 N.M. 389, 378 P.2d 622 (1963).

Insurance monopoly. — Laws 1925, ch. 135, § 69, prohibiting more than one agent of fire insurance company in each town violated due process and special privileges clauses of constitution. Franklin Fire Ins. Co. v. Montoya, 32 N.M. 88, 251 P. 390 (1926).

Privilege tax and exemption. — Former 2% privilege tax, previously imposed under 59-26-31 NMSA 1978, from which qualified benefit societies were exempted did not violate this section; power of legislature to classify for purposes of taxation and to impose tax in question must be conceded if any reasonable or sound basis can be found to sustain it. Sovereign Camp, W.O.W. v. Casados, 21 F. Supp. 989 (D.N.M.) aff'd, 305 U.S. 558, 59 S. Ct. 79, 83 L. Ed. 352 (1938).

Legislature may constitutionally limit municipal electric system's right to serve area. — Where the legislature limits a municipal electric system's right to serve in an area, that legislative limitation does not constitute an unconstitutional exclusive franchise in violation of this section. Springer Elec. Coop. v. City of Raton, 99 N.M. 625, 661 P.2d 1324 (1983).

Reimbursement of municipal utilities' relocation costs improper. — Provisions of Laws 1959, ch. 289, attempting to provide for reimbursement of relocation costs for municipally-owned utilities on primary highway system, retrospectively to March 29, 1957, involved an attempt to grant rights, privileges or immunities in an unequal manner so as to be contrary to this section. State ex rel. City of Albuquerque v. Lavender, 69 N.M. 220, 365 P.2d 652 (1961).

Private signs illegal on state fences. — An adjoining property owner may not legally post "no trespassing," "no hunting" or directional signs or information signs in connection with his ranch upon right-of-way fences belonging to the state and erected by the state highway commission [state transportation commission]. 1953-54 Op. Att'y Gen. No. 5934.

Rural electric cooperatives subject to regulations. — Rural electrification cooperatives are subject to the same regulations by the highway commission and the

county or municipality for the use of rights-of-way as any other public utility, and would be subject to the penal features of 67-8-13, 67-8-14 NMSA 1978, relating to wiring requirements. 1951-52 Op. Att'y Gen. No. 5624.

Comparable provisions. — Utah Const., art. VI, § 28.

Wyoming Const., art. III, § 27.

Law reviews. — For survey, "The Statute of Limitations in Medical Malpractice Actions," see 6 N.M. L. Rev. 271 (1976).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 16A Am. Jur. 2d Constitutional Law § 785.

Special privileges, "Mothers" Pension Act, 3 A.L.R. 1233, 88 A.L.R. 1068.

Discrimination by degrees of punishment based upon age, color or sex, 3 A.L.R. 1614, 8 A.L.R. 854.

Discrimination, degree of penalty for violating Sunday laws, 8 A.L.R. 566.

Special privileges, old-age pension or assistance acts, 37 A.L.R. 1524, 86 A.L.R. 912, 101 A.L.R. 1215.

Population as basis of classification of water companies, 45 A.L.R. 1170.

License fees, discrimination against foreign corporations in imposition of, 49 A.L.R. 726, 77 A.L.R. 1490.

Blue Sky Laws, constitutionality of, 87 A.L.R. 45.

Competition by grantor of nonexclusive franchise, or provision therefor, as violation of constitutional rights of franchise holder, 114 A.L.R. 192.

Discrimination between business by Sunday laws, 119 A.L.R. 752.

Inclusion of different franchise rights or purposes in same ordinance, 127 A.L.R. 1049.

Cooperative group furnishing service to members only, constitutionality of statutes as to, or of application to, of public utility statute, 132 A.L.R. 1496.

Validity of governmental requirement of oath of allegiance or loyalty, 18 A.L.R.2d 268.

Discretion of court to refuse to entertain action for nonstatutory tort occurring in another state or country, 48 A.L.R.2d 800.

16B C.J.S. Constitutional Law § 652.

Sec. 27. [Extra or increased compensation for officers, contractors, etc.]

No law shall be enacted giving any extra compensation to any public officer, servant, agent or contractor after services are rendered or contract made; nor shall the compensation of any officer be increased or diminished during his term of office, except as otherwise provided in this constitution.

ANNOTATIONS

I. GENERAL CONSIDERATION.

Cross references. — For provision prohibiting appointment of legislators to civil office and acquisition of interest in certain contracts with state or municipality by legislator during or within one year after service of term, see N.M. Const., art. IV, § 28.

Purpose of this section was to secure official independence. Dorman v. Sargent, 20 N.M. 413, 150 P. 1021 (1915). See also, 1969 Op. Att'y Gen. No. 69-2.

"Except as otherwise provided". — When the constitution itself says that the salary for a particular office "shall be as prescribed by law," without any limiting phrase, such a provision must be construed as bringing the office within the "except as otherwise provided in this constitution" proviso of this article. 1973 Op. Att'y Gen. No. 73-8.

Word "officer" herein is broadly interpreted. 1967 Op. Att'y Gen. No. 67-2.

"Officer" defined. — A person who is elected to public office for a fixed and definite term and whose functions and duties affect the public is an officer within meaning of this section, without regard to whether the office is one created by the constitution or by the legislature. State ex rel. Gilbert v. Board of Comm'rs, 29 N.M. 209, 222 P. 654, 31 A.L.R. 1310 (1924).

An officer is a public officer if the office he holds is elective for a definite and certain tenure in the manner provided by law and his duties affect and are to be exercised for the benefit of the public for a stipulated compensation paid out of the public treasury. 1967 Op. Att'y Gen. No. 67-2.

The constitutional prohibition against diminishing an officer's compensation during his term in office does not apply to public employees who do not hold "terms of office". This precludes application of the provision to public employees such as juvenile probation officers who are not hired for a definite term nor particular period of time, but who are removable, consistent with applicable personnel rules, at the discretion of the appointing authority. Whitely v. New Mexico State Personnel Bd., 115 N.M. 308, 850 P.2d 1011 (1993).

This provision applies to all public officers, whether their offices be created by the constitution or by the legislature. 1969 Op. Att'y Gen. No. 69-2.

This section applies to municipal employees. 1988 Op. Att'y Gen. No. 88-40.

Municipal judge is public officer for purposes of this section. 1979 Op. Att'y Gen. No. 79-27.

Mayors and councilmen are public officers, being persons elected to public office for fixed and definite terms whose functions and duties affect the public. 1961-62 Op. Att'y Gen. No. 62-85, 1981 Op. Att'y Gen. No. 81-17.

Police judge was an "officer" under this constitutional section, and his salary could not be increased. 1967 Op. Att'y Gen. No. 67-2.

Deputy not an officer. — Since a deputy county official does not have a fixed term of office and serves at the pleasure of the appointing officer, the constitutional prohibition against increasing or decreasing a salary during the term of an officer does not apply to a deputy. 1959-60 Op. Att'y Gen. No. 59-100; 1953-54 Op. Att'y Gen. No. 5985.

Section applicable to agencies. — As this constitutional provision precludes the legislature itself from granting retroactive salary increases, clearly, then, the agency, department, commission, etc., cannot grant them. 1971 Op. Att'y Gen. No. 71-44.

If the legislature itself is precluded from granting retroactive salary increases, it naturally follows that so too are all agencies, departments or institutions of state government. 1961-62 Op. Att'y Gen. No. 62-28.

"Trading" tax exemptions for health care. — Repeal of the state income tax exemptions for teacher pensions and public employee pensions does not remedy constitutional defects of the proposed retiree health care act under a theory that those exemptions would be "traded" for retiree health care. Those exemptions are not property rights, irrepealable contractual entitlements, or pension benefits. Hence, elimination of the favorable tax treatment for current retirees is not consideration for a multi-million dollar health care plan that the state proposes to provide them. 1990 Op. Att'y Gen. No. 90-03.

Comparable provisions. — Iowa Const., art. III, § 31.

Wyoming Const., art. III, § 30.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 63A Am. Jur. 2d Public Officers and Employees §§ 439, 455, 456, 464; 65 Am. Jur. 2d Public Works and Contracts § 171.

Per diem compensation of officers of legislature, 1 A.L.R. 286.

Extra compensation for past services, power of legislature to grant, 23 A.L.R. 612.

Operation of statute fixing public officer's salary on basis of population or of the valuation of the taxable property, as contravening a constitutional provision that the salary of a public officer shall not be increased or diminished during his term, 139 A.L.R. 737.

Validity of contract by officer with public for rendition of new or special services to be paid for in addition to regular compensation, 159 A.L.R. 606.

Constitutional provision fixing or limiting salary of public officer as precluding allowance for expenses or disbursements, 5 A.L.R.2d 1182.

67 C.J.S. Officers and Public Employees §§ 229 to 236; 22 C.J.S. Supp. Public Contracts §§ 24, 27; 81A C.J.S. States §§ 168, 173.

II. EXTRA COMPENSATION.

Retroactive pay increase prohibited. — The language and import of this section prohibits the giving of retroactive pay increases to state employees. 1957-58 Op. Att'y Gen. No. 57-17.

The legislature does not have the power, by an emergency appropriation, to give retroactive pay increases to state employees. 1957-58 Op. Att'y Gen. No. 57-17.

Retroactive salary increases violate this section of the constitution. 1957-58 Op. Att'y Gen. No. 57-308.

The former health and social services department could not make retroactive payment for salary increases in January of 1971 which were originally authorized during the last six months of 1970. 1971 Op. Att'y Gen. No. 71-7.

But administrative errors correctible. — Where salary increases for certain agency employees were required by state personnel board rules, but were not granted through a clerical or administrative error, backdating these salary increases to the proper date would not be the type of retroactivity prohibited by the constitution. 1971 Op. Att'y Gen. No. 71-44.

It is unlawful for county hospital to give employees discount on bills for services provided by that hospital. 1970 Op. Att'y Gen. No. 70-39.

Sick leave plan constitutional if contracted for. — A sick leave benefit plan established by contract as part of the compensation for services rendered would not violate this section. 1977 Op. Att'y Gen. No. 77-8.

Including payment of accumulated benefits on retirement. — The constitution would not prohibit legislation authorizing local school boards to devise a plan of compensation which would include the payment of benefits to retiring employees for accumulated unused sick leave. The various prohibitions contained in the New Mexico constitution would not be violated so long as the benefit was, in fact, bargained for consideration in the form of compensation for services rendered as defined by contract between the employee and the local school board. 1977 Op. Att'y Gen. No. 77-18.

But benefits not to be retroactive. — If a school board chooses to adopt, as part of a plan of compensation, benefits for unused accumulated sick leave, those benefits cannot be provided retroactively. This section provides that no law shall be enacted giving any extra compensation to public employees after services are rendered. 1977 Op. Att'y Gen. No. 77-18.

Increase in retirement benefits. — An act increasing benefits to public employees, and permitting those employees who had annuitant status under the 1947 act to participate therein provided they elected so to do by paying an additional lumpsum of money to the association does not violate New Mexico constitution as payment of extra compensation for services already performed. State ex rel. Hudgins v. Public Employees Retirement Bd., 58 N.M. 543, 273 P.2d 743 (1954).

Payment of matching funds by an affiliated public employer under former 10-11-9 NMSA 1978 for contributing service credit for services rendered by an employee after August 1, 1947 and prior to the effective date of his membership in retirement association does not violate this section. 1966 Op. Att'y Gen. No. 66-87.

Retroactive application of benefit improvement. — The provisions of a municipal ordinance which allow retiring employees to convert to vacation leave any sick leave that has been accumulated prior to retirement may not be applied to employees who have retired prior to the enactment of the ordinance. 1988 Op. Att'y Gen. No. 88-40.

If the New Mexico School for the Deaf established a sick leave buyback policy that permitted retiring employees to receive compensation for accrued sick leave, the policy could be applied to hours of sick leave accrued prior to the implementation of the policy. 1988 Op. Att'y Gen. No. 88-73.

Contribution to retirement system based on reclassification. — The proposal of the corrections department to pay the additional retirement system contribution of correctional officer specialists required as a result of their reclassification from "regular" to "state police" members under the public employees' retirement system is precluded by this section. 1981 Op. Att'y Gen. No. 81-16.

City council members assuming additional duties. — Incumbent Santa Fe city council members, unable to receive pay increases voted for new council members but who assume duties and responsibilities not assumed by all members, may not receive

additional compensation for the performance of such duties. 1987 Op. Att'y Gen. No. 87-5.

Pension law not to cover former employees. — This section precludes payment of pension to one who has left service of the state prior to enactment of pension law. State ex rel. Sena v. Trujillo, 46 N.M. 361, 129 P.2d 329 (1942).

Nature of per diem payments. — Whether the payment of per diem is additional compensation or merely reimbursed must be determined from the language accompanying the words "per diem" and the surrounding circumstances. 1969 Op. Att'y Gen. No. 69-134.

Payment for additional services proper. — This section does not prevent legislature from appropriating money to pay for services rendered state by a servant or contractor outside scope of his previous employment. Laws 1915, ch. 86, § 1, and Laws 1917, ch. 28, § 1, appropriating money to cover additional matter not included in the original appropriation, do not violate this section. State ex rel. Sedillo v. Sargent, 24 N.M. 333, 171 P. 790 (1918).

Grant in excess of contract price improper. — Where an appropriation was made to the university for building and installing a heating plant, and a contract was made for less than the appropriation, which amount was paid the contractor who defaulted leaving unsatisfied claims, the legislature may not grant a sum in excess of the contract price, and the balance of the appropriation will revert to the treasury. 1925-26 Op. Att'y Gen. 6.

Recovery of improper increases. — If illegal retroactive salary increases have in fact been made, the public moneys so paid should be recovered back from the recipients thereof. 1961-62 Op. Att'y Gen. No. 62-28.

III. INCREASE OR DIMINISHMENT OF OFFICER'S COMPENSATION.

Increasing or decreasing officer's compensation prohibited. — By virtue of the provisions of this article, there is a definite prohibition against increasing or diminishing the compensation of any officer during his term of office. 1959-60 Op. Att'y Gen. No. 59-100.

This section would prohibit the legislature from either increasing or decreasing the compensation provided for in 3-10-3 NMSA 1978, relating to compensation of governing bodies of noncharter municipalities, during the term of office of those members of the governing body holding office at the time. 1969 Op. Att'y Gen. No. 69-2.

Laws which have been enacted subsequent to the adoption of N.M. Const., art. X, § 1 (relating to the classification of counties and the salaries of county officers) in 1923, 1927 and 1929 are unconstitutional to the extent that they increase or diminish the

compensation of county officers who have a definite and fixed tenure of office. 1929-30 Op. Att'y Gen. 32.

Laws 1923, ch. 49, § 2, was unconstitutional insofar as it operated to increase or diminish compensation of relators, who were a county clerk, a county assessor and a county treasurer. State ex rel. Gilbert v. Board of Comm'rs, 29 N.M. 209, 222 P. 654 (1924).

Salary increases granted by county commissions under 4-44-12.3 NMSA 1978, for elected officials who were in midterm on the date the increases took effect, violates this section. State ex rel. Haragan v. Harris, 1998-NMSC-043, 126 N.M. 310, 968 P.2d 1173.

Compensation. — The salaries of the judges of constitutionally established courts are not subject to the constitutional prohibition against an increase in compensation during the term for which they were elected. 1979 Op. Att'y Gen. No. 79-27.

County school superintendent is county officer, whose salary may not constitutionally be changed during his term of office. 1957-58 Op. Att'y Gen. No. 57-67.

Police judge's salary cannot be increased during term of office. 1953-54 Op. Att'y Gen. No. 5683.

Salary of municipal judge may not ordinarily be increased during the term for which he was elected. 1979 Op. Att'y Gen. No. 79-27.

However, compensation increase justifiable only with additional duties. — The governing body of a municipality may increase the compensation paid to a municipal judge during his term of office only if it also defines additional duties of the office. An increase in salary during the term for which a judge was elected would not be justified because of increased costs of living or an anticipated increase in the amount of work to be done by the judge pursuant to his ordinary duties. 1979 Op. Att'y Gen. No. 79-27.

Governing body may increase salary. — Subject to applicable law or charter, the governing body of a municipality may enact an ordinance to increase the salary of its members, but members serving during the term in which such an ordinance is enacted cannot benefit from the increase during that term. 1981 Op. Att'y Gen. No. 81-17.

Commissioners may not employ additional clerical assistance for county treasurer, as the payment of an assistant would be a violation of this provision. 1919-20 Op. Att'y Gen. 150.

Imposition of income tax as diminishment of salary. — The imposition of state income tax upon salaries of all public officers of state, having a fixed and definite term of office by constitution or statute, would amount to a reduction of their compensation and

was invalid, and such officials who were entitled to claim exemption were not required to make any return of such salary. 1933-34 Op. Att'y Gen. 124, 126.

Requiring out of pocket expenditures as diminishment of compensation. — To require of officers the performance of duties requiring the expenditure of expense money out of the officer's own pocket, without reimbursement, would probably run afoul of constitutional provision against enacting a law diminishing the compensation of officers during their term of office. State ex rel. Peck v. Velarde, 39 N.M. 179, 43 P.2d 377 (1935).

Effect of repeal of salary provision. — Where statute setting a salary for district attorneys as ex officio juvenile court attorneys was repealed and replaced with a statute (part of the Children's Code) establishing the office of children's court attorney, which section contained no salary provision for a district attorney's service as children's court attorney, district attorneys should continue to receive their pre-Children's Code rate until expiration of their terms of office. 1972 Op. Att'y Gen. No. 72-45.

Deduction of juror's compensation not illegal diminishment. — There would be no illegality in a plan which required a deduction from an employee's ordinary compensation in the amount of the compensation received for jury duty as there would be no diminishment; the persons affected would continue to receive in salary an amount equal to their regular compensation. 1975 Op. Att'y Gen. No. 75-33.

Governing body of municipality may provide salary for themselves during their term of office if there was no salary provided when they took office. 1969 Op. Att'y Gen. No. 69-2.

This provision does not prohibit members of governing body from exercising the option, provided in 3-10-3 NMSA 1978, of receiving the statutory salary, by adopting an ordinance. 1969 Op. Att'y Gen. No. 69-2.

Governing body may increase salary. — Subject to applicable law or charter, the governing body of a municipality may enact an ordinance to increase the salary of its members, but members serving during the term in which such an ordinance is enacted cannot benefit from the increase during that term. 1981 Op. Att'y Gen. No. 81-17.

Salary increases during term of office. — An interpretation of 4-44-12.3B NMSA 1978, permitting an increase of county commissioner salaries during their terms of office, violates the restriction on salary changes during a public officer's term found under this section. 1994 Op. Att'y Gen. No. 94-09.

Legislature's provision of salary for members improper. — Proposed legislation providing for a $300 a month salary for each member of the legislature would probably be held unconstitutional by the courts. 1971 Op. Att'y Gen. No. 71-18.

Coinciding commencement of terms and operation of charter. — Where a county clerk, assessor and sheriff were elected to their respective offices in November of 1968, while the county charter setting the salaries for these offices did not become effective until January 1, 1969, there was no violation of this section, since the term of these officers did not commence until January 1, 1969, as provided by N.M. Const., art. XX, § 3. 1969 Op. Att'y Gen. No. 69-134.

Newly appointed probate judge may receive increased salary designated for that office by legislation enacted by the last legislature. 1959-60 Op. Att'y Gen. No. 60-60.

Reclassification of office. — Where a reclassification of a county office has been made, a reelected county officer may be paid the higher salary after his reelection, without doing violence to this provision; after the reclassification has been made the official is not getting additional compensation as he has new duties and is a new officer under the new classification. 1957-58 Op. Att'y Gen. No. 58-45.

Increase to statutory salary rate. — Where an elected county officer receives a budgeted salary less than the statutory salary, a subsequent increase in salary to the statutorily allowed salary does not violate the constitutional prohibition against salary increases because the officers would only be receiving what they were entitled to receive. 1968 Op. Att'y Gen. No. 68-60.

Social security modification permissible. — This section does not prohibit the modification of the federal-state agreement providing for social security coverage for state employees. 1957-58 Op. Att'y Gen. No. 57-61.

Use of subterfuge improper. — Constitution makers did not contemplate allowance of subterfuge whereby an incumbent would resign and be immediately reappointed, thus avoiding the constitutional prohibition against salary increase during his term. 1953-54 Op. Att'y Gen. No. 5995.

Salaries of county officers. — For discussion of statutory and constitutional provisions as to salaries of county officers, including jailer, under 1915 Salary Law, see 1915-16 Op. Att'y Gen. 77.

Sec. 28. [Appointment of present and former legislators to office; interest of legislators in contracts.]

No member of the legislature shall, during the term for which he was elected, be appointed to any civil office in the state, nor shall he within one year thereafter be appointed to any civil office created, or the emoluments of which were increased during such term; nor shall any member of the legislature during the term for which he was elected nor within one year thereafter, be interested directly or indirectly in any contract with the state or any municipality thereof, which was authorized by any law passed during such term.

ANNOTATIONS

I. GENERAL CONSIDERATION.

Cross references. — For provision making one holding office of profit or trust in state, local or national government at the time of qualifying ineligible to serve in the legislature, see N.M. Const., art. IV, § 3.

For prohibition against receipt by or payment to legislator of compensation for services rendered as state officer or employee other than that received as legislator, see 2-1-3, 2-1-4 NMSA 1978.

For Conflict of Interest Act, see Chapter 10, Article 16 NMSA 1978.

Compiler's notes. — An amendment to this section proposed by H.J.R. No. 3, § 1 (Laws 1961), which would have restricted appointment of members of the legislature to other civil offices and their interest in government contracts, was submitted to the people at the special election held on September 19, 1961. It was defeated by a vote of 17,874 for and 31,451 against.

Comparable provisions. — Montana Const., art. V, § 9.

Utah Const., art. VI, § 7.

Wyoming Const., art. III, § 8.

Law reviews. — For comment, "Legislative Bodies - Conflict of Interest - Legislators Prohibited From Contracting With State," see 7 Nat. Resources J. 296 (1967).

For article, "Separation of Powers and the Judicial Rule-Making Power in New Mexico: The Need for Prudential Restraints," see 15 N.M.L. Rev. 407 (1985).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 63A Am. Jur. 2d Public Officers and Employees §§ 64 to 86, 338 to 347.

Constitutional or statutory inhibition of change of compensation of public officer as applicable to one appointed or elected to fill vacancy, 166 A.L.R. 842.

67 C.J.S. Officers and Public Employees §§ 24, 27 to 33, 204.

II. APPOINTMENT TO CIVIL OFFICE DURING TERM.

A. IN GENERAL.

Provision is concerned primarily with issue of conflict of interest involved in serving in the legislature while receiving other compensation. 1969 Op. Att'y Gen. No. 69-111.

"Member of legislature". — A person who has been elected to the legislature, but who has not qualified, is not a member of that body for purposes of the constitutional prohibition against being appointed to any other civil office. 1961-62 Op. Att'y Gen. No. 62-145.

A person who was elected to the New Mexico legislature for the first time at the general election in November of 1962 is not a member of the legislature prior to being seated at the session to be convened in January, 1963. 1961-62 Op. Att'y Gen. No. 62-145.

Lieutenant governor not member of legislative branch. — While the lieutenant governor presides over the senate, he is not a member of the legislative branch of government, but a member of the executive department; hence, he is not included within the scope of this section. 1965 Op. Att'y Gen. No. 65-229.

Term for which elected. — In this section the phrase "during the term for which he was elected" means the entire term, unaffected by a resignation from the legislative office. 1969 Op. Att'y Gen. No. 69-49.

Legislator cannot, by resigning office, remove himself from ban of this section, since the constitution phrased the restriction in the language during the term for which he was elected. 1972 Op. Att'y Gen. No. 72-10.

Resignation by a member of the legislature does not affect prohibition against holding appointive civil office during entire term for which he was elected; to hold otherwise would defeat the plain intention of this constitutional prohibition, and would render the section meaningless. 1959-60 Op. Att'y Gen. No. 60-139.

The prohibition of this section is applicable during the term for which the legislator was elected regardless of whether he resigns his office prior to the expiration of the term. A legislator may not, therefore, become eligible for an appointive civil office merely by resigning his position in the legislature. 1963-64 Op. Att'y Gen. No. 63-23.

"Appointment" is not restricted to appointment by the governor or any other individual. 1970 Op. Att'y Gen. No. 70-2.

Members of the mining safety board are appointed within the meaning of this section. 1969 Op. Att'y Gen. No. 69-5.

Section applies only to appointments and not to elections. State ex rel. Anaya v. McBride, 88 N.M. 244, 539 P.2d 1006 (1975).

"Civil office". — Requirements for a civil office are: (1) it must be created by the constitution, by the legislature or through authority conferred by the legislature; (2) it must possess a delegation of a portion of the sovereign power of government, to be exercised for the benefit of the public; (3) its powers and duties must be directly or impliedly defined by the legislature or through legislative authority; (4) its duties must be performed independently and without control of a superior power, other than the law, unless they be those of an inferior office created or authorized by the legislature and placed by it under the control of a superior officer or body; (5) it must have some permanency or continuity and not be only temporary or occasional. State ex rel. Gibson v. Fernandez, 40 N.M. 288, 58 P.2d 1197 (1936); 1963-64 Op. Att'y Gen. No. 63-23.

Section applies to any civil office in the state, be it state, county or municipal. 1972 Op. Att'y Gen. No. 72-61.

Requirement of taking oath does not define position as office. 1969 Op. Att'y Gen. No. 69-49.

Compensation or refusal of compensation has no bearing on question of whether or not a position is a civil office. 1969 Op. Att'y Gen. No. 69-49.

Constitutional ban applies only to civil office created by state and would not apply to one created by the federal government. 1967 Op. Att'y Gen. No. 67-46.

Prohibition of section would not reach "employee" of state as distinguished from one seeking to occupy a "civil office." 1957-58 Op. Att'y Gen. No. 57-40.

Elements distinguishing civil office from employment are: (1) the office must be created by law; (2) the office must have delegated to it a portion of the sovereign power; (3) the powers and duties of the office must be defined by law; (4) the duties must be performed independently of any superior control except as established by law; and (5) the office must have permanence and continuity. Of these elements, any or all may exist in the case of an ordinary employment except the distinctive one that the sovereign power must be vested in the position by the legislature. 1979 Op. Att'y Gen. No. 79-1.

B. PROHIBITED APPOINTMENTS.

Section applies to appointments to the judiciary. State ex rel. Anaya v. McBride, 88 N.M. 244, 539 P.2d 1006 (1975).

Legislator was not qualified to serve as justice of peace (now replaced by magistrate courts) during his term in office. 1959-60 Op. Att'y Gen. No. 59-167.

Executive boards, agencies, institutions or departments. — It is not lawful for a legislator to serve on an executive board, agency, institution or department even though

his appointment was made in the same manner as are appointments to standing committees in each house of the legislature. 1959-60 Op. Att'y Gen. No. 59-79.

Members of the legislature may not serve on the following boards and commissions: livestock board, state police board, capitol buildings improvement commission (functions of which have now been transferred to the director of the property control division of the department of finance and administration), board of regents of El Rito normal school (northern New Mexico state school), state fair commission and miners' hospital. 1959-60 Op. Att'y Gen. No. 59-140.

Position of department secretary is civil office within the meaning of this section. 1979 Op. Att'y Gen. No. 79-1.

Appointment of a former state legislator as Secretary of the Taxation and Revenue Department did not violate this section, even though the salary for that office was increased as a result of an appropriations bill which was intended to adjust salaries of state employees generally rather than to increase the salary for a particular office or class of offices. 1991 Op. Att'y Gen. No. 91-03.

Board of regents. — Membership on boards of regents of New Mexico state university and northern New Mexico normal school constitutes holding civil office, and legislators serving thereon are not legal members of these boards. 1959-60 Op. Att'y Gen. No. 59-93.

School board member. — A member of the state legislature is not precluded by state law from serving as an elected local school board member. 1991 Op. Att'y Gen. No. 91-02.

Administrative assistant. — A member of the state legislature is prohibited from accepting employment as an administrative assistant in one of the state educational institutions set forth in N.M. Const., art. XII, § 11. 1957-58 Op. Att'y Gen. No. 57-40.

Section prohibits appointment of legislator to mining safety advisory board. 1969 Op. Att'y Gen. No. 69-5.

Membership on board of educational finance constitutes civil office, and it is a violation of this section for a legislator to be a member of this board. 1959-60 Op. Att'y Gen. No. 59-93.

Office of highway commissioner is "civil office" within the meaning of this section. 1957-58 Op. Att'y Gen. No. 57-20.

River compact commission. — The position of the New Mexico commissioner on the Pecos river compact commission is a civil office within the terms of the New Mexico constitution and, therefore, a legislator may not be appointed to that office during the term of his legislative position. 1969 Op. Att'y Gen. No. 69-49.

County planning and zoning board. — A state representative cannot legally serve as a regularly appointed member of a county planning and zoning board. 1972 Op. Att'y Gen. No. 72-14.

C. PERMITTED APPOINTMENTS.

Sovereign power must be vested in position by legislature else it is not a public office. 1979 Op. Att'y Gen. No. 79-28.

Member of state legislature may also serve as elected mayor of the city of Albuquerque, the prohibitions against dual office-holding being inapplicable, as the office of mayor is elective. 1977 Op. Att'y Gen. No. 77-26.

A person may serve both as mayor of a city and as state senator at the same time. 1959-60 Op. Att'y Gen. No. 60-24.

It is legal for legislator to serve on city council. 1959-60 Op. Att'y Gen. No. 59-196.

Legislator is not disqualified from membership on city school board. 1912-13 Op. Att'y Gen. 324.

It is legal for a member of the New Mexico legislature to be a member of the municipal board of education and, if not on such a board now, he may be a candidate for election to such a municipal board of education. 1959-60 Op. Att'y Gen. No. 59-196.

Legislator may accept position as rural school supervisor under an act passed when he was not a member of the legislature. State ex rel. Baca v. Otero, 33 N.M. 310, 267 P. 68 (1928).

Or high school supervisor. — A member of the legislature may be employed as high school supervisor and is entitled to payment for such services for it is merely an employment and not an office, and she was not such member when power to employ in such capacity was granted. 1931-32 Op. Att'y Gen. 91.

School director. — There is a difference between the word "appointed" and the word "elected," and a member of the New Mexico legislature is eligible to hold office of school director by virtue of an election. 1915-16 Op. Att'y Gen. 347.

Section does not prohibit legislator's employment as high school teacher, since it is not an appointment to a "civil office." 1939-40 Op. Att'y Gen. 31.

School teacher and school administrator. — The prohibitive language of this section did not apply to a school teacher and a school administrator who were also members of the state legislature, since their respective contracts were not "with the state" and were not authorized by any law passed during their respective terms. State ex rel. Stratton v. Roswell Indep. Schools, 111 N.M. 495, 806 P.2d 1085 (Ct. App. 1991).

University professors not civil officers. — Neither a teaching professor in a state university nor a retired person holding emeritus status is a civil officer, and such individuals would be eligible to run for the state legislature. 1957-58 Op. Att'y Gen. No. 58-39.

Member of legislature may be a notary public. 1929-30 Op. Att'y Gen. 229.

State legislator may serve as peanut commissioner. — As the position of peanut commissioner is elected rather than appointed, this section does not operate to prevent a state legislator from serving in that capacity during a term for which he was elected. 1979 Op. Att'y Gen. No. 79-34.

Office of city attorney does not qualify as "civil office" since the city attorney's position is created and the duties defined by the governing board of the municipality and he does not possess a delegation of a portion of the sovereign power of the government. 1970 Op. Att'y Gen. No. 70-64.

Position of special tax attorney is not a public office, and quo warranto is not the proper proceeding to test right of an individual to hold that position while serving as a legislator. State ex rel. Gibson v. Fernandez, 40 N.M. 288, 58 P.2d 1197 (1936).

Senator may hold position of special investigator for district attorney. 1959-60 Op. Att'y Gen. No. 60-32.

Office of deputy county assessor is not civil office. 1955-56 Op. Att'y Gen. No. 6530.

Advisory council to agency. — The appointment of a state representative to serve on the advisory council to the department of hospitals and institutions (now replaced by the public health division of the department of health) does not violate this section which prohibits the appointment of a legislator to a civil office during the term to which he was elected as a legislator. 1977 Op. Att'y Gen. No. 77-3.

Commission for promotion of uniform law. — A member of the commissioners for the promotion of uniformity of legislation in the United States does not hold a civil office so as to disqualify him from being a member of the state senate. 1967 Op. Att'y Gen. No. 67-4.

Delegate to Western Interstate Nuclear Compact is not civil officer. 1970 Op. Att'y Gen. No. 70-37.

State representative may hold a county job. 1972 Op. Att'y Gen. No. 72-60.

This provision does not prohibit the appointment of a member of the legislature as an employee of a county or municipality as distinguished from a county or municipal officer. 1972 Op. Att'y Gen. No. 72-60.

Deputy county clerk is mere employee and not civil officer within the contemplation of this section. 1955-56 Op. Att'y Gen. No. 6235.

Selective service director. — Holding of position of state selective service director by a former legislator during the term of office to which he was elected is not barred. 1967 Op. Att'y Gen. No. 67-46.

III. CIVIL OFFICE CREATED OR BENEFITTED DURING LEGISLATOR'S TERM.

Purpose. — This section is designed to prevent a member of the legislature from benefitting from an act of the legislature of which he is a member at the expense of the general welfare. 1965 Op. Att'y Gen. No. 65-208.

Disinterestedness sought. — The reasons for excluding persons from offices who have been concerned in creating them, or increasing their emoluments, are to take away, as far as possible, any improper bias in the vote of the representative, and to secure the constituents some solemn pledge of his disinterestedness. State ex rel. Anaya v. McBride, 88 N.M. 244, 539 P.2d 1006 (1975).

This provision is designed to prevent a legislator from using his position as such to help create a civil office or increase the salary thereof with a view toward being appointed to the office as soon as his term expires. 1967 Op. Att'y Gen. No. 67-38.

"Emoluments". — Term "emoluments" does not refer merely to the fixed salary that is attached to an office, but includes such fees and compensation as the incumbent of the office is by law entitled to receive; in determining whether there has been an increase in the emoluments of a particular office, the various items of salary and other compensation which the incumbent was entitled to receive under the statute previously in effect must be taken together. State ex rel. Anaya v. McBride, 88 N.M. 244, 539 P.2d 1006 (1975).

Acceptance of prior salary insufficient to remove bar. — Appointment of a person who was a member of the legislature during 1965 to 1966 to an office, the salary of which was increased in 1965, even where the former legislator agreed to take the office at the salary which was provided for the office prior to his service in the legislature would probably be held illegal by the courts. 1967 Op. Att'y Gen. No. 67-38.

Office established by legislature. — The appointment of a member of the thirteenth legislature to be director of transportation (which office has now been replaced by secretary of transportation) violated this constitutional provision, as the thirteenth legislature had authorized this office. 1937-38 Op. Att'y Gen. 152.

Section applied to appointment as department secretary. — A member of the legislature whose term expired on December 31, 1978, would have been elected for a term during which the civil offices of department secretaries were created under the Executive Reorganization Act (9-1-1 to 9-1-10 NMSA 1978), and under this section

such a person cannot be appointed as a secretary of a cabinet department in 1979, the year following the term in which the position of secretary was created. 1979 Op. Att'y Gen. No. 79-1.

Employment on commission enforcing new tax law. — A member of the legislature which enacted former Income Tax Law could not accept employment by former state tax commission which enforced it during his term as such member, nor within a year after his term expired. 1933-34 Op. Att'y Gen. 104.

Increase in judicial salaries. — Argument that prohibition against appointment of legislator during or for one year after term for which he was elected to civil office, the emoluments of which were increased during that term, did not apply to judicial appointments because at the time of this section's adoption the legislature lacked power to increase judicial salaries was without merit. State ex rel. Anaya v. McBride, 88 N.M. 244, 539 P.2d 1006 (1975).

In view of the fact that a justice of the peace (now replaced by magistrate courts) was a civil officer, and that the emoluments of the office were increased during the 1913 legislature, a member of the legislature should not be appointed to such office. 1914 Op. Att'y Gen. 197.

Establishment of indigent defense fee schedule. — The establishment of a fee schedule under the Indigent Defense Act (31-16-1 NMSA 1978 et seq.) for representation of indigent defendants does not preclude attorney-legislators who served when the act was enacted in 1965 from being appointed and paid under that schedule. 1968 Op. Att'y Gen. No. 68-32.

Legislators may serve as members of commissions created by legislature and are entitled to receive per diem and expenses as provided by the act at the existing rates. 1951-52 Op. Att'y Gen. No. 5364.

Illegally appointed director to recover salary and expenses. — Appointment of member of the legislature which created the position of director of the division of field administration was in violation of this section, and in addition, if the position was a civil office, he could not be legally appointed thereto. But since he rendered services and incurred expenses and was a de facto officer, no de jure director having been appointed, and the state received benefits therefrom, his claim for salary and expenses should be allowed. 1939-40 Op. Att'y Gen. 42.

IV. CONTRACTS WITH STATE OR MUNICIPALITY.

Applicability. — Prohibition in the latter part of this section appears to apply only to the state and municipalities and not to counties. 1955-56 Op. Att'y Gen. No. 6530.

Effect of Conflict of Interest Act. — The Conflict of Interest Act (10-16-1 NMSA 1978 et seq.) does not disqualify or restrict a nonprofit organization's ability to enter into

contracts with state agencies managed by a board of directors having as one of its members a state legislator. 1990 Op. Att'y Gen. No. 90-17.

Damages authorized against violators. — A legislator and other directors of a nonprofit organization may be found liable for damages for breach of fiduciary duty if they intentionally enter into a contract which is invalid under this section. 1990 Op. Att'y Gen. No. 90-17.

Authorization of alternative method of financing. — Where the power of the capitol buildings improvement commission (functions of which have now been transferred to the director of the property control division of the department of finance and administration) to furnish capitol buildings existed since 1945, while legislation in 1965 simply provided another method of financing for such purposes if the commission and the state board of finance decided to do so, a legislator who served in the 1965 session was not precluded from contracting with the state for capitol furnishings. 1965 Op. Att'y Gen. No. 65-208.

Consolidation of older statutes without material change. — Compensation policy covering state highway commission [state transportation commission] employees engaged in road building was not invalidated by fact that a legislator was interested in such a contract when the act was passed, in view of fact that statute was not new, but brought older statutes together with no material amendment. State ex rel. Maryland Cas. Co. v. State Hwy. Comm'n, 38 N.M. 482, 35 P.2d 308 (1934).

Fixing of publication rates. — This section is not violated by a member of the legislature who owns stock in a newspaper which publishes legal notices, because Laws 1912, ch. 49 (since repealed) fixed a maximum rate for the publication of delinquent tax lists and legal notices already required by law; the same is true with reference to the printing of forms and blanks required by Laws 1912, ch. 85, § 48 (17-3-7 NMSA 1978, relating to hunting and fishing licenses). 1912-13 Op. Att'y Gen. 53.

State legislator as employee of private contractor. — A private entity, either for-profit or nonprofit, that has a state legislator within its organization may enter into a contract with the state provided that the contracting process is conducted in accordance with constitutional and statutory requirements. 2003 Op. Att’y Gen. No. 03-01.

A legislator who complies with legislative rules is entitled to receive his legislative per diem. His private sector employ is free to determine whether it should also compensate him for that day’s work. 2003 Op. Att’y Gen. No. 03-01.

Contract of employment with school district. — The contracts of employment made between the legislators and a local school district for positions as a school instructor and a school administrator were not made "with the state" and thus were not prohibited by this section. State ex rel. Stratton v. Roswell Indep. Schools, 111 N.M. 495, 806 P.2d 1085 (Ct. App. 1991).

A general appropriations bill increasing the salaries of public school employees did not authorize the legislators' employment contracts with a local school district as a school instructor and a school administrator as prohibited by this section. State ex rel. Stratton v. Roswell Indep. Schools, 111 N.M. 495, 806 P.2d 1085 (Ct. App. 1991).

A legislator is prohibited from entering into a contract of employment with a school district for one year after his term, if said contract was authorized by any law passed during his term. 1988 Op. Att'y Gen. No. 88-20.

Operation of school bus route. — A legislator is not barred by this section from contracting with a school bus district for the operation of a school bus route, authorization for which has been in our statutes for a great number of years. 1961-62 Op. Att'y Gen. No. 61-42.

Contracts under Indigent Defense Act. — The attorney-legislators who served in the second session of the twenty-eighth legislature may continue to be appointed to represent indigent defendants and may receive fees and expenses as authorized in the Indigent Defense Act (31-16-1 NMSA 1978 et seq.), but such attorneys would be precluded from entering into a contract authorized by 31-16-9 NMSA 1978 during the year after the term for which they had been elected. 1968 Op. Att'y Gen. No. 68-32.

Consulting services. — This section prohibits a water users association from contracting with a firm whose president and stockholder is a state legislator for consulting services in connection with a water installation project funded partly through a state contract authorized by the state legislature during the legislator's term in office. 1991 Op. Att'y Gen. No. 91-11.

Contract with community action agency. — A legislator contracting with a community action agency will have to ascertain how the agency is organized to determine whether the prohibitions of this section will apply. If it is a county, county agency or a private agency, the contract will not be covered by the provision, but if it is a municipality or municipal agency, the contract will be prohibited if it was authorized by law during the legislator's term. 1989 Op. Att'y Gen. No. 89-34.

Contract with municipal housing authority. — A municipal housing authority is designated by statute as an agency of a city, and this section applies to any interest a legislator may have in a contract with the housing authority authorized by law during his term. 1989 Op. Att'y Gen. No. 89-34.

Surety bond for new commission. — A member of the legislature which created the oil and gas accounting commission cannot write a surety bond for that commission. 1959-60 Op. Att'y Gen. No. 59-138.

Enactment of procedural purchasing act not determinative event. — This section prohibits a legislator, for the duration of his term or for one year thereafter, from entering into those contracts executed pursuant to the Public Purchases Act which were

authorized by laws enacted while the legislator was a member of the legislature, the year in which the contract was authorized, and not the year in which the procedural Public Purchases Act was enacted, being determinative. 1967 Op. Att'y Gen. No. 67-133.

Violation of contract prohibition not criminal. — While this section prohibits any member of the legislature during the term for which he was elected and for one year thereafter from being interested directly or indirectly in any contract with the state or municipality which was authorized by any law passed during such term, such acts are not made a criminal offense. 1965 Op. Att'y Gen. No. 65-229.

Injunction or invalidation proceeding appropriate. — Execution of a contract prohibited by this section could be enjoined by any party having legal standing; if the contract had already been entered into, the appropriate procedure would be to bring a civil action to invalidate the contract. 1965 Op. Att'y Gen. No. 65-229.

Injunction could be brought against public officials authorized to execute contracts on behalf of the state or to disburse public funds for violation of this section by any person having standing to sue. 1967 Op. Att'y Gen. No. 67-133.

Prohibited contracts generally. — This section precludes a nonprofit organization from entering into a contract with the state or a state agency if the organization, within one year of entering the contract, had as a director a member of the legislature and the contract was authorized during that member's term. 1990 Op. Att'y Gen. No. 90-17.

Sec. 29. [Laws creating debts.]

No law authorizing indebtedness shall be enacted which does not provide for levying a tax sufficient to pay the interest, and for the payment at maturity of the principal.

ANNOTATIONS

State Revenue Bond Act. — Former State Revenue Bond Act (Laws 1963, ch. 271, now repealed) did not violate this section. State ex rel. State Park & Recreation Comm'n v. New Mexico State Auth., 76 N.M. 1, 411 P.2d 984 (1966).

Street improvement bonds. — Special street improvement bonds authorized under Laws 1947, ch. 122 (now repealed) did not create a debt as contemplated by this section. Stone v. City of Hobbs, 54 N.M. 237, 220 P.2d 704 (1950).

State Highway Bond Act. — This section was not violated by the former State Highway Bond Act (Laws 1912, ch. 58). Catron v. Marron, 19 N.M. 200, 142 P. 380 (1914).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Public debt, permissive or mandatory character of legislation in relation to payment of, 103 A.L.R. 812.

81A C.J.S. States § 217.

Sec. 30. [Payments from treasury to be upon appropriations and warrant.]

Except interest or other payments on the public debt, money shall be paid out of the treasury only upon appropriations made by the legislature. No money shall be paid therefrom except upon warrant drawn by the proper officer. Every law making an appropriation shall distinctly specify the sum appropriated and the object to which it is to be applied.

ANNOTATIONS

Cross references. — For limitations on subjects to be embraced in general appropriation bills, and provision that other appropriations should be made by separate bills, see N.M. Const., art. IV, § 16.

Provision is designed to insure legislative control of public purse. Gamble v. Velarde, 36 N.M. 262, 13 P.2d 559 (1932). See also, 1967 Op. Att'y Gen. No. 67-108.

This constitutional provision is directed toward state's money in treasury and its purpose is to insure legislative control and to exclude executive control over the purse strings of the state. 1965 Op. Att'y Gen. No. 65-151.

Construction. — The constitutional limitation upon legislative power and practice should receive a reasonable construction with a view to effectuate their sound purpose, without unnecessarily or arbitrarily hampering legislation. Gamble v. Velarde, 36 N.M. 262, 13 P.2d 559 (1932).

Applicability. — Provisions of this section are not applicable in instances where the funds are not paid out of the treasury by appropriation. 1961-62 Op. Att'y Gen. No. 62-88.

Federal funds in suspense accounts not affected. — New Mexico may accept federal matching funds which are eventually to be paid to charitable or benevolent institutions, which moneys, under 6-10-3 NMSA 1978, are put in suspense accounts and not deposited in the state treasury, without violating this section, since this money never becomes money of the state. 1967 Op. Att'y Gen. No. 67-7.

Section inapplicable to agency's disposition of appropriation. — This section imposes limits on the legislature's power to appropriate money and the treasurer's power to disburse it, but has nothing to do with an administrative agency's disposition of its appropriation. 1975 Op. Att'y Gen. No. 75-10.

Section prohibits expenditure of money unless appropriated by legislature, and an appropriation act is required to fix the amount and object of expenditure. State ex rel. Constitutional Convention v. Evans, 80 N.M. 720, 460 P.2d 250 (1969).

Appropriations required. — To specify a purpose or use for public funds, the legislature is required by the constitution to prescribe the amount appropriated and the object to which it is to be applied. 1972 Op. Att'y Gen. No. 72-15.

With exception of payment on public debt, no money can be paid out of state treasury except upon appropriation made by legislature. 1931-32 Op. Att'y Gen. 48.

Even for refund of erroneous payments. — The constitutional provision has been held by the court to prohibit the payment of any moneys out of the state treasury except upon appropriation, even though the moneys were erroneously paid to the state of New Mexico. 1955-56 Op. Att'y Gen. No. 6477.

Governor may not spend revenue-sharing funds without legislative appropriation. 1973 Op. Att'y Gen. No. 73-9.

Salary provisions as continuing appropriations. — Where the constitution creates an office and prescribes the salary for it, the necessity for legislative appropriation is dispensed with on the ground that such a provision in a constitution is proprio vigore an appropriation; this rule has been extended to a general law fixing the amount of salary of a public officer, and prescribing its payment at particular periods. State ex rel. Fornoff v. Sargent, 18 N.M. 272, 136 P. 602 (1913).

Laws 1915, ch. 59, creating the office of state traveling auditor (since abolished) and fixing his salary, in connection with Laws 1889, ch. 32, §§ 2 and 3 (since repealed) and Laws 1897, § 2597, amounted to a continuing appropriation for such salary. Dorman v. Sargent, 20 N.M. 413, 150 P. 1021 (1915).

Laws 1905, ch. 5 (since repealed) which created the office of the superintendent of insurance and provided a permanent salary for him, amounted to a continuing appropriation out of the insurance fund and required no subsequent appropriations by the legislature. State ex rel. Chavez v. Sargent, 18 N.M. 627, 139 P. 144 (1914).

There is considerable doubt as to validity of setting a salary in the appropriation bill, which is different than that provided for in a specific statute. Thompson v. Legislative Audit Comm'n, 79 N.M. 693, 448 P.2d 799 (1968).

Encumbrance of unappropriated sums improper. — A state agency may not undertake to legally obligate itself or the state to pay sums by contract beyond such amounts as are currently appropriated to such agency, nor may it purport in any manner to bind future legislatures to provide appropriations for payment of rentals for such public body. 1963-64 Op. Att'y Gen. No. 64-74.

Pledging of current funds for subsequent years not permissible. — The pledging of funds for one fiscal year to meet obligations of one or more subsequent fiscal years in order to prevent a reversion pursuant to specific language in the general appropriations act would violate this constitutional appropriation requiring legislative appropriations. 1967 Op. Att'y Gen. No. 67-71.

Restrictions on term of agency lease. — In the absence of express statutory provision otherwise providing, a state agency, department, bureau or commission may enter into a lease for rental of office space or other similar facilities only for such period of time as there exists legislative appropriations or other funds which are available to cover rental payments which will become legally due under the provisions of the lease contract. 1963-64 Op. Att'y Gen. No. 64-74.

A lease contract can be entered into by a state agency, department, bureau or commission for longer than the period of time for which the legislature has made appropriations or other funds available only if it expressly provides that the public body is under no obligation to continue such contract or to pay rental sums if legislative appropriations are not available or if the legislature by subsequent enactment restricts, reorganizes or abolishes such agency. 1963-64 Op. Att'y Gen. No. 64-74.

Withdrawal of contributions only proper upon appropriation. — Although there may be no legislation conferring upon the state board of public accountants authority to solicit voluntary contributions from its members, once such contributions are deposited in the state treasury, where they become commingled with other funds of the board, they can only be withdrawn through appropriations made by the legislature upon warrants drawn by the proper officer. New Mexico State Bd. of Pub. Accountancy v. Grant, 61 N.M. 287, 299 P.2d 464 (1956).

Authority required for tax refund. — An overpayment of a succession tax may not be refunded except on authority of the legislature. 1929-30 Op. Att'y Gen. 231.

Refunds unlawful. — In the absence of a specific refund statute in the act creating the state bank examiner (now director of the financial institutions division of the commerce and industry department), his refund of a registration fee would be in contravention of this section and therefore unlawful. 1957-58 Op. Att'y Gen. No. 58-165.

Former 19-1-15 NMSA 1978, relating to erroneous payments on lease or sale of state lands, violated this section insofar as it assumes to authorize repayments of moneys covered into the treasury and funded, as the property of the state, on the mere say-so of an administrative officer. McAdoo Petroleum Corp. v. Pankey, 35 N.M. 246, 294 P. 322 (1930).

Excise tax refund provisions valid. — Laws 1931, ch. 31 (former 64-26-31, 1953 Comp. et seq.), relating to refund of certain gasoline excise tax funds, sufficiently complied with provisions of this section. Gamble v. Velarde, 36 N.M. 262, 13 P.2d 559 (1932).

Refund of nomination fees by state fair permissible. — A refund by the New Mexico state fair of nomination fees paid for the 1965 and 1966 New Mexico thoroughbred and quarter horse futurities upon the inadvertent nomination of certain ineligible race horses would not violate this section, as the fees had been deposited in a trust account, and had never reached the state treasury, and furthermore, the state fair had received this money not as fees paid to a state agency but as fees paid to a licensee of the state racing commission. 1965 Op. Att'y Gen. No. 65-151.

Correction of clerical error not improper. — Where the crediting of $677.35, which was really federal and not state money, to the general fund instead of to the vocational rehabilitation account was a clerical error, it could be corrected without violation of this section. 1963-64 Op. Att'y Gen. No. 64-4.

Appropriations to specify sums and objects. — It is axiomatic that under this section of the constitution money may be paid out of the treasury only upon appropriation made by the legislature, and that every appropriation law must distinctly specify the sum appropriated and the object to which it is to be applied. 1957-58 Op. Att'y Gen. No. 58-8.

Aligned with the power over appropriating funds to the state treasury for the operation of the state government is the authority to designate and specify how these funds will be spent. 1968 Op. Att'y Gen. No. 68-64.

Object of appropriation sufficiently specific. — Appropriation to state board of finance "for emergencies and necessary expenses affecting the public welfare" sufficiently specified the object of the appropriation; the legislature itself performed the legislative duty of making the appropriation and delegated to the state board of finance the power to make the factual determination on which disbursement of the appropriated fund hinges. 1959-60 Op. Att'y Gen. No. 59-79.

Specified purposes controlling. — Funds which have been appropriated to an agency may be expended only for the purpose or object specified in the appropriation. 1957-58 Op. Att'y Gen. No. 57-305.

Funds appropriated by the legislature to be used for acquisition of land and planning expenses for long-range capitol grounds and building improvement may not be used for the purpose of supervision, salvage planning, maintenance and protection of the old penitentiary buildings and site. 1957-58 Op. Att'y Gen. No. 57-305.

Bonds issued for airport other than the one specified. — Where the legislature clearly and unambiguously authorized issuance of severance tax bonds to enlarge the facilities of an existing airport in Questa, those bonds could not be used for a new airport at a site different from the existing airport. 1988 Op. Att'y Gen. No. 88-46.

Transfer between general and specific accounts must be authorized. — Public moneys cannot lawfully be transferred from the general appropriation account to a separate or specific fund unless authorized by statute. 1937-38 Op. Att'y Gen. 115.

Transfers between line items not permissible. — The state highway commission [state transportation commission] may not take money appropriated by the legislature for one specific purpose and transfer it to another legislative line item for another purpose, if the total amount appropriated for one category would thereby be increased at the expense of the total for another category; if such a procedure were followed without legislative authorization therefor, it would permit the use of moneys for a purpose not authorized by the legislature when it made the appropriation. 1967 Op. Att'y Gen. No. 67-108.

Object of highway appropriations. — The policy-making power with reference to state highways and public roads formerly held by the legislature is now in the state highway commission [state transportation commission], but the legislature still retains the responsibility for designating the object to which appropriations are to be applied. 1951-52 Op. Att'y Gen. No. 5591.

Control of highway expenditures. — Neither the state board of finance nor the governor can exercise any control over expenditure of highway funds. 1951-52 Op. Att'y Gen. No. 5588.

State board of finance cannot alter specific appropriations in the absence of statutory or constitutional authorization. 1947-48 Op. Att'y Gen. No. 5129.

Appropriation to constitutional convention. — Expenditure of funds which had been appropriated to the constitutional convention could not be directed or controlled by the president thereof. State ex rel. Constitutional Convention v. Evans, 80 N.M. 720, 460 P.2d 250 (1969).

Advance determination of exact expenditure unnecessary. — The fact that the sum appropriated must be distinctly specified does not mean that the sum to be expended must be accurately determined in advance, but only that a maximum amount or limit be fixed. 1959-60 Op. Att'y Gen. No. 59-181.

Appropriation is only statement of maximum which may be spent. State ex rel. Constitutional Convention v. Evans, 80 N.M. 720, 460 P.2d 250 (1969).

Investment of trust proceeds controlled by Enabling Act. — The state treasurer is authorized to pay, out of the proceeds of the trust lands granted by § 10 of the Enabling Act, the necessary and reasonable costs of investment of the same, and this section cannot be construed so as to prohibit such actions; hence, investment of such funds in federal housing administration mortgages was not prohibited on grounds that no appropriation had been made to pay the one-half of one percent service charge essential for purchase of such mortgages. 1953-54 Op. Att'y Gen. No. 5788.

Mandamus for drawing of warrant denied. — An irrigation district has no clear legal right to draw on income from land grant by congress, the use of which was limited to establishment of reservoirs and hydraulic engineering, and mandamus directed to the drawing of warrant thereon will be denied. Carson Reclamation Dist. v. Vigil, 31 N.M. 402, 246 P. 907 (1926).

Complaint to recover fees. — In action to recover license plate fees, complaint not charging that fees were collected for or on behalf of state or that they had been turned over to state treasurer was not defective for failing to show that an appropriation had been made by the legislature for refund of moneys collected. Lord v. Gallegos, 46 N.M. 221, 126 P.2d 290 (1942).

Comparable provisions. — Wyoming Const., art. III, § 35.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 63A Am. Jur. 2d Public Funds §§ 36 to 48.

Liability for work done or materials furnished, etc., for state or federal governments in excess of appropriations, 19 A.L.R. 408.

Budget provisions of constitution or statute in relation to appropriation of state funds, 40 A.L.R. 1067.

Mandamus to compel appropriation for payment of salary of public officer or employee, 81 A.L.R. 1253.

Taxes illegally or erroneously exacted, constitutionality of statute providing for refund of, without providing means to pay it, 98 A.L.R. 289.

Unemployment insurance legislation, validity of provisions of, as to appropriations, 100 A.L.R. 697, 106 A.L.R. 243, 108 A.L.R. 613, 109 A.L.R. 1346, 118 A.L.R. 1220, 121 A.L.R. 1002.

Reimbursement of public officer or employee for money paid or liability incurred by him in consequence of breach of duty, validity of appropriation for, 155 A.L.R. 1438.

Statutory provisions creating office and fixing salary as continuing appropriation, 164 A.L.R. 928.

81A C.J.S. States §§ 230 to 240, 242 to 244.

Sec. 31. [Appropriations for charitable, educational, etc., purposes.]

No appropriation shall be made for charitable, educational or other benevolent purposes to any person, corporation, association, institution or community, not under the absolute control of the state, but the legislature may, in its discretion, make

appropriations for the charitable institutions and hospitals, for the maintenance of which annual appropriations were made by the legislative assembly of nineteen hundred and nine.

ANNOTATIONS

Cross references. — For constitutional provision prohibiting the giving of any extra compensation to public officers, etc., see N.M. Const., art. IV, § 27.

For provision prohibiting donations by the state or its subdivisions to any person or private enterprise, see N.M. Const., art. IX, § 14.

Applicability. — This section imposes limits on the legislature's power to appropriate money and the treasurer's power to disburse it; it has nothing to do with an administrative agency's disposition of its appropriation, nor does it have any application to a department's administration of federal or nonstate moneys. 1975 Op. Att'y Gen. No. 75-10.

Bill appropriating state funds to state fair is constitutional, for such fair is an instrumentality and under the control of the state. 1937-38 Op. Att'y Gen. 62.

Armory. — Proposal to obtain an appropriation of funds to the state armory board, a creature of the state and under its absolute control, and to apply such appropriation to the construction of an armory involved no infraction of this section. 1957-58 Op. Att'y Gen. No. 58-235.

Irrigation projects. — Appropriations under Laws 1961, chs. 181, 182 and 183 are not, nor do they appear on their face to be, for charitable, educational or other benevolent purposes; making permanent water sources available for irrigation purposes throughout the state is an economic necessity, and the fact that nonprofit organizations may incidentally benefit from the appropriations made to the state engineer, who has absolute control of their expenditure, does not put them within the classifications of this section. State ex rel. Interstate Stream Comm'n v. Reynolds, 71 N.M. 389, 378 P.2d 622 (1963).

The fact that others may incidentally benefit from the appropriations made to the state engineer, who has absolute control over their expenditure, does not put them within the classifications of this section. 1979 Op. Att'y Gen. No. 79-7.

Park and recreation commission. — Appropriation to the park and recreation commission (now state parks division of the natural resources department), a state executive body, under the "absolute control" of the state, was not unconstitutional; argument that groups not under state control would get the benefit of the appropriation was irrelevant so long as the appropriation was placed in the hands and under the control of a state official. 1971 Op. Att'y Gen. No. 71-75.

Increase in retirement benefits. — Provision of Laws 1953, ch. 162 (Public Employees Retirement Act, compiled as 10-11-1 NMSA 1978 et seq.), which permitted those employees who had annuitant status under the 1947 act to participate therein provided they elected so to do by paying an additional lump sum to the association equivalent to one and one-half percent of the total salary received during the last five years immediately preceding retirement, does not violate this section. State ex rel. Hudgins v. Public Employees' Retirement Bd., 58 N.M. 543, 273 P.2d 743 (1954).

Contributing service credit payments. — Payment of matching funds by an affiliated public employer for an employee's contributing service credit for services rendered after August 1, 1947, and prior to the effective date of his membership in the public employees retirement association, pursuant to former 10-11-9 NMSA 1978, would not violate this section. 1966 Op. Att'y Gen. No. 66-87.

Sick leave benefits. — This section would not prohibit legislation authorizing local school boards to devise a plan of compensation which would include the payment of benefits to retiring employees for accumulated, unused sick leave, so long as such benefits were, in fact, bargained for consideration in the form of compensation for services rendered as defined by contract between the employee and the local school board. 1977 Op. Att'y Gen. No. 77-18.

If the basis for a program of sick leave benefits for school employees is neither charitable nor benevolent but rather compensation for services rendered, then the prohibition of this section would not apply. 1977 Op. Att'y Gen. No. 77-8.

State Bar Act. — State Bar Act (former 36-2-2 NMSA 1978 et seq.) did not violate this section. In re Gibson, 35 N.M. 550, 4 P.2d 643 (1931).

Private organization. — This section prohibits the use of public funds for the purpose of supporting any private organization. 1955-56 Op. Att'y Gen. No. 6426.

Private corporation. — Any appropriation to a private corporation whether directly or indirectly made would clearly be violative of constitutional provisions. 1963-64 Op. Att'y Gen. No. 64-41.

Privately owned county hospital. — County funds may not be donated to a county hospital owned by a private corporation. 1929-30 Op. Att'y Gen. 147.

County hospital run by private lessee. — The evident purpose of Laws 1955, ch. 224 (former 4-48-11, 4-48-14 NMSA 1978) was to provide a means by which a county operating a hospital itself could pay for such operation; for the county commissioners to use funds authorized thereby for support and maintenance of a hospital owned by the county but leased to a private organization would be in direct violation of this section. 1955-56 Op. Att'y Gen. No. 6426.

Public moneys may not be used in aid of denominational schools, and only for such benevolent purposes as were aided in Laws 1909, ch. 127, § 7 (since repealed). 1914 Op. Att'y Gen. 205.

This section would be violated if public money was disbursed to nonpublic schools in order to purchase secular education service. 1969 Op. Att'y Gen. No. 69-6.

Vouchers for private school education. — Tuition assistance in the form of vouchers for private education may violate this provision, although the New Mexico Supreme Court has suggested that a constitutional issue is not raised if appropriations are made to a state agency, which in turns disburses the money. 1999 Op. Att'y Gen. No. 99-01.

Grants to defray tuition costs. — A bill providing that a sum of money be appropriated to the board of educational finance for allocation as grants to students for the purpose of defraying tuition costs at private colleges and universities may not violate this section because the legislative appropriation is not made to the students but to the board of educational finance, a state agency which would control the expenditure of the appropriation. 1979 Op. Att'y Gen. No. 79-7.

County fairs. — Laws 1913, ch. 51, regarding appropriations by counties to their fairs, contravened this section. Harrington v. Atteberry, 21 N.M. 50, 153 P. 1041 (1915).

Hay purchase contributions. — Since assistance under the emergency roughage program was not limited to paupers or even to those who were in danger of becoming such, this section prohibits the state's contribution of $2.50 per ton toward the purchase of hay. 1957-58 Op. Att'y Gen. No. 57-62.

Historical society. — The state may not properly appropriate public moneys to the use and benefit of the historical society of New Mexico, a private corporation. 1963-64 Op. Att'y Gen. No. 64-41.

Federal matching funds in suspense accounts. — New Mexico may accept federal matching funds eventually to be paid to charitable or benevolent institutions where under 6-10-3 NMSA 1978 the moneys are put in suspense accounts and not deposited in the state treasury. 1967 Op. Att'y Gen. No. 67-7.

Comparable provisions. — Montana Const., art. V, § 11.

Law reviews. — For student symposium, "Constitutional Revision - State Aid to Private Enterprise in New Mexico," see 9 Nat. Resources J. 457 (1969).

For 1986-88 survey of New Mexico law of real property, 19 N.M.L. Rev. 751 (1990).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 63A Am. Jur. 2d Public Funds §§ 68, 69, 71.

Purpose, particularity of specification of, required in appropriation bill, 20 A.L.R. 981.

Contract to pay for services or reimburse expenditures as within constitutional inhibition of aid to sectarian institutions, 22 A.L.R. 1319, 55 A.L.R. 320.

Pension to one who had left service of state prior to enactment of pension statute as violating constitutional prohibition of appropriation for benevolent purposes to any person not under absolute control of state, 142 A.L.R. 938.

Releasing public school pupils from attendance for purpose of attending religious education classes as use of public money for sectarian purpose, 2 A.L.R.2d 1371.

Use of public school premises for religious purposes during nonschool time, 79 A.L.R.2d 1148.

Public payment of tuition, scholarship or the like to sectarian school, 81 A.L.R.2d 1309.

Use of public money for furnishing free textbooks to sectarian school or student therein, 93 A.L.R.2d 986.

81A C.J.S. States §§ 204 to 208, 211.

Sec. 32. [Remission of debts due state or municipalities.]

No obligation or liability of any person, association or corporation held or owned by or owing to the state, or any municipal corporation therein, shall ever be exchanged, transferred, remitted, released, postponed or in any way diminished by the legislature, nor shall any such obligation or liability be extinguished except by the payment thereof into the proper treasury, or by proper proceeding in court. Provided that the obligations created by Special Session Laws 1955, Chapter 5, running to the state or any of its agencies, remaining unpaid on the effective date of this amendment are void. (As amended November 4, 1958.)

ANNOTATIONS

The 1958 amendment, which was proposed by H.J.R. No. 1 (Laws 1957) and adopted at the general election held on November 4, 1958, with a vote of 58,347 for and 28,802 against, added the second sentence.

Compiler's notes. — Laws 1955 (S.S.), ch. 5, which provided for the recovery of public assistance payments via claims against recipients' estates and liens against their realty, was repealed by Laws 1957, ch. 56, § 1.

Purpose. — This constitutional provision is intended to prevent public officials from releasing debts justly owed to a public body and to discourage collusion between public

officials and private citizens. 1970 Op. Att'y Gen. No. 70-88; No. 70-4; 1969 Op. Att'y Gen. No. 69-69 (debts owed the state).

Section authorizes only two methods of extinguishing obligations owed to a public body; one, payment, and the other a proper proceeding in court; a public body may remit or release debts or uncollectible accounts only by these two methods. 1970 Op. Att'y Gen. No. 70-88.

Obligations owed to a municipality, such as the lien upon a tract of land assessed under the street improvement district, may be properly extinguished in two manners only: either by payment of the penalty and the assessment into the proper treasury or by a proper proceeding in court. 1970 Op. Att'y Gen. No. 70-4.

Compromise or settlement of judgment as "proper proceeding in court". — A compromise and settlement of a judgment which is entered of record as a satisfaction of judgment would be a proper proceeding in court and would alert the public to the action of the district attorney or attorney general. 1969 Op. Att'y Gen. No. 69-69.

Section 36-1-22 NMSA 1978, relating to compromise or release of claims or judgments by attorney general or district attorney, is completely harmonious with this section. 1969 Op. Att'y Gen. No. 69-69.

Tax liability not forgivable. — The legislature can enact no law, by repeal of an existing tax statute or otherwise, which may have the effect of forgiving tax liability due the state or any municipal corporation therein. 1957-58 Op. Att'y Gen. No. 57-111.

The tax return provided for in former 72-10-2, 1953 Comp., could be required despite repeal of 72-10-1 to 72-10-6, 1953 Comp., by Laws 1957, ch. 66; since the tax was on gross earnings for 1956, it could not be forgiven. 1957-58 Op. Att'y Gen. No. 57-111.

Delinquent taxes aggregated against property cannot be remitted, even by the legislature, on the expectation that such property is to be improved and used for school purposes. 1929-30 Op. Att'y Gen. 249.

Penalty and interest on tax owed not waivable. — Once the tax, penalty and interest has been established as a debt of the state, there was no power in tax commissioner to waive either the penalty or interest. 1957-58 Op. Att'y Gen. No. 58-126.

District attorney's authority to settle tax suits is not restrained by this section. State v. State Inv. Co., 30 N.M. 491, 239 P. 741 (1925).

The authority to release a lien filed upon property to insure payment of delinquent taxes under former emergency school tax act was invested in former commissioner of revenue only after full payment of lien, penalties and interest; the attorney general or a district attorney could, in the event a proper proceeding was filed in court, and wherein

the state was a proper party, compromise or settle such suit in the interests of the state. 1962 Op. Att'y Gen. No. 62-112.

The trial court erred in declining to lend approval to stipulation of settlement entered into by the attorney general prior to entry of judgment in declaratory judgment suit relating to assessment of emergency school taxes against insurance adjusters. Lyle v. Luna, 65 N.M. 429, 338 P.2d 1060 (1959).

Tax lien dischargeable. — Laws 1921, ch. 133, § 474, offended this section insofar as it attempted to discharge personal liability for taxes duly assessed, or barred suit therefor, but not insofar as it discharged the lien of taxes. State v. Montoya, 32 N.M. 314, 255 P. 634 (1927).

Extension of tax sale redemption period permissible. — Laws 1913, ch. 84, § 38 (now repealed), extending the time for redemption from tax sales made to the county, did not violate this section. Lewis v. Tipton, 29 N.M. 269, 222 P. 661 (1924).

Dissolved corporations must pay back due franchise tax before reinstatement, for repeal of Franchise Tax Law did not affect obligations arising before its repeal; but tax should be computed to date of dissolution rather than to date of such repeal. 1931-32 Op. Att'y Gen. 180.

Head of family and veteran exemptions. — The amendment of N.M. Const., art. VIII, § 5, in 1921 effected an exception to this section to the extent that the legislature is authorized to exempt the qualified property from a tax already a fixed liability or obligation, but this right to exempt did not extend to accrued road taxes. Asplund v. Alarid, 29 N.M. 129, 219 P. 786 (1923).

Development agreements. — A home rule municipality has the authority to enter into a contract with a private developer in order to facilitate the construction of retail business establishments, which contract provides for the reimbursement or forgiveness of impact fees. 2002 Op. Att'y Gen. No. 02-02.

Poll tax. — Laws 1923, ch. 148, §§ 621 and 622 (since repealed), making poll tax applicable to women, was inoperative for the year 1923 because of this section. Board of Educ. v. McRae, 29 N.M. 85, 218 P. 346 (1923).

Public general hospital may not forgive any portion of debt owed it by former patients; however, a proper court proceeding may reduce or extinguish such debts. 1966 Op. Att'y Gen. No. 66-18.

In view of this constitutional provision, state hospital has no authority to remit or release any debt or uncollectible account. 1953-54 Op. Att'y Gen. No. 5662.

Hospital cannot accept part payment as satisfaction. — The New Mexico constitution prohibits a public hospital from accepting payment of less than the full

amount of an undisputed legal obligation as a satisfaction. The state cannot compromise the amount owed to it for providing medical services unless a good faith dispute exists as to the amount of indebtedness or liability. Gutierrez v. Gutierrez, 99 N.M. 333, 657 P.2d 1182 (1983).

Outstanding accounts cannot be written off as uncollectible; but where the state hospital finds a patient is indigent but originally committed as a paying patient, the board should have the status of such patient changed by submitting a petition to the district court which committed him, to avoid running uncollectible accounts in the future. 1953-54 Op. Att'y Gen. No. 5662.

But accounts barred by limitations could be removed from ledger of accounts receivable of a joint county-municipal hospital, thereby satisfying the constitutional requirements. 1970 Op. Att'y Gen. No. 70-88.

Collection of debts by credit bureau. — The memorial general hospital in Las Cruces, financed in part by the city of Las Cruces and Dona Ana county, may use the services of a credit bureau to collect bad debts for the hospital and pay for such services from revenues received by the hospital. 1959-60 Op. Att'y Gen. No. 59-212.

Rentals specified in state land lease contracts cannot be reduced, though a lease holder might surrender his lease and thereafter obtain a new lease containing a unitization agreement and possibly modified rentals without violating this section. 1943-44 Op. Att'y Gen. No. 4210.

State land commissioner cannot order a reduction of rentals on existing state leases; while the prohibition of this section was for the legislature, yet an executive order of the land commissioner has the force of law, and the prohibition would extend to it. 1923-24 Op. Att'y Gen. 53, 88.

Grazing lease may be canceled on petition of lessee and consent of the commissioner, as there is then no obligation due the state on unpaid rental notes, nor is the lessee liable for any difference in the rental contract with a subsequent lessee. 1925-26 Op. Att'y Gen. 39.

Cancellation of purchase contracts. — There is nothing in this section which prevents the cancellation of land purchase contracts, which contracts provide that upon default the state's only recourse is cancellation and retention of payments as liquidated damages, and nothing to prevent their lease to the defaulting contract holder. Vesely v. Ranch Realty Co., 38 N.M. 480, 35 P.2d 297 (1934).

Oil and gas lease. — Laws 1931, ch. 18 (19-10-1 NMSA 1978 et seq.), regarding conversion of leases, would be void insofar as it diminished obligation of oil and gas lessee to pay rental to state. Harry Leonard, Inc. v. Vesely, 39 N.M. 33, 38 P.2d 1112 (1934).

Compromise of civil penalties. — A statute allowing the state corporation commission (now public regulation commission) to compromise civil penalties assessed for violations of the Pipeline Safety Act (70-3-11 to 70-3-20 NMSA 1978) would not violate this section. 1971 Op. Att'y Gen. No. 71-16.

Deferment of mortgage payments. — The state investment council may legally enter into an agreement with a mortgagor to defer the payment of principal or interest on a federally insured mortgage investment which is held by the council, so long as the original maturity date of the promissory note securing the mortgage investment is not changed. 1966 Op. Att'y Gen. No. 66-93.

Delinquent liquor license fees. — Neither board of county commissioners nor state comptroller may cancel delinquent liquor license fees inasmuch as these represent obligations owing to the state which cannot be discharged in any manner except by payment or by proper court proceedings. 1941-42 Op. Att'y Gen. No. 3871.

Lien priorities. — Statutes (Laws 1929, §§ 90-1217, 90-1701, now repealed) elevating assessment liens to parity with liens for general taxes did not violate this provision. Waltom v. City of Portales, 42 N.M. 433, 81 P.2d 58 (1938).

Conservancy districts. — Laws 1927, ch. 45 (73-14-1 NMSA 1978 et seq.), relating to conservancy districts, does not violate this section. Gutierrez v. Middle Rio Grande Conservancy Dist., 34 N.M. 346, 282 P. 1 (1929), cert. denied, 280 U.S. 610, 50 S. Ct. 158, 74 L. Ed. 653 (1930).

Power of court to compromise or reduce obligation. — The power of a court to extinguish an obligation owing to the state includes the power to compromise or reduce the obligation. White v. Sutherland, 92 N.M. 187, 585 P.2d 331 (Ct. App.), cert. denied, 92 N.M. 79, 582 P.2d 1292 (1978).

Under second sentence, obligations in question are flatly declared void; no further procedures are necessary to the enjoyment of the privilege conferred. 1957-58 Op. Att'y Gen. No. 58-242.

Constitutional amendment, adding second sentence of this section, is self-executing. 1957-58 Op. Att'y Gen. No. 58-242.

But execution of releases permissible. — The constitutional amendment embodied in the second sentence of this section operates to destroy the underlying obligation and to release the lien which secures payment thereof, without more; however, the department of public welfare (now human services department), is authorized to execute and deliver appropriate releases if requested. 1957-58 Op. Att'y Gen. No. 58-242.

Return of funds received prior to passage of amendment. — Funds being held by the department of welfare (now human services department) which, upon receipt, were subject to the requirement that they be deposited directly and unconditionally into the

state treasury could not be regarded as remaining unpaid and could not be returned to the payor; but to the extent that the department held, prior to November 20, 1958, funds which upon receipt were subject to the requirement that they be deposited in a suspense account in the state treasury, pending determination of whether or not they would become the absolute property of the state, such moneys could properly be returned to the payor. 1957-58 Op. Att'y Gen. No. 58-242.

Installment payments received by the department of public welfare (now human services department) prior to November 20, 1958, could not lawfully be returned to the payor. 1957-58 Op. Att'y Gen. No. 58-242.

Comparable provisions. — Wyoming Const., art. III, § 40.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 56 Am. Jur. 2d Municipal Corporations, Counties, and Other Political Subdivisions §§ 807, 819 to 826; 72 Am. Jur. 2d States, Territories and Dependencies § 86.

What amounts to "indebtedness" to state within constitutional or statutory provision as to release or compromise of same, 108 A.L.R. 376.

64 C.J.S. Municipal Corporations §§ 1880, 2073; 81A C.J.S. States §§ 223, 224.

Sec. 33. [Prosecutions under repealed laws.]

No person shall be exempt from prosecution and punishment for any crime or offenses against any law of this state by reason of the subsequent repeal of such law.

ANNOTATIONS

This section does not apply to 2002 amendment to 31-18-17 NMSA 1978 or to the interpretation of the amendment through 12-2A-16 NMSA 1978. State v. Shay, 2004-NMCA-077, 136 N.M. 8, 94 P.3d 8, cert. granted, 2005-NMCERT-002, 137 N.M.266, 110 P.3d 74.

Repeal between arrest and filing of information no bar. — Fact that statute under which defendant was charged (for unlawful possession of LSD) was repealed after arrest but prior to filing of information did not bar or abate the proceedings against the defendant. State v. McAdams, 83 N.M. 544, 494 P.2d 622 (Ct. App. 1972).

Habitual Criminal Act. — Although habitual criminality is a status rather than an offense, so that prior convictions only relate to the punishment to be imposed in the last case in which the accused was convicted of a felony in this state, trial court's sentencing of defendant under Habitual Criminal Act which had been repealed by time of sentencing was valid. State v. Tipton, 78 N.M. 600, 435 P.2d 430 (1967).

Because the Habitual Offender Act was not repealed, this section is not implicated. State v. Shay, 2004-NMCA-077, 136 N.M. 8, 94 P.3d 8, cert. granted, 2005-NMCERT-002, 137 N.M.266, 110 P.3d 74.

Negligent homicide. — Prosecution of automobile driver upon charge of negligent homicide under former 64-22-1, 1953 Comp., was not abated by subsequent repeal of the statute by Laws 1957, ch. 239. State v. Tracy, 64 N.M. 55, 323 P.2d 1096 (1958).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 73 Am. Jur. 2d Statutes § 384.

Witnesses, statute restoring competency of convicts as, as infringement of governor's pardoning power, 63 A.L.R. 982.

Crime, withdrawal by legislative act of power under which political body acted in punishing act as, as affecting prior offenses, 89 A.L.R. 1514.

Criminal prosecution, pendency of, within saving clause of statute, or principle which prevents application of statute to pending prosecution, 122 A.L.R. 670.

Penalty for second or subsequent offense, enhancement of, as affected by repeal of statute under which prior conviction was secured, 132 A.L.R. 105, 139 A.L.R. 673.

22 C.J.S. Criminal Law § 29; 82 C.J.S. Statutes §§ 434 to 439.

Sec. 34. [Change of rights or procedure in pending cases.]

No act of the legislature shall affect the right or remedy of either party, or change the rules of evidence or procedure, in any pending case.

ANNOTATIONS

This section limits ability of legislature to enact legislation that affects pending litigation. State v. Sanford, 2004-NMCA-071, 136 N.M. 14, 94 P.3d 14.

This section applies to legislative action that changes a substantive right or remedy. State v. Sanford, 2004-NMCA-071, 136 N.M. 14, 94 P.3d 14.

And section expressly applies to either party in a pending case. State v. Sanford, 2004-NMCA-071, 136 N.M. 14, 94 P.3d 14.

Habitual offender statute. — This section precludes the effect of the 2002 amendment to the habitual offender statute when a supplemental criminal information is filed before, and defendant is sentenced after, the July 1, 2002 effective date of the amendment. State v. Sanford, 2004-NMCA-071, 136 N.M. 14, 94 P.3d 14.

Because no habitual offender proceedings were pending at the time the 2002 amendment to 31-18-17 NMSA 1978 became effective and because any right or remedy the state may have to prosecute habitual offenders does not ripen until after the conviction, there is no constitutional prohibition to applying the 2002 amendment to cases in which the supplemental information charging status was not filed before July 1, 2002. State v. Shay, 2004-NMCA-077, 136 N.M. 8, 94 P.3d 8, cert. granted, 2005-NMCERT-002, 137 N.M.266, 110 P.3d 74.

Sex Offender Registration and Notification Act does not violate this section. State v. Druktenis, 2004-NMCA-032, 135 N.M. 223, 86 P.3d 1050.

Where a constitutionally permissible retroactive application of Sex Offender Registration and Notification Act requirements to defendant made him subject to a probation violation if he knowingly failed to register and if he were found to have committed a felony by failing to register, this does not constitute a legislative act that changes rules of evidence or procedure in a pending case. Therefore, the legislative changes are too indirect, remote, and attenuated to be considered unconstitutional under this section. State v. Druktenis, 2004-NMCA-032, 135 N.M. 223, 86 P.3d 1050.

Applicability of section to acts of regulatory agencies. — Although this section speaks only of acts of the legislature, it also applies to regulatory agencies created by the legislature. The legislature cannot circumvent the constitutional prohibition by delegating the task to an agency. Pineda v. Grande Drilling Corp., 111 N.M. 536, 807 P.2d 234 (Ct. App. 1991).

Applicability of section to administrative agencies. — This section applies to administrative agencies, such as the workers' compensation division. Pineda v. Grande Drilling Corp., 111 N.M. 536, 807 P.2d 234 (Ct. App. 1991).

Constitutional amendment not "act of legislature". — The 1996 amendment of N.M. Const., art. XI, was not an "act of the legislature" within the meaning of this section. U.S. West Communications, Inc. v. New Mexico Pub. Regulation Comm'n, 1999-NMSC-024, 127 N.M. 375, 981 P.2d 789.

Effective date as determining factor. — Notice of enactment of a law is irrelevant under this section. The effective date is the determining factor. Pineda v. Grande Drilling Corp., 111 N.M. 536, 807 P.2d 234 (Ct. App. 1991).

Statute prior to amendment applies to pending case. — Where a case is pending when an amended statute is enacted, the old statute applies to the case. U.S. Life Title Ins. Co. v. Romero, 98 N.M. 699, 652 P.2d 249 (Ct. App. 1982).

"Pending case" refers to suit pending on some court docket and does not include a suit filed after the statute became effective on a cause of action arising prior to the statute. Gray v. Armijo, 70 N.M. 245, 372 P.2d 821 (1962); DiMatteo v. County of Dona Ana ex rel. Board of County Comm'rs, 109 N.M. 374, 785 P.2d 285 (Ct. App. 1989).

Case "pending" while under district court's control. — Judgments of the district court remain under control of the court for a period of 30 days, during which period a case remains a "pending case." Marquez v. Wylie, 78 N.M. 544, 434 P.2d 69 (1967).

Divorce decree with custody provisions not a "pending case". — Although trial court had continuing jurisdiction to modify divorce decree containing child custody provisions under the provisions of 40-4-7 NMSA 1978, that decree was considered final and not within the meaning of a "pending case" under this section; therefore, 28-6-1 NMSA 1978 (making the age of majority 18), which by its operation freed divorced father from making support payments to daughter who had reached age of 18, was not unconstitutional hereunder. Phelps v. Phelps, 85 N.M. 62, 509 P.2d 254 (1973).

Cause filed after dismissal of original as new case. — Second cause, filed within six months after dismissal of first, under 37-1-14 NMSA 1978, was a new case for all purposes, except for purposes of lowering the bar of the statute of limitations and having been filed almost two years after the effective date of the long-arm statute, 38-1-16 NMSA 1978, its provisions were available; this section had no application, there having been no change of procedure after the case was filed. Benally v. Pigman, 78 N.M. 189, 429 P.2d 648 (1967).

Effect of removal of case to federal court. — Case removed to federal court and later remanded was "pending" notwithstanding fact that the jurisdiction of the state court was suspended while the case was before federal court. Elephant Butte Irrigation Dist. v. Regents of N.M. State Univ., 115 N.M. 229, 849 P.2d 372 (Ct. App. 1993).

Case not pending. — Although under the law as it formerly stood a state officer's salary was exempt from garnishment, application of Laws 1917, ch. 18, removing this exemption, did not violate this section, as final judgment in the case in question had been obtained long prior to enactment of the 1917 law. Stockard v. Hamilton, 25 N.M. 240, 180 P. 294 (1919).

Where a worker was injured and the employer began paying temporary disability benefits before Payment and Benefits Rule II(A)(3)(b) was promulgated, but the worker's compensation complaint was not filed until long after the rule became effective, and the claim was not placed on any court's docket until after the complaint was filed, the case was not pending, and the rule was constitutionally applied to the claim. Cass v. Timberman Corp., 110 N.M. 158, 793 P.2d 288 (Ct. App.), rev'd on other grounds, 111 N.M. 184, 803 P.2d 669 (1990).

The fact that a worker's compensation judgment remains subject to modification during the entire period for which benefits were awarded, does not mean that a workers' compensation case is a "pending case" within the meaning of this constitutional provision. Church's Fried Chicken No. 1040 v. Hanson, 114 N.M. 730, 845 P.2d 824 (Ct. App. 1992).

Since the defendant in an action by a bank charged the bank with violations of usury and disclosure laws that were repealed more than a year before the conduct complained of took place, even though the repeal occurred after the bank filed its action, the repealed provisions did not apply after the final judgment was filed and the case was not pending. Century Bank v. Hymans, 120 N.M. 684, 905 P.2d 722 (Ct. App. 1995).

Developer could not avoid a lawful vote by board of commissioners on a moratorium on subdivisions by filing a declaratory judgment action, so as to achieve "pending case" status under this section one month after the proposal of the moratorium but one-half hour prior to the vote. Santa Fe Trail Ranch II, Inc. v. Board of County Comm'rs, 1998-NMCA-099, 125 N.M. 360, 961 P.2d 785.

Final district court orders following appeals of decisions of administrative agencies were entered after the effective dates of 39-3-1.1 NMSA 1978 and Rule 12-505 NMRA. Therefore, cases before the court of appeals for review were not "pending" cases within the meaning of this section. Hyden v. New Mexico Human Servs. Dep't, 2000-NMCA-002, 128 N.M. 423, 993 P.2d 740.

Where defendant did not appeal his judgment of conviction and sentence, defendant’s criminal liability was not pending for the purpose of this section, as there had been a judgment of conviction and an exhaustion of his right to appeal his conviction, not only by virtue of his plea of guilty but also by the passage of the deadline to appeal. State v. Druktenis, 2004-NMCA-032, 135 N.M. 223, 86 P.3d 1050.

This constitutional provision applies to court rules. State v. DeBaca, 90 N.M. 806, 568 P.2d 1252 (Ct. App. 1977).

Rules adopted by the supreme court are not effective to change the procedure in any pending case. State v. Gallegos, 91 N.M. 107, 570 P.2d 938 (Ct. App. 1977).

This section should be considered applicable to rules of court as well as statutes. Marquez v. Wylie, 78 N.M. 544, 434 P.2d 69 (1967).

Supreme court orders as to the use of criminal jury instructions are not to be used, and are not intended to be used, to deprive defendants of a duress defense ex post facto. State v. Norush, 97 N.M. 660, 642 P.2d 1119 (Ct. App.), cert. denied, 98 N.M. 50, 644 P.2d 1039 (1982).

Changes affecting procedure for trial and appeal. — This section applied to legislative changes, during the six years between defendant's original charge and his conviction, to the procedure for the trial and appeal of DWI cases from metropolitan court. State v. Maynes, 2001-NMCA-022, 130 N.M. 452, 25 P.3d 902, cert. denied, 130 N.M. 213, 22 P.3d 681 (2001).

City cannot, by enacting ordinance, affect or change result of pending action, based upon valid ordinances existing at the time of the action. State ex rel. Edwards v. City of Clovis, 94 N.M. 136, 607 P.2d 1154 (1980).

Applicability to land use cases. — For this section to apply to a land use decision by a regulatory body, the landowner must show initial approval of the proposed use and that the landowner substantially changed his position in reliance thereon. Santa Fe Trail Ranch II, Inc. v. Board of County Comm'rs, 1998-NMCA-099, 125 N.M. 360, 961 P.2d 785.

Application to divert water. — This section does not bar the court from considering cases subsequent to their initial filing of an application to divert water in 1982. Herrington v. Office of State Engineer, 2004-NMCA-062, 135 N.M. 585, 92 P.3d 31, cert. granted, 2004-NMCERT-005, 135 N.M. 565, 92 P.3d 11.

Retroactive application of zoning ordinances. — The retroactive application of a new zoning ordinance to an administrative action in which the plaintiff only submitted an application for preliminary plat approval of its subdivision did not violate Article IV, § 34 of New Mexico Constitution because plaintiff did not establish a "vested right" under the vested rights approach. There are two prongs which must be met for a vested right to exist. First there must be approval by the regulatory body, and second, there must be a substantial change in position in reliance thereon. Brazos Land, Inc. v. Board of County Comm'rs, 115 N.M. 168, 848 P.2d 1095 (Ct. App. 1993).

No vested right to interest on illegally collected taxes. — Statutory requirement that the state pay interest on refunds of taxes judicially determined to have been illegally collected could not be said to create an obligation of the state to the taxpayer which gives rise to a vested right in the taxpayer within the meaning of the constitutional provision. Bradbury & Stamm Constr. Co. v. Bureau of Revenue, 70 N.M. 226, 372 P.2d 808 (1962).

Change in interest rate affects the rights or remedies of the parties, even if these rights or remedies are purely statutory, and therefore the statutory rate of interest in effect when a claim became a pending case is applicable to that case even if the rate of interest is changed prior to judgment. Hillelson v. Republic Ins. Co., 96 N.M. 36, 627 P.2d 878 (1981).

Administrator's compensation. — This section did not prohibit use of statute in effect at time of allowance of compensation to administrator, although it was different from statute in effect at commencement of estate proceeding. In re Hildebrand's Estate, 57 N.M. 778, 264 P.2d 674 (1953).

Damages in partial condemnation. — The language of former 42-1-10 NMSA 1978, relating to measure of damages to remainder in partial condemnation, did not amount to changing the rule during the pendency of a case in violation of this section, as former 42-1-10 NMSA 1978 did not alter, amend or modify any other existing statutes, but

merely codifies the correct and existing rule of measure of damages in cases of a partial taking, in harmony and compliance with the payment of just compensation for the taking of private property as required by N.M. Const., art. II, § 20. State ex rel. State Hwy. Comm'n v. Hesselden Inv. Co., 84 N.M. 424, 504 P.2d 634 (1972).

Enactment of "seat belt defense." — It was not error to exclude evidence of the plaintiff's failure to use seat belts because the defendant had no right or remedy with regard to seat belts prior to the adoption of 66-7-373 NMSA 1978, and application of the section did not violate this section of the Constitution. Mott v. Sun Country Garden Prods., Inc., 120 N.M. 261, 901 P.2d 192 (Ct. App. 1995).

Change in mode of executing death penalty. — Statute (31-14-1 NMSA 1978 et seq.) substituting electrocution for hanging was not rendered violative of this section by fact that it was applicable to persons informed against before passage of the statute. Woo Dak San v. State, 36 N.M. 53, 7 P.2d 940 (1931).

Parole and probation of juveniles. — 1969 amendments to former Juvenile Act constituting legislative removal of the power of the juvenile courts to parole or release juveniles committed to New Mexico boys' school or girls' home were not contrary to the provisions of this section, because no "right" of the juvenile has been affected. 1970 Op. Att'y Gen. No. 70-57.

Effect of intervening validating law on illegal school district consolidation. — In proceeding seeking an order mandamusing members of state and district boards of education and state superintendent to dissolve consolidation of two school districts, a validating statute passed by the legislature in 1967, which became effective after the action was commenced, could in no way alter rights as they existed when the action was commenced. State ex rel. Barela v. New Mexico State Bd. of Educ., 80 N.M. 220, 453 P.2d 583 (1969).

Prima facie evidence provision. — Laws 1921, ch. 133, § 455 (since repealed), declaring tax deed to be prima facie evidence of its own validity, could not be applied to cause of action pending at time of its passage. Hudson v. Phillips, 29 N.M. 101, 218 P. 787 (1923).

Disqualification of judge. — Laws 1933, ch. 184 (38-3-9, 38-3-10 NMSA 1978), relating to disqualification of judges, did not violate this section as applied to a case pending when the statutes became effective. State ex rel. Hannah v. Armijo, 38 N.M. 73, 28 P.2d 511 (1933).

Designation of motion day. — Designation of a certain day each month on which to hear motions with directions to clerk to notify attorneys and litigants, in place of former custom of hearing motions on notice by attorneys or order of court at irregular periods, was not such change in procedure as prescribed herein. Heron v. Gaylor, 53 N.M. 44, 201 P.2d 366 (1948).

Dismissal for lack of prosecution. — Laws 1965, ch. 132, purporting to amend Rule 41(e), N.M.R. Civ. P. (see now Rule 1-041 E NMRA), so as to extend from two to three years the period of inaction required for dismissal of suit, was a procedural statute and the changes therein incorporated could not be constitutionally applied in a pending case. Sitta v. Zinn, 77 N.M. 146, 420 P.2d 131 (1966). See also, Southwest Underwriters v. Montoya, 80 N.M. 107, 452 P.2d 176 (1969), holding that the 1965 act was void as infringing on the court's duties.

Laws 1937, ch. 121 (superseded by Rule 1-041 E NMRA), which provided for dismissal of suit with prejudice for failure to prosecute for two years, was void as to an action pending when the statute took effect. Pankey v. Hot Springs Nat'l Bank, 44 N.M. 59, 97 P.2d 391 (1939); State ex rel. Western Acceptance Corp. v. Moise, 44 N.M. 6, 96 P.2d 704 (1939); City of Roswell v. Holmes, 44 N.M. 1, 96 P.2d 701 (1939).

Preservation of error. — Because of this section, Laws 1927, ch. 93, § 11, repealing Laws 1917, ch. 43, § 37, dispensing with necessity for formal exceptions in cases tried by the court without a jury, could not be effective in a case instituted five days before the former act took effect. Bays v. Albuquerque Nat'l Bank, 34 N.M. 20, 275 P. 769 (1929).

Time for objections. — Trial court rule requiring objection to instructions to be made prior to retirement of jury was not applicable to prosecution pending at time of rule's adoption. State v. Hall, 40 N.M. 128, 55 P.2d 740 (1935).

Computation of time. — Rule change adding Saturdays, Sundays and legal holidays as period not to be included in the running of time was a change in procedure, effect of which in the case in question was to extend the time for filing of new trial motion from 10 to 12 days, and could not be applied to a pending case. Marquez v. Wylie, 78 N.M. 544, 434 P.2d 69 (1967).

Change in appeal procedure after filing of complaint. — Court of appeals lacked jurisdiction where teacher's original complaint was filed in 1963 but appeal from decision of the state board of education after hearing in 1969 was taken in accordance with provisions of statute that became effective in 1967, as this section provides that no legislative act shall affect the rights of any party in a pending case. Brown v. Board of Educ., 81 N.M. 460, 468 P.2d 431 (Ct. App. 1970).

Appeal in special proceedings. — Section 39-3-7 NMSA 1978, authorizing appeals from judgments of the district court in special statutory proceedings, did not apply to pending case relating to sale of property forfeited for taxes for less than the amount due thereon, since proceedings at institution of case were special and no valid provision had been made for an appeal. In re Sevilleta De La Joya Grant, 41 N.M. 305, 68 P.2d 160 (1937).

Issue to be raised at trial. — Where appellant was substituted as a defendant in the manner provided by Laws 1931, ch. 156, but did not question the constitutionality of the procedure at trial, he could not raise this objection on appeal on grounds that the act

had not gone into effect until after the complaint was filed. In re Sevilleta De La Joya Grant, 41 N.M. 305, 68 P.2d 160 (1937); Shaffer v. McCulloh, 38 N.M. 179, 29 P.2d 486 (1934).

Language in this section may not be considered implied grant of legislative authority to enact rules in circumstances other than those expressly forbidden; the constitution itself forbids exercise of such power. Southwest Underwriters v. Montoya, 80 N.M. 107, 452 P.2d 176 (1969).

Continued viability of statutory principle despite repeal. — The Tort Claims Act (41-4-1 NMSA 1978 et seq.) was an extension of previous statutes that recognized a limited waiver of sovereign immunity. Accordingly, a claimant's remedy under former 5-6-20 NMSA 1953 to redress her 1974 injury due to the alleged negligence of a state agency did not abate upon the repeal of that statute in 1975, nor upon the enactment of the Tort Claim Act in 1976. Her claim was, thus, not barred under common-law sovereign immunity, but rather retained its vitality pursuant to former 5-6-20 NMSA 1953. Romero v. New Mexico Health & Env't Dep't, 107 N.M. 516, 760 P.2d 1282 (1988).

Law reviews. — For article, "Separation of Powers and the Judicial Rule-Making Power in New Mexico: The Need for Prudential Restraints," see 15 N.M.L. Rev. 407 (1985).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 73 Am. Jur. 2d Statutes § 347 et seq.

Bounty or pension laws, repeal of, as affecting vested rights, 7 A.L.R. 1657, 13 A.L.R. 587, 15 A.L.R. 1359, 147 A.L.R. 1432, 156 A.L.R. 1458.

Taxes, repeal of succession tax as affecting liability for tax already accrued, 26 A.L.R. 1475, 66 A.L.R. 404, 109 A.L.R. 858, 114 A.L.R. 518.

Retroactive application of repeal of statute which operated as limitation of or exception to a subsequent right of action in tort otherwise arising at common law, 120 A.L.R. 943.

Taxes illegally or erroneously assessed, collected or paid, statute repealing or modifying statute providing for refunding of, as applicable retroactively, 124 A.L.R. 1480.

Divorce: retrospective effect of statute prescribing grounds of divorce, 23 A.L.R.3d 626.

82 C.J.S. Statutes § 422.

Sec. 35. [Power and procedure for impeachment and trial.]

The sole power of impeachment shall be vested in the house of representatives, and a concurrence of a majority of all the members elected shall be necessary to the proper exercise thereof. All impeachments shall be tried by the senate. When sitting for that purpose the senators shall be under oath or affirmation to do justice according to the law and the evidence. When the governor or lieutenant governor is on trial, the chief

justice of the supreme court shall preside. No person shall be convicted without the concurrence of two-thirds of the senators elected.

ANNOTATIONS

Cross references. — As to officers subject to impeachment, see N.M. Const., art. IV, § 36.

Removal of appointed officer by governor. — State officer appointed by governor, with advice and consent of senate, can be removed by him under N.M. Const., art. V, § 5, regardless of whether he is subject to impeachment. State ex rel. Ulrick v. Sanchez, 32 N.M. 265, 255 P. 1077 (1926).

Comparable provisions. — Idaho Const., art. V, §§ 3, 4.

Iowa Const., art. III, § 19.

Montana Const., art. V, § 13.

Utah Const., art. VI, §§ 17, 18.

Wyoming Const., art. III, § 17.

Law reviews. — For student symposium, "Constitutional Revision - The Executive Branch - Long or Short Ballot?" see 9 Nat. Resources J. 430 (1969).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 63A Am. Jur. 2d Public Officers and Employees §§ 211, 212, 216, 217.

Physical or mental disability as ground for impeachment, 28 A.L.R. 777.

Power of officer as affected by pendency of impeachment proceeding, 30 A.L.R. 1149.

Injunction as remedy against removal of public officer, 34 A.L.R.2d 554.

Removal of public officer for misconduct during previous term, 42 A.L.R.3d 691.

Power of court to remove or suspend judge, 53 A.L.R.3d 882.

67 C.J.S. Officers and Public Employees §§ 179, 181; 81A C.J.S. States §§ 98, 101.

Sec. 36. [Officers subject to impeachment.]

All state officers and judges of the district court shall be liable to impeachment for crimes, misdemeanors and malfeasance in office, but judgment in such cases shall not extend further than removal from office and disqualification to hold any office of honor,

trust or profit, or to vote under the laws of this state; but such officer or judge, whether convicted or acquitted shall, nevertheless, be liable to prosecution, trial, judgment, punishment or civil action, according to law. No officer shall exercise any powers or duties of his office after notice of his impeachment is served upon him until he is acquitted.

ANNOTATIONS

Cross references. — As to power of impeachment, and exercise thereof, see N.M. Const., art. IV, § 35.

Legislators. — The impeachment route could be used to handle violation by a legislator of N.M. Const., art. IV, § 28 (relating to appointment of legislators to civil office and interests of legislators in contracts with the state or municipalities) or of art. IV, § 39 (relating to bribery or solicitation involving member of the legislature). 1965 Op. Att'y Gen. No. 65-229.

Judicial officers. — Although the supreme court, upon proper recommendation of the board of bar commissioners, could hold an individual subject to discipline, even though he was a judge, insofar as his activities and standing as a member of the bar association were concerned, recommendation by the board to the court regarding a judge's alleged dishonest, illegal or fraudulent act could not as such affect the individual's capacity as a judge during his term of office, inasmuch as the constitution provides the only method for the removal of a judicial officer. In re Board of Comm'rs of State Bar, 65 N.M. 332, 337 P.2d 400 (1959).

Judicial immunity. — The judge reviewing the petition for a grand jury should consider that the alleged conduct may be protected under judicial immunity if the subject of the inquiry is a member of the judiciary. In doing so, however, the reviewing judge should also recognize that judicial immunity does not relieve a person from the consequences of criminal conduct. District Court v. McKenna, 118 N.M. 402, 881 P.2d 1387 (1994), cert. denied, 514 U.S. 1018, 115 S. Ct. 1361, 131 L. Ed. 2d 218 (1995).

Officers appointed by governor are subject to removal by him, whether or not they may be impeached. State ex rel. Ulrick v. Sanchez, 32 N.M. 265, 255 P. 1077 (1926).

Comparable provisions. — Iowa Const., art. III, § 20.

Montana Const., art. V, § 13.

Utah Const., art. VI, § 19.

Wyoming Const., art. III, § 18.

Law reviews. — For student symposium, "Constitutional Revision - Judicial Removal and Discipline - The California Commission Plan for New Mexico?" see 9 Nat. Resources J. 446 (1969).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 46 Am. Jur. 2d Judges §§ 17 et seq.; 63A Am. Jur. 2d Public Officers and Employees §§ 213, 214, 218.

Physical or mental disability as ground for impeachment, 28 A.L.R. 777.

Power of officer as affected by pendency of impeachment proceeding, 30 A.L.R. 1149.

Offense under federal law or law of another state or country, conviction as vacating accused's holding of state or local office or as ground of removal, 20 A.L.R.2d 732.

Infamous crime, or one involving moral turpitude, constituting disqualification to hold public office, 52 A.L.R.2d 1314.

Abuse or misuse of contempt power as ground for removal or discipline of judge, 76 A.L.R.4th 982.

What constitutes conviction within statutory or constitutional provision making conviction of crime ground of disqualification for, removal from, or vacancy in, public office, 10 A.L.R.5th 139.

48A C.J.S. Judges §§ 42 to 45; 67 C.J.S. Officers and Public Employees §§ 179 to 181; 81A C.J.S. States §§ 99, 101, 129.

Sec. 37. [Railroad passes.]

It shall not be lawful for a member of the legislature to use a pass, or to purchase or receive transportation over any railroad upon terms not open to the general public; and the violation of this section shall work a forfeiture of the office.

ANNOTATIONS

Cross references. — As to prohibition against use of railroad passes by public officers, see N.M. Const., art. XX, § 14.

Purpose. — This provision was adopted for the primary purpose of eliminating graft upon the part of members of the legislature and to relieve said members of any feeling of obligation toward a railroad company by virtue of possession of a free pass. 1939-40 Op. Att'y Gen. 34.

Use of railroad passes prohibited. — There is no legislation against accepting free passes on railroads, but under this section and N.M. Const., art. XX, § 14, members of the legislature, of the state board of equalization, of the corporation commission (now

public regulation commission), judges of the supreme or district courts, district attorney, county commissioner and county auditor assessor are prohibited from accepting and using passes. 1912-13 Op. Att'y Gen. 22.

Grant or receipt of free passes by motor carrier unlawful. — No carrier is required to transport any state employee or other person free of charge whether traveling on official business or not, and it is unlawful for a motor carrier which is regulated by the state to grant passes to any such person or for such person to accept them. 1937-38 Op. Att'y Gen. 160.

Prohibition inapplicable to railroad employees. — The prohibition does not apply to bona fide employees of the railroad companies or their wives, if they become legislators. 1939-40 Op. Att'y Gen. 34.

The acceptance of a pass from a railroad company by a member of the legislature who is also regularly employed by such company would not be within the contemplation of this provision of the constitution. 1937-38 Op. Att'y Gen. 56.

A railroad employee who becomes a member of the legislature does not come within the purview of this law prohibiting free passes. 1933-34 Op. Att'y Gen. 53.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Evidence of right to free transportation on public conveyance, 3 A.L.R. 387.

Carriers, free passes to public officials or employees, 8 A.L.R. 682.

Sec. 38. [Monopolies.]

The legislature shall enact laws to prevent trusts, monopolies and combinations in restraint of trade.

ANNOTATIONS

Cross references. — As to restraints of trade, see 57-1-1 to 57-1-6 NMSA 1978.

As to monopolies, restraints of trade and the like in the motion picture business, see 57-5-1 to 57-5-22 NMSA 1978.

For Unfair Practices Act, see 57-12-1 NMSA 1978 et seq.

For Price Discrimination Act, see 57-14-1 to 57-14-9 NMSA 1978.

As to trade practices and frauds, see Article 16 of Chapter 59A NMSA 1978.

As to improper trade practices in the sale of alcoholic beverages, see Article 8A of Chapter 60 NMSA 1978.

For provision making contracts tending to restrict or abridge the building or operation of railroads void, see 63-2-17 NMSA 1978.

Purpose. — The constitutional prohibition contained in this section is aimed at preventing such monopolies and combinations as would, in effect, result in a practically complete destruction of competition. Skaggs Drug Center v. General Elec. Co., 63 N.M. 215, 315 P.2d 967 (1957).

"Price control". — The makers of the constitution did not intend to include the words "price control" in this section. Skaggs Drug Center v. General Elec. Co., 63 N.M. 215, 315 P.2d 967 (1957).

Exercise of police power over business or profession. — While language of this section enjoins legislation tending to create monopolies, it must yield to the more important consideration of reasonably exercising the police power over a business or profession having a vital relation to public welfare and health; former 61-17-37 NMSA 1978, fixing a minimum price for barber work, had a direct relation to public health and did not violate this section. Arnold v. Board of Barber Exmrs., 45 N.M. 57, 109 P.2d 779 (1941).

Former Fair Trade Act. — The Fair Trade Act (former 49-2-4, 1953 Comp.) did not violate this section of the state constitution. Skaggs Drug Center v. General Elec. Co., 63 N.M. 215, 315 P.2d 967 (1957).

Restrictions in townsite deeds on sale of alcohol. — This section is not violated by restricted deeds of an improvement company establishing a townsite and restricting forever the sale of intoxicating liquor in the town to one block, by such persons as are designated by the company, such restriction being for the benefit of the community and without intent to create a monopoly. Alamogordo Imp. Co. v. Prendergast, 45 N.M. 40, 109 P.2d 254 (1940).

Comparable provisions. — Idaho Const., art. XI, § 18.

Utah Const., art. XII, § 20.

Wyoming Const., art. X, § 8.

Law reviews. — For article, "New Mexico Restraint of Trade Statutes - A Legislative Proposal," see 9 N.M.L. Rev. 1 (1978-79).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 54A Am. Jur. 2d Monopolies, Restraints of Trade and Unfair Trade Practices § 781 et seq.

Interstate transaction, applicability of state antitrust act to, 24 A.L.R. 787.

Constitutionality of statutes making certain facts presumptive evidence of violation of regulations, 51 A.L.R. 1169, 86 A.L.R. 179, 162 A.L.R. 495.

Statute prohibiting buyer or seller of commodities from fixing prices in one locality higher or lower than in another, 67 A.L.R.3d 26.

Reputation or repute, constitutionality of statute relating to combinations in restraint of trade which predicates criminality upon, 92 A.L.R. 1235.

Copyright owners, state's powers to prohibit combinations of, 136 A.L.R. 1438.

Application of state "fair trade" law to nonsigning reseller as violation of federal anti-trust laws, 19 A.L.R.2d 1139.

Filling stations: restrictive agreement or covenant in respect of purchase or handling of petroleum products by operator of filling station as in restraint of trade or in violation of antitrust statute, 26 A.L.R.2d 219.

Validity, under state constitutions, of nonsigner provisions of Fair Trade Laws, 60 A.L.R.2d 420.

Public utilities: validity of contract between public utilities, other than carriers, dividing territory and customers, 70 A.L.R.2d 1326.

Banks: application to banks and banking institutions of antimonopoly or antitrust laws, 83 A.L.R.2d 374.

Validity, construction and effect of real estate broker's multiple listing agreement, 45 A.L.R.3d 190.

Propriety, under state law, of manufacturer's or supplier's refusal to sell medical product to individual physician, hospital, or clinic, 45 A.L.R.4th 1006.

58 C.J.S. Monopolies § 27.

Sec. 39. ["Bribery" and "solicitation" defined.]

Any member of the legislature who shall vote or use his influence for or against any matter pending in either house in consideration of any money, thing of value or promise thereof, shall be deemed guilty of bribery; and any member of the legislature or other person who shall directly or indirectly offer, give or promise any money, thing of value, privilege or personal advantage, to any member of the legislature to influence him to vote or work for or against any matter pending in either house; or any member of the legislature who shall solicit from any person or corporation any money, thing of value or personal advantage for his vote or influence as such member shall be deemed guilty of solicitation of bribery.

ANNOTATIONS

Cross references. — For penalty for bribery, see N.M. Const., art. IV, § 40.

Statutory crime void. — The statutory crime of demanding or receiving a bribe as a public official (30-24-2 NMSA 1978) conflicts with the constitutional crime of soliciting a bribe as a member of the legislature and is therefore void. State v. Olguin, 118 N.M. 91, 879 P.2d 92 (Ct. App. 1994), aff'd in part, 120 N.M. 740, 906 P.2d 731 (1995).

This provision covers three types of activity, namely, (1) a legislator voting or using his influence for or against any pending legislation in consideration of any money, thing of value or promise thereof, (2) any legislator or other person who offers, gives or promises to give anything of value to a member of the legislature to influence him to vote or work for or against any pending legislation and (3) any legislator who solicits anything of value for his vote or influence. 1965 Op. Att'y Gen. No. 65-229.

Word "person" includes individuals and entities that are not corporations; thus, in a prosecution for soliciting a bribe as a member of the legislature, it was not necessary for the state to prove that the entity from which the defendant solicited a bribe was a corporation. State v Olguin, 120 N.M. 740, 906 P.2d 731 (1995).

Paid lobbyist. — A legislator who is a paid lobbyist on retainer would, in all probability, be precluded from voting on or in any way using his influence for or against any pending legislation which would directly affect the person or persons paying the retainer. 1965 Op. Att'y Gen. No. 65-229.

Section not applicable to lieutenant governor. — While the lieutenant governor presides over the senate, he is not a member of the legislative branch of government, but of the executive department, and is not included within the scope of this section. 1965 Op. Att'y Gen. No. 65-229.

Impeachment route could be used for violation of this section. 1965 Op. Att'y Gen. No. 65-229.

Enjoining violations. — Although only in limited instances will the courts enjoin the commission of a crime, where necessary to protect property and property rights from irreparable injury, the courts will issue an injunction; thus, it might be that the courts would enjoin a violation of this section. 1965 Op. Att'y Gen. No. 65-229.

Criminal prosecution. — While bribery and solicitation thereof are secretive crimes which usually come to light, if at all, after the offense has been committed, it is the duty of the district attorney to prosecute all crimes for the state, and if he fails or refuses to do so, the attorney general is authorized to act on behalf of the state if after a thorough investigation such action is ascertained to be advisable. 1965 Op. Att'y Gen. No. 65-229.

Indictment hereunder need not allege that the matter was pending in either house. State v. Lucero, 20 N.M. 55, 146 P. 407 (1915).

Standard of proof. — Since violation of this section is a felony, the proof would have to be beyond a reasonable doubt. 1965 Op. Att'y Gen. No. 65-229.

Comparable provisions. — Wyoming Const., art. III, § 42.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 12 Am. Jur. 2d Bribery §§ 12 to 14.

Liability of one cooperating in bribery which he was incapable of committing personally, 74 A.L.R. 1114, 131 A.L.R. 1322.

Candidate, statement by, regarding salary or fees of office, as bribery, 106 A.L.R. 493.

Recovery of money paid or property transferred as a bribe, 60 A.L.R.2d 1273.

Entrapment to commit bribery or offer to bribe, 69 A.L.R.2d 1397.

Furnishing public official with meals, lodging or travel, or receipt of such benefits, as bribery, 67 A.L.R.3d 1231.

Criminal offense of bribery as affected by lack of authority of state public officer or employee, 73 A.L.R.3d 374.

11 C.J.S Bribery §§ 1 to 7.

Sec. 40. [Penalty for bribery.]

Any person convicted of any of the offenses mentioned in Sections thirty-seven and thirty-nine hereof, shall be deemed guilty of a felony and upon conviction shall be punished by fine of not more than one thousand dollars [($1,000)] or by imprisonment in the penitentiary for not less than one nor more than five years.

ANNOTATIONS

Cross references. — As to bribery and solicitation involving legislators in general, see N.M. Const., art. IV, § 39.

Standard of proof. — Since violation of N.M. Const., art. IV, § 39, is made a felony under this section, the proof would have to be proof beyond a reasonable doubt. 1965 Op. Att'y Gen. No. 65-229.

Comparable provisions. — Wyoming Const., art. III, §§ 42, 43.

Sec. 41. [Compelling testimony in bribery cases.]

Any person may be compelled to testify in any lawful investigation or judicial proceeding against another charged with bribery or solicitation of bribery as defined herein, and shall not be permitted to withhold his testimony on the ground that it might incriminate or subject him to public infamy; but such testimony shall not be used against him in any judicial proceeding against him except for perjury in giving such testimony.

ANNOTATIONS

Cross references. — For constitutional guarantee against compulsory self-incrimination, see N.M. Const., art. II, § 15.

As to perjury in general, see 30-25-1 NMSA 1978.

Comparable provisions. — Wyoming Const., art. III, § 44.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Other jurisdiction, privilege against self-incrimination as extending to danger of prosecution in, 59 A.L.R. 895, 82 A.L.R. 1380.

Adequacy of immunity offered as condition of denial of privilege against self-incrimination, 118 A.L.R. 602, 53 A.L.R.2d 1030, 29 A.L.R.5th 1.

Assertion of privilege against self-incrimination, necessity and sufficiency of, as condition of statutory immunity of witness from prosecution, 145 A.L.R. 1416.

Waiver of privilege, in exchange for immunity from prosecution, as barring reassertion of privilege on account of prosecution in another jurisdiction, 2 A.L.R.2d 631.

Grand jury, privilege against self-incrimination as to testimony before, 38 A.L.R.2d 225.

Assertion of immunity as ground for removing or discharging public officer or employee, 44 A.L.R.2d 789.

Propriety, under state constitutional provisions, of granting use or transactional immunity for compelled incriminating testimony - post-Kastigar cases, 29 A.L.R.5th 1.

Sec. 42. [Hearings on confirmation of gubernatorial appointments.]

The senate, in exercising its advice and consent responsibilities over gubernatorial appointments, may by resolution designate the members of an appropriate standing committee to operate as an interim committee during the interim between legislative sessions for the purpose of conducting hearings and taking testimony on the confirmation or rejection of gubernatorial appointments. Recommendations of the committee shall be submitted to the senate for action at the next succeeding legislative session. Members of such committee shall be paid per diem and mileage for attendance at such hearings at the same rates as legislators are paid for attendance at joint legislative interim committee meetings. The governor shall submit all appointments

requiring senate confirmation to such committee within thirty days after the date of appointment. (As added November 4, 1986.)

ANNOTATIONS

Cross references. — As to governor's appointive and removal power, including interim appointees, see N.M. Const., art. V, § 5.

As to oath of officer, see N.M. Const., art. XX, § 1.

As to holding office until successor qualified, see N.M. Const., art. XX, § 2.

As to interim appointments when senate not in session, see N.M. Const., art. XX, § 5.

The 1986 amendment, which was proposed by S.J.R. No. 1 (Laws 1986) and adopted at the general election held on November 4, 1986, by a vote of 161,322 for and 103,134 against added new Section 42 to Article IV.

Compiler's notes. — An amendment to this article proposed by H.J.R. No. 15, § 1 (Laws 1965), which would have added a new Section 42, providing for the appointment of a legislative auditor, was submitted to the people at the special election held on September 28, 1965. It was defeated by a vote of 21,144 for and 29,162 against.

An amendment to this article proposed by S.J.R. No. 1, § 1 (Laws 1965), which would have added a new section, providing for the weighing of legislative votes for the purpose of securing to the people of New Mexico equal protection of the laws, was submitted to the people at the special election held on September 28, 1965. It was defeated by a vote of 16,299 for and 34,568 against.

Recess appointment of regent. — The failure of the legislature to act upon the governor's nomination of a person to the board of regents of an educational institution operates neither as "constructive consent" to, nor as rejection of, the nomination. A regent appointed by recess appointment may be replaced through a new gubernatorial nomination made during the next session of the legislature. 1991 Op. Att'y Gen. No. 91-04.

A nominee to the board of regents of an educational institution who is neither confirmed nor rejected by the senate cannot serve as regent unless, following adjournment of both houses of the legislature, the governor makes a recess appointment of the person, in which case, that person may serve as a full-fledged regent until the next session of the legislature. As either a de jure or de facto officer, the regent's actions are valid as to the public. The governor is not obliged to re-submit the former nominee to the next session of the legislature and may make a new nomination. The new nominee may assume the duties as regent, either upon approval by the senate or by a recess appointment by the governor if the senate fails to take any action. 1991 Op. Att'y Gen. No. 91-04.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 38 Am. Jur. 2d Governor §§ 5 to 7; 63A Am. Jur. 2d Public Officers and Employees §§ 117, 119, 120.

67 C.J.S. Officers and Public Employees § 42; 81A C.J.S. States §§ 55, 84.

ARTICLE IV
APPORTIONMENT [REPEALED]

ANNOTATIONS

Repeals. — A concluding portion of N.M. Const., art. IV, entitled "Apportionment" and relating to the apportionment of legislative districts throughout the state was repealed in 1949 by the constitutional amendment of N.M. Const., art. IV, § 3. See catchline "The 1949 amendment" in notes to N.M. Const., art. IV, § 3. For apportionment provisions, see N.M. Const., art. IV, § 3.

ARTICLE V
Executive Department

Section 1. [Composition of department; terms of office of members; residing and maintaining records at seat of government.]

The executive department shall consist of a governor, lieutenant governor, secretary of state, state auditor, state treasurer, attorney general and commissioner of public lands, who shall, unless otherwise provided in the constitution of New Mexico, be elected for terms of four years beginning on the first day of January next after their election. The governor and lieutenant governor shall be elected jointly by the casting by each voter of a single vote applicable to both offices.

Such officers shall, after having served two terms in a state office, be ineligible to hold that state office until one full term has intervened.

The officers of the executive department, except the lieutenant governor, shall during their terms of office, reside and keep the public records, books, papers and seals of office at the seat of government.

Upon the adoption of this amendment by the people, the terms provided for in this section shall apply to those officers elected at the general election in 1990 and all state executive officers elected thereafter. (As amended November 3, 1914, November 4, 1958, effective January 1, 1959, November 6, 1962, November 3, 1970 and November 4, 1986.)

ANNOTATIONS

Cross references. — For qualifications of officers specified in this section, see N.M. Const., art. V, § 3.

As to compensation of such officers, see N.M. Const., art. V, § 12 and 8-1-1 NMSA 1978.

As to executive cabinet, see 9-1-3, 9-1-4 NMSA 1978.

The 1914 amendment, which was proposed by S.J.R. No. 19 (Laws 1913) and adopted at the general election held on November 3, 1914, by a vote of 18,472 for and 12,257 against, amended this section, which formerly read, "The executive department shall consist of a governor, lieutenant governor, secretary of state, state auditor, state treasurer, attorney general, superintendent of public instruction and commissioner of public lands, who shall be elected for the term of four years beginning on the first day of January next after their election.

"Such officers, except the commissioner of public lands and superintendent of public instruction, shall be ineligible to succeed themselves after serving one full term. The officers of the executive department, except the lieutenant governor, shall, during their terms of office, reside and keep the public records, books, papers and seals of office at the seat of government," to read, "The executive department shall consist of a governor, lieutenant governor, secretary of state, state auditor, state treasurer, attorney general, superintendent of public instruction and commissioner or [of] public lands, who shall be elected for the term of two years beginning on the first day of January next after their election.

"Such officers shall, after having served two consecutive terms, be ineligible to hold any state office for two years thereafter.

"The officers of the executive department except the lieutenant governor, shall during their terms of office, reside and keep the public records, books, papers and seals of office at the seat of government."

The 1958 amendment, which was proposed by S.J.R. No. 3, § 2 (Laws 1957) and adopted at the general election held on November 4, 1958, with a vote of 48,884 for and 41,795 against, omitted "superintendent of public instruction" from list of officers and added "unless otherwise provided in the constitution of New Mexico" following "who shall" in the first paragraph.

The 1962 amendment, which was proposed by S.J.R. No. 3, § 1 (Laws 1961) and adopted at the general election held on November 6, 1962, with a vote of 41,435 for and 22,383 against, added the second sentence to the first paragraph.

The 1970 amendment, which was proposed by S.J.R. No. 7, § 1 (Laws 1970) and adopted at the general election held on November 3, 1970, with a vote of 79,722 for and 59,426 against, substituted "term of four years" for "term of two years" in the first

sentence of the first paragraph, rewrote the second paragraph to provide that after service of one term, executive officers would be ineligible to hold state office until passage of another full term, with an exception for the lieutenant governor, and added the fourth paragraph.

The 1986 amendment, which was proposed by H.J.R. No. 15 (Laws 1986) and adopted at the general election held on November 4, 1986, by a vote of 168,850 for and 106,013 against, substituted "terms" for "the term" in the first paragraph; in the second paragraph, substituted "two terms in a state office" for "one term," substituted "that" for "any" after "hold," and deleted the exception relating to the lieutenant governor at the end; substituted "1990" for "1970" in the last paragraph; and deleted the proviso at the end.

Compiler's notes. — An amendment to this section proposed by S.J.R. No. 2, § 1 (Laws 1959), which would have provided for a four-year term for executive officials, would have made such officers ineligible for office for four years after service of two consecutive four-year terms and would have provided for election of such officers, was submitted to the people at the general election held on November 8, 1960. It failed to pass because it did not receive the necessary majority.

An amendment to this section proposed by H.J.R. No. 15, § 1 (Laws 1961), which would have deleted reference to the state auditor from the list of officers in the first paragraph, and an amendment proposed by S.J.R. No. 13, § 1 (Laws 1961), which would have provided for a four-year term for elected executive officials, would have made such officers ineligible for office after service of one four-year term and would have provided for election of such officers, were both submitted to the people at the special election held on September 19, 1961. They failed to pass because they did not receive the necessary majority.

An amendment to this section proposed by S.J.R. No. 25 (Laws 1975), which would have allowed state executive officers to serve two consecutive four-year terms, was submitted to the people at the general election held on November 2, 1976. It was defeated by a vote of 117,167 for and 181,201 against.

An amendment to this section, proposed by S.J.R. Nos. 5 and 6 (Laws 1979), which would have substituted "terms" for "the term" in the first sentence of the first paragraph, substituted "two consecutive terms in a state office" for "one term" in the second paragraph and substituted "1982" for "1970" and deleted the second sentence in the fourth paragraph, was submitted to the people at the general election on November 4, 1980. It was defeated by a vote of 107,676 for and 138,393 against.

Constitutionality of amendment. — The 1970 session of the legislature proposed eight amendments to the constitution, although the attorney general has indicated that under N.M. Const., art. IV, § 5, constitutional amendments may not be considered in even-numbered years. See 1965 Op. Att'y Gen. No. 65-212, 1969 Op. Att'y Gen. No. 69-151 and catchline "The 1970 amendment" under this section, above.

Powers of secretary of state. — Secretary of state has only such powers and authority as specifically granted by the constitution or by statute; he has no inherent or implied power to certify candidates not selected in a manner specifically provided by law. 1959-60 Op. Att'y Gen. No. 60-151.

The secretary of state does not have the power to change mandatory provisions of the Election Code. Weldon v. Sanders, 99 N.M. 160, 655 P.2d 1004 (1982).

Purpose of state auditor. — The office of state auditor was created and exists for the basic purpose of having a completely independent representative of the people, accountable to no one else, with the power, duty and authority to examine and pass upon the activities of state officers and agencies receiving and expending public moneys. Thompson v. Legislative Audit Comm'n, 79 N.M. 693, 448 P.2d 799 (1968).

No common-law powers in attorney general. — Absent common-law powers in the solicitor general, they would not have resided in the attorney general in 1912 when our constitution was adopted. State ex rel. Att'y Gen. v. Reese, 78 N.M. 241, 430 P.2d 399 (1967), refusing to prohibit district judge from proceeding further in action brought in the name of the state by district attorney for Santa fe county, seeking recovery of certain amounts allegedly paid illegally to chairman of the state highway commission [state transportation commission], without permitting intervention of attorney general.

Land commissioner. — In order to avail themselves of the federal land grant provided by the Enabling Act, the people in their constitution created the office of commissioner of public lands. State ex rel. Evans v. Field, 27 N.M. 384, 201 P. 1059 (1951).

Legislature cannot abolish a constitutional office nor deprive the office of a single prescribed constitutional duty; nor can this be done by indirection, such as depriving the officer of all statutory duties, thereby leaving the office in name only, an empty shell. Thompson v. Legislative Audit Comm'n, 79 N.M. 693, 448 P.2d 799 (1968); Torres v. Grant, 63 N.M. 106, 314 P.2d 712 (1957); 1980 Op. Att'y Gen. No. 80-3,.

Laws 1965, ch. 287 (former 4-24-1 to 4-24-25, 1953 Comp.), designed to take away from the state auditor all post-audit duties and place them with the legislative audit commission, and making the commission's appointee, the legislative auditor, responsible for substantially all the duties performed by the state auditor, was unconstitutional. Thompson v. Legislative Audit Comm'n, 79 N.M. 693, 448 P.2d 799 (1968).

But legislature empowered to create other executive officers. — Enumeration by the constitution of certain officers constituting the executive departments of the state does not necessarily deprive the legislature of the power to create other executive officers, although it cannot abolish any of those created by the constitution; N.M. Const., art. V, § 5, recognizes and provides for the appointment of all officers whose appointment or election is not otherwise provided for. Pollack v. Montoya, 55 N.M. 390, 234 P.2d 336 (1951).

Constitutional and statutory offices distinguished. — There is an obvious distinction between offices created under the constitution itself and executive officers created by statute; the latter are creatures of the legislature, and may have their duties changed or their offices abolished at any time the legislature so desires, unlike the former. State ex rel. Gomez v. Campbell, 75 N.M. 86, 400 P.2d 956 (1965).

Purely statutory duties transferable. — Since this section is silent as to the duties appertaining to the office of state auditor, the legislature had power to transfer purely statutory duties of the office previously performed by the auditor to another officer of its own choosing. Torres v. Grant, 63 N.M. 106, 314 P.2d 712 (1957).

Laws 1957, ch. 252 (6-5-1 NMSA 1978), providing that warrants on state funds may be drawn only by director (now secretary) of department of finance and administration, was unconstitutional on theory that it removed from the state auditor, a constitutional officer, substantially all the powers and duties of that office. Torres v. Grant, 63 N.M. 106, 314 P.2d 712 (1957).

Second sentence of first paragraph of this section is self-executing. 1962 Op. Att'y Gen. No. 62-149.

Governor and lieutenant governor to be voted on as unit. — It was the intention of the people, in amending this section and N.M. Const., art. V, § 2, to require that the governor and lieutenant governor be voted on as a unit; lacking one of them, namely the governor, there could be no candidate for lieutenant governor by himself, and mandamus would not lie to compel certification of his name. State ex rel. Chavez v. Evans, 79 N.M. 578, 446 P.2d 445 (1968).

Reelection. — Incumbents of both state and county offices were eligible to reelection in 1916. 1915-16 Op. Att'y Gen. 91.

Location of legislatively created offices not restricted hereunder. — The constitution makers did not intend to restrict the creation of additional executive offices, but only to specifically provide that the elective officials named must live and keep all of their records at the seat of government. State ex rel. Gomez v. Campbell, 75 N.M. 86, 400 P.2d 956 (1965).

Act not invalid. — An official act by the lieutenant governor, recorded "Done at the executive office," is not invalid although actually done at his residence in another city. 1921-22 Op. Att'y Gen. 49.

Standing to sue. — Relators, who were residents, citizens, qualified electors and citizens of the city and county of Santa Fe, suing in behalf of themselves and other citizens of the state similarly situated, were without standing to raise constitutional question in original proceeding in mandamus, seeking to require governor and eleven state boards or commissions to return and thereafter maintain the main offices of the agencies in question at the capital; but the supreme court, in its own discretion, would

proceed to determine the question. State ex rel. Gomez v. Campbell, 75 N.M. 86, 400 P.2d 956 (1965).

State board of finance is an executive agency. 1959-60 Op. Att'y Gen. No. 59-79.

State tourist bureau is agency of executive branch of the state government and is under the control of the governor. 1957-58 Op. Att'y Gen. No. 57-166.

Comparable provisions. — Idaho Const., art. IV, § 1.

Iowa Const., art. IV, § 1; amendment 32.

Montana Const., art. VI, §§ 1, 2.

Utah Const., art. VII, §§ 1, 2.

Wyoming Const., art. IV, § 1.

Law reviews. — For article, "Mandamus in New Mexico," see 4 N.M. L. Rev. 155 (1974).

For article, " 'New Mexican Nationalism' and the Evolution of Energy Policy in New Mexico," see 17 Nat. Resources J. 283 (1977).

For student symposium, "Constitutional Revision - The Executive Branch - Long or Short Ballot?" see 9 Nat. Resources J. 430 (1969).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 63A Am. Jur. 2d Public Officers and Employees §§ 16, 17, 23, 32, 56, 154 to 156; 72 Am. Jur. 2d States, Territories and Dependencies § 62.

Power to abolish or discontinue office, 4 A.L.R. 205, 172 A.L.R. 1366.

Term of office, "during term for which elected," 5 A.L.R. 120, 40 A.L.R. 945.

Beginning of term, no time fixed for, 80 A.L.R. 1290, 135 A.L.R. 1173.

Power of legislature to extend term of public office, 97 A.L.R. 1428.

Doctrine of estoppel as applicable against one's right to hold a public office or his status as a public officer, 125 A.L.R. 294.

Constitutional or statutory provision referring to "employees" as including public officers, 5 A.L.R.2d 415.

Legislative power to prescribe qualifications for or conditions of eligibility to constitutional office, 34 A.L.R.2d 155.

Construction and effect of constitutional or statutory provisions disqualifying one for public office because of previous tenure of office, 59 A.L.R.2d 716.

Delegation to private persons or organizations of power to appoint or nominate to public office, 97 A.L.R.2d 361.

Removal of public officer for misconduct during previous term, 42 A.L.R.3d 691.

Construction and application, under state law, of doctrine of "executive privilege," 10 A.L.R.4th 355.

67 C.J.S. Officers and Public Employees §§ 5, 13, 66 to 70; 81A C.J.S. States §§ 34, 80, 82.

Sec. 2. [Canvass of elections; tie votes.]

The returns of every election for state officers shall be sealed up and transmitted to the secretary of state, who, with the governor and chief justice, shall constitute the state canvassing board which shall canvass and declare the result of the election. The joint candidates having the highest number of votes cast for governor and lieutenant governor and the person having the highest number of votes for any other office, as shown by said returns, shall be declared duly elected. If two or more have an equal, and the highest, number of votes for the same office or offices, one of them, or any two for whom joint votes were cast for governor and lieutenant governor respectively, shall be chosen therefor by the legislature on joint ballot. (As amended November 6, 1962.)

ANNOTATIONS

Cross references. — As to joint election of governor and lieutenant governor, see N.M. Const., art. V, § 1.

For Election Code see Chapter 1 NMSA 1978.

"Returns". — "Returns" did not include registration lists, and state canvassing board had only the duty of canvassing returns, not ballots; for purpose of discovering discrepancies, errors and omissions on face of returns and directing their correction, the board might consider certificates, tally sheets and pollbooks as part of the "returns"; when corrected they would be reflected in the certificates, and it was the corrected certificate and those not requiring correction which were to be canvassed. Chavez v. Hockenhull, 39 N.M. 79, 39 P.2d 1027 (1934).

Powers of canvassers limited. — Canvassers had power to pass upon genuineness of returns before them, but beyond that their powers were purely ministerial.

Determination by state canvassing board as to whether illegal or fraudulent votes had been cast, or had been cast in such numbers as to warrant excluding returns from the canvass, presented a judicial question wherein the board would be exercising judicial functions without legislative or constitutional warrant. Chavez v. Hockenhull, 39 N.M. 79, 39 P.2d 1027 (1934).

Results as determined by state canvass are public records and this determination constitutes the official record. 1964 Op. Att'y Gen. No. 64-35.

Poll book and ballots. — A general election which includes votes for state officers, presidential electors, members of congress, a highway bond issue and a constitutional amendment should require but one poll book, and one ballot for the constitutional amendment, and one for all the other matters to be voted upon. 1912-13 Op. Att'y Gen. 61.

Governor and lieutenant governor to be voted on as unit. — It was the intention of the people in amending N.M. Const., art. V, § 1 and this section to require that the governor and lieutenant governor be voted on as a unit; lacking one of them, namely, the governor, there could be no candidate for lieutenant governor by himself, and mandamus would not lie to compel the certification of his name. State ex rel. Chavez v. Evans, 79 N.M. 578, 446 P.2d 445 (1968).

Section does not provide for tie in school director election. Unless the statute provides a method for determining a tie, there is no election and the incumbent holds over until a regular election. 1921-22 Op. Att'y Gen. 143.

Comparable provisions. — Idaho Const., art. IV, § 2.

Iowa Const., art. IV, §§ 3 to 5.

Wyoming Const., art. IV, § 3.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 26 Am. Jur. 2d Elections § 392 et seq.; 38 Am. Jur. 2d Governor § 2.

Officers conducting election, result as affected by lack of title or by defective title of, 1 A.L.R. 1535.

Statutory provisions relating to form or manner in which election from voting districts or precincts are to be made, failure to comply with, 106 A.L.R. 398.

Excess or illegal ballots, treatment of, when it is not known for which candidate or upon which side of a proposition they were cast, 155 A.L.R. 677.

Power of election officers to withdraw or change returns, 168 A.L.R. 855.

29 C.J.S. Elections §§ 222, 232, 235 to 239; 81A C.J.S. States §§ 80, 81.

Sec. 3. [Qualifications of executive officers.]

No person shall be eligible to any office specified in Section One, hereof, unless he be a citizen of the United States, at least thirty years of age, nor unless he shall have resided continuously in New Mexico for five years next preceding his election; nor to the office of attorney general, unless he be a licensed attorney of the supreme court of New Mexico in good standing; nor to the office of superintendent of public instruction unless he be a trained and experienced educator.

ANNOTATIONS

Cross references. — As to qualifications for election to elective public office, see N.M. Const., art. VII, § 2.

Residency requirement. — If a person is a resident for the purpose of voting in New Mexico elections, and has been for at least five continuous years preceding his election to an executive office of the state, he is qualified to be a candidate for, and hold such office. 1959-60 Op. Att'y Gen. No. 60-27.

Service in armed forces. — A person who has left the physical limits of the state to serve with the armed forces of the United States after having once established residence here is eligible to hold an executive office. 1959-60 Op. Att'y Gen. No. 60-27.

Qualifications for governor's office. — This section should be read together with N.M. Const., art. VII, § 2, so that a person in order to hold the office of governor must be a citizen of the United States, at least 30 years of age, who has been a resident continuously for five years preceding his election, and who is a qualified elector in New Mexico. State ex rel. Chavez v. Evans, 79 N.M. 578, 446 P.2d 445 (1968).

Convicted felon ineligible. — Denial of certification of name of individual nominated for governor by People's Constitutional Party was proper where candidate had been convicted of a felony in federal district court, as one must be a qualified elector in this state to hold office of governor; fact that an appeal was pending would not change this result. State ex rel. Chavez v. Evans, 79 N.M. 578, 446 P.2d 445, 39 A.L.R. 3d 290 (1968).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 63A Am. Jur. 2d Public Officers and Employees §§ 36 to 46, 60 to 61.

Legislative power to prescribe qualifications for or conditions of eligibility to constitutional office, 34 A.L.R.2d 155.

81A C.J.S. States §§ 15 to 21, 26, 34.

Sec. 4. [Governor's executive power; commander of militia.]

The supreme executive power of the state shall be vested in the governor, who shall take care that the laws be faithfully executed. He shall be commander in chief of the military forces of the state, except when they are called into the service of the United States. He shall have power to call out the militia to preserve the public peace, execute the laws, suppress insurrection and repel invasion.

ANNOTATIONS

Cross references. — For authorized purposes of state indebtedness, including suppression of insurrection and public defense, see N.M. Const., art. IX, § 7.

As to the militia generally, see N.M. Const., art. XVIII, §§ 1 and 2.

As to heading cabinet, see 9-1-3 NMSA 1978.

As to governor's power to call out the militia, see 20-2-6 NMSA 1978.

Governor has almost unlimited authority to suppress insurrection, and is himself the judge as to the local condition requiring it. 1919-20 Op. Att'y Gen. 83.

Governor is sole judge of facts that may seem to demand aid and assistance of military force of state. State ex rel. Charlton v. French, 44 N.M. 169, 99 P.2d 715 (1940).

Governor's authority not to be invaded by legislature. — Any attempt by the legislature to invade the authority vested in the governor by virtue of this section would be interference by one department of the government with another, contrary to Article 3 of the constitution. 1951-52 Op. Att'y Gen. No. 5438.

Limitation imposed by former 20-6-2 NMSA 1978, prior to its 1953 amendment, on the issuance of certificates of indebtedness by the governor without calling a special session of the legislature, was not in conflict with this section as it did not interfere with the governor's power to call out the militia. 1951-52 Op. Att'y Gen. No. 5438.

To provide for public defense embraces considerations of preparedness as well as execution. State ex rel. Charlton v. French, 44 N.M. 169, 99 P.2d 715 (1940).

Power of militia supersedes civil authorities. — Where governor, seeking to quell insurrection, calls out the militia, by executive process, and puts them in charge, such military forces do not act as sheriffs or deputy sheriffs, but their power supersedes the civil authorities. State ex rel. Roberts v. Swope, 38 N.M. 53, 28 P.2d 4 (1933).

Other provisions. — This section is in pari materia with N.M. Const., art. IX, § 7 (authorizing state indebtedness for certain purposes, including the suppressing of

insurrection and public defense) and art. XVIII, § 2 (relating to the organization, discipline and equipment of the militia). State ex rel. Charlton v. French, 44 N.M. 169, 99 P.2d 715 (1940).

Governor does not have authority to legislate regulation of massage practitioners and he cannot delegate it to a massage board. 1980 Op. Att'y Gen. No. 80-09.

Governor did not have authority to enter compacts with Indian tribes. — The governor could not rely on statutory authority to enter into compacts and revenue-sharing agreements with Indian tribes which would permit gaming on Indian lands pursuant to the federal Indian Gaming Regulatory Act. State ex rel. Clark v. Johnson, 120 N.M. 562, 904 P.2d 11 (1995).

Comparable provisions. — Idaho Const., art. IV, §§ 4, 5.

Iowa Const., art. IV, §§ 7, 9.

Montana Const., art. VI, §§ 4, 13.

Utah Const., art. VII, §§ 4, 5.

Wyoming Const., art. IV, § 4.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 38 Am. Jur. 2d Governor § 4; 53 Am. Jur. 2d Military and Civil Defense §§ 3, 32, 34.

Mandamus to governor, 105 A.L.R. 1124.

Prohibition as means of controlling action of governor, 115 A.L.R. 14, 159 A.L.R. 627.

Devolution, in absence of governor, of veto and approval powers upon lieutenant governor or other officer, 136 A.L.R. 1053.

War, constitutionality, construction and application of statute conferring emergency powers on governor during, 150 A.L.R. 1488.

Governor's authority to remit forfeited bail bond, 77 A.L.R.2d 988.

6 C.J.S. Armed Services § 288 et seq.; 81A C.J.S. States § 130.

Sec. 5. [Governor's appointive and removal power; interim appointees.]

The governor shall nominate and, by and with the consent of the senate, appoint all officers whose appointment or election is not otherwise provided for and may remove any officer appointed by him unless otherwise provided by law. Should a vacancy occur

in any state office, except lieutenant governor and member of the legislature, the governor shall fill such office by appointment, and such appointee shall hold office until the next general election, when his successor shall be chosen for the unexpired term. (As amended November 8, 1988.)

ANNOTATIONS

Cross references. — As to vacancies in office of governor (or lieutenant governor) and succession to governorship, see N.M. Const., art. V, § 7.

As to removal of state highway commissioners, see N.M. Const., art. V, § 14.

For governor's power to make interim appointments to fill vacancies in appointive offices between sessions of the legislature, see N.M. Const., art. XX, § 5.

As to appointed secretaries of cabinet departments serving until final action by senate on confirmation, see 9-1-4 NMSA 1978.

For ineligibility of person whose appointment has been rejected by the senate to hold office under recess appointment, see 10-1-1 NMSA 1978.

As to designation of three disaster successors to each executive office, see 12-11-5 NMSA 1978.

The 1988 amendment, which was proposed by H.J.R. No. 11, § 2 (Laws 1988) and adopted at the general election held on November 8, 1988, by a vote of 224,091 for and 145,206 against substituted "unless otherwise provided by law" for "for incompetency, neglect of duty or malfeasance in office" at the end of the first sentence.

No conflict with Article VI, Section 32. — This section addresses the power to remove officers. N.M. Const., art. VI, § 32, addresses the power to fill a vacancy. The two powers are not mutually exclusive, and one does not negate the other. State ex rel. New Mexico Judicial Standards Comm’n v. Espinosa, 2003-NMSC-017, 134 N.M. 59, 73 P.3d 197.

Governor is under constitutional duty to submit appointments of officers to positions requiring the advice and consent of the senate at the next session of that body following the appointment. 1970 Op. Att'y Gen. No. 70-10.

Senate has constitutional duty to act on submitted appointments whenever it is next in session, in time for the governor to make a substitute appointment for anyone rejected by the senate. 1970 Op. Att'y Gen. No. 70-10.

Legislature's confirmatory power exercisable at any session. — Confirmation by the senate of appointments made by governor is not part of its legislative duties, but rather, is an administrative function given to the senate as part of the system of checks

and balances, which exists whenever the senate is in session and may be exercised whether the session is a regular-long, regular-short or special one. 1970 Op. Att'y Gen. No. 70-10.

But legislature not to invade governor's prerogative. — In providing for the "consent" of the senate, it was not the intention of the constitutional draftsmen to permit the senate to instruct or otherwise assert the prerogative of the governor in making the nomination; to the contrary, the nominating authority is vested exclusively in the governor, but his appointing power is shared with the senate. 1961-62 Op. Att'y Gen. No. 61-17.

Commencement of appointee's term. — When a public officer is appointed while the senate is in session, the office holder can neither assume the duties nor exercise the powers of his office until the consent of the senate is given. 1961-62 Op. Att'y Gen. No. 61-17.

Staggered terms. — The use of staggered terms is not sufficient to limit the governor’s removal power under this section. While policies underlying staggered terms are important, such policies cannot override the governor’s express removal authority. State ex rel. New Mexico Judicial Standards Comm’n v. Espinosa, 2003-NMSC-017, 134 N.M. 59, 73 P.3d 197.

Appointment power for legislatively created offices not inherently in governor. — There would be no impediment to the legislature's placing the power of appointment for an office legislatively created in someone other than the governor, and in that event, it might also prescribe the authority to exercise the removal power and the manner of its exercise. 1957-58 Op. Att'y Gen. No. 58-10.

The appointments contemplated in the Oil Conservation Act (Laws 1935, ch. 72, as amended) are appointments "otherwise provided for" as those words are used in this section, and do not invade the governor's power of appointment. 1951-52, Op. Att'y Gen. No. 5397.

The Sales Tax Act of 1934 (Laws 1934 (S.S.), ch. 7) was not unconstitutional and in violation of this section because it did not make the "seller" a collector who should be appointed by the governor, but, instead, levied the tax on the "seller" and made former tax commission the collector of the tax. State ex rel. Attorney Gen. v. Tittmann, 42 N.M. 76, 75 P.2d 701 (1938).

The Drainage District Law of 1912 (73-6-1 NMSA 1978 et seq.) did not violate this section, the commissioners of drainage districts not being of the class contemplated. In re Dexter-Greenfield Drainage Dist., 21 N.M. 286, 154 P. 382 (1915).

But conferral of appointive power on governor includes removal power. — The legislature lacks the power to restrict the governor's removal power over legislatively

created offices where it has conferred the appointing power for these offices upon the governor. 1957-58 Op. Att'y Gen. No. 58-10.

Governor has power to remove any officer appointed by him, including those appointed by and with consent of senate; he is not required to make charges, give notice or accord a hearing. State ex rel. Ulrick v. Sanchez, 32 N.M. 265, 255 P. 1077 (1926); State ex rel. Duran v. Anaya, 102 N.M. 609, 698 P.2d 882 (1985).

Governor's power to remove member of real estate commission. — Since the governor may remove any person appointed by him or his predecessor, the governor can remove any member of the real estate commission at any time without notice or hearing. 1963-64 Op. Att'y Gen. No. 63-134.

Removal of board members. — Since no statutory method of removal was prescribed for former health and social services board, the method prescribed under this section would be the proper method for governor to proceed under. 1971 Op. Att'y Gen. No. 71-6.

Notice and hearing unnecessary for removal. — A public official who, under the law, has a fixed term of office, and who is removable only for specified causes, can be removed without notice or a hearing upon the charges. 1967 Op. Att'y Gen. No. 67-6.

An executive termination is a nullity only where there is a failure to state the reason for removal as required; neither proof of the stated reason nor a hearing thereon is required. 1957-58 Op. Att'y Gen. No. 57-179 (regarding a member of the economic development commission).

No proof of changes required. — The constitution does not require that a notice and hearing be given before a removal can be made and, therefore, no proof would be necessary of the charges made by the governor. 1953-54 Op. Att'y Gen. No. 5746.

Governor may remove policy-making appointee for political reasons, without notice or hearing, and this power encompasses removal for expressions made by the appointee in contravention of the policy goals of the governor; however, a contrary rule may apply to a nonpolicy-making state employee. Mitchell v. King, 537 F.2d 385 (10th Cir. 1976) (decided prior to 1988 amendment, which rewrote first sentence).

Governor's discretion not subject to court review. — Where an appointment is during pleasure, or for a fixed period, with a discretionary power of removal, the office may be vacated and the removal made ex parte, and because the office of governor is political, the discretion vested in the chief executive by the constitution and laws of the state respecting his official duties is not subject to control or review by the courts. Mitchell v. King, 537 F.2d 385 (10th Cir. 1976).

Removal proceedings moot. — Removal proceedings based on conduct during a previous term are generally considered to be moot. In re Thaxton, 78 N.M. 668, 437 P.2d 129 (1968).

Governor's power over highway commission greatly limited. — Passage of N.M. Const., art. V, § 14, was in direct derogation of this section, and was drawn to limit, almost to the point of abolition, the governor's power over the highway commission. 1957-58 Op. Att'y Gen No. 57-47.

Length of term of interim appointee to elective office. — Under this section an appointee to a state office holds his office only until the next general election, and the term of office of the elected successor commences upon the date he qualifies, since he has been elected to an office to fill a vacancy. 1951-52 Op. Att'y Gen. No. 5612.

Where appointees of the governor were holding state offices after a vacancy, until the next election, and no candidates for such office were nominated or elected as their successors, they were entitled to hold office until their successors were duly qualified. 1925-26 Op. Att'y Gen. 89.

Commission as prima facie evidence of entitlement to office. — An appointment to office by the executive is complete upon delivery of the commission. When governor appointed and commissioned plaintiff, he gave him prima facie title to the office, and the commission, when issued, must be taken at least as prima facie evidence that the person holding it is lawfully entitled to the office. Conklin v. Cunningham, 7 N.M. 445, 38 P. 170 (1894).

Power of legislature to create offices. — Enumeration by constitution of certain officers constituting executive department of the state does not necessarily deprive the legislature of power to create other executive officers, although it cannot abolish any of those created by the constitution. Pollack v. Montoya, 55 N.M. 390, 234 P.2d 336 (1951).

Legislature may restrict membership on any legislatively created professional board to members of the profession, and may also enact a residential restriction so long as the restrictions on the terms are compatible with the elective restriction on executive officers in the constitution. 1953-54 Op. Att'y Gen. No. 5750.

Comparable provisions. — Idaho Const., art. IV, § 6.

Montana Const., art. VI, § 8.

Utah Const., art. VII, § 10.

Wyoming Const., art. IV, § 7.

Law reviews. — For article, "The Executive," see 7 Nat. Resources J. 267 (1967).

For note, "The Public Service Commission: A Legal Analysis of an Administrative System," see 3 N.M. L. Rev. 184 (1973).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 38 Am. Jur. 2d Governor §§ 5 to 8; 63A Am. Jur. 2d Public Officers and Employees §§ 95, 117, 119, 120, 219, 221 to 225, 231.

Power of legislature to abolish or discontinue office, 4 A.L.R. 205, 172 A.L.R. 1366.

Physical or mental disability as ground for removal from office, 28 A.L.R. 777.

Removal for failure to answer frankly questions asked during investigation, 77 A.L.R. 616.

Removal for bringing or defending action affecting personal rights or liabilities; collecting mileage after traveling without expense as ground for removal, 81 A.L.R. 493.

Implied power of appointing authority to remove officer whose tenure is not prescribed by law, though appointed for definite term, 91 A.L.R. 1097.

Membership in or affiliation with religious, political, social or criminal society or group as ground of removal of public officer, 116 A.L.R. 358.

Power of courts or judges in respect of removal of officers, 118 A.L.R. 170.

Constitutionality and construction of statute which fixes or specifies term of office but provides for removal without cause, 119 A.L.R. 1437.

Failure of public officer or employee to pay creditors on claims not related to his office or position as ground or justification for his removal or suspension, 127 A.L.R. 495.

Induction or voluntary enlistment in military service as creating a vacancy in, or as ground for removal from, public office or employment, 154 A.L.R. 1456, 156 A.L.R. 1457, 157 A.L.R. 1456.

Validity of contract by officer with public for rendition of new or special services to be paid for in addition to regular compensation, 159 A.L.R. 606.

Vacancy in public office within constitutional or statutory provision for filling vacancy, where incumbent appointed or elected for fixed term and until successor is appointed or elected is holding over, 164 A.L.R. 1248.

Validity of governmental requirement of oath of allegiance or loyalty, 18 A.L.R.2d 268.

Conviction of offense under federal law or law of another state or country as ground for removal from state or local office, 20 A.L.R.2d 732.

Injunction as remedy against removal of public officer, 34 A.L.R.2d 554.

Assertion of immunity as ground for removing or discharging public officer or employee, 44 A.L.R.2d 789.

Infamous crime, or one involving moral turpitude constituting disqualification to hold office, 52 A.L.R.2d 1314.

Power to appoint public officer for term commencing at or after expiration of term of appointing officer or body, 75 A.L.R.2d 1277.

Removal for misconduct during previous term of office, 42 A.L.R.3d 691.

67 C.J.S. Officers and Public Employees §§ 36, 40, 42, 117 to 126; 81A C.J.S. States §§ 84, 98, 99.

Sec. 6. [Governor's power to pardon and reprieve.]

Subject to such regulations as may be prescribed by law, the governor shall have power to grant reprieves and pardons, after conviction for all offenses except treason and in cases of impeachment.

ANNOTATIONS

Cross references. — For statutory provision relating to granting of pardon or restoration of civil rights after service of individual's sentence, see 31-13-1 NMSA 1978.

"Pardon" restores one to customary civil rights which ordinarily belong to a citizen of the state, including the right to vote and the right to hold office. 1970 Op. Att'y Gen. No. 70-85.

In the broad sense of the term "pardon," a "certificate restoring a person to full rights of citizenship" is a pardon; this method may be used to restore a federal ex-convict to his political rights. 1970 Op. Att'y Gen. No. 70-85.

This provision is clearly self-executing, and requires no legislative action to make it effective. Ex parte Bustillos, 26 N.M. 449, 194 P. 886 (1920).

Power to pardon is not inherent attribute of executive department, but rests solely in a grant by the people. 1970 Op. Att'y Gen. No. 70-85.

Ultimate power and right to pardon is granted to governor, unrestrained by any consideration other than his conscience, wisdom and sense of public duty, although there may be regulations by law of the manner of its exercise. Ex parte Bustillos, 26 N.M. 449, 194 P. 886 (1920).

This provision is a plain and clear grant of the pardoning power, the exercise of which may be regulated by law so long as the prescribed regulation does not impair the ultimate power granted. 1970 Op. Att'y Gen. No. 70-85.

The power to grant "reprieves" and "pardons" is vested in the governor by this section. 1959-60 Op. Att'y Gen. No. 60-199.

In pardoning person convicted of misdemeanor, governor was not bound by legislative restriction. 1915-16 Op. Att'y Gen. 240.

Power to grant partial pardons. — The governor has the power under the New Mexico Constitution to grant a partial pardon conferring the right to vote and hold public office while denying the right to possess a firearm. 1992 Op. Att'y Gen. No. 92-09.

Legislative invasion of governor's rights unconstitutional. — Code 1915, § 5087 (since repealed), providing for issuance of pardons only upon recommendation of board of penitentiary commissioners, whether or not it was an "existing statute" when adopted and enacted into the code, constituted a plain invasion of rights and duties of the executive, and taken as a whole, was unconstitutional and inoperative. Ex parte Bustillos, 26 N.M. 449, 194 P. 886 (1920).

Parole or release by court after sentencing improper. — An inmate of the New Mexico industrial school (New Mexico boys school at Springer) who has been convicted and sentenced for crime, whether he has been removed to state penitentiary or not, can only be pardoned by the governor and may not be paroled or released by the court. 1941-42 Op. Att'y Gen. No. 4072.

But statute permitting court to suspend sentence valid. — Laws 1909, ch. 32, § 1 (since repealed), authorizing suspension of sentence by district court, did not encroach upon this section. Ex parte Bates, 20 N.M. 542, 151 P. 698, 1916A L.R.A. 1285 (1915).

Governor has full power to pardon for direct criminal contempt of a court. Ex parte Magee, 31 N.M. 276, 242 P. 332 (1925).

Constructive criminal contempt pardonable. — Constructive criminal contempt is an offense against the state which has the power, through its executive, to extend grace or forgiveness. State v. Magee Publishing Co., 29 N.M. 455, 224 P. 1028, 38 A.L.R. 142 (1924).

Pardon of juveniles. — The governor did not have power to pardon boys sentenced to reform school who had merely been adjudged juvenile delinquents, but he did have power to pardon such boys who had first been convicted by court of competent jurisdiction of offense against the peace and dignity of the state. 1933-34 Op. Att'y Gen. p. 60.

Commutation of minor's punishment. — It is within power of governor to commute punishment of defendant, under 18 years of age at time crime was committed, from imprisonment in penitentiary to imprisonment in reform school. 1914 Op. Att'y Gen. 32.

Pardon pending appeal. — The pardoning power of the governor might be exercised after conviction in the district court, pending appeal. 1917-18 Op. Att'y Gen. 161.

Habitual offender sentences. — The governor has the power to pardon habitual offender sentences, even those not yet imposed on convictions in existence at the time the governor issues the pardon. State v. Mondragon, 107 N.M. 421, 759 P.2d 1003 (Ct. App. 1988).

Effect of pardon on habitual criminal provisions. — An executive pardon of an offense which has provoked the court into imposing a life sentence under the habitual criminal act does not avail to deny the court authority to employ the same felony convictions again for the purpose of imposing another sentence under the habitual criminal act, if subsequent to the pardon the prisoner commits another felony. Shankle v. Woodruff, 64 N.M. 88, 324 P.2d 1017 (1958).

Effect of pardon on eligibility for appointment as police officer. — An unconditional gubernatorial pardon allows a person convicted of a felony to be eligible for certification by the Law Enforcement Academy for permanent appointment as a police officer. However, if authorized by statute or regulation, a pardoned felon's character and the acts underlying the conviction may be considered in certification or licensing. 1992 Op. Att'y Gen. No. 92-09.

Or on eligibility for license as private investigator. — An unconditional gubernatorial pardon allows a person convicted of a felony to be eligible for licensure as a private investigator. However, if authorized by statute or regulation, a pardoned felon's character in the acts underlined the conviction maybe considered in certification or licensing. 1992 Op. Att'y Gen. No. 92-09.

Revocation of pardon. — The governor may revoke a pardon he has issued before it has been delivered to and accepted by the pardonee. 1970 Op. Att'y Gen. No. 70-89.

Governor is without power to pardon conviction under municipal ordinance. City of Clovis v. Hamilton, 41 N.M. 4, 62 P.2d 1151 (1936).

Ward of court. — Pardon powers of the governor do not extend to a person adjudged to be a ward of the court, since such a person has not been convicted of crime. 1943-44 Op. Att'y Gen. No. 4315.

Governor does not have right to reinstate driver's license which had been revoked by the courts; governor's authority would be limited to pardoning conviction for the violation of the law which was the basis for the revocation of the license by the court. 1939-40 Op. Att'y Gen. 31.

Retroactive application of statutory credits improper. — There is no constitutional authority under this section for the governor to apply the benefits of an act granting time credits to inmates while they appealed retroactively; such an act is neither a pardon nor a reprieve. 1968 Op. Att'y Gen. No. 68-57.

Prisoner sentenced to death may not be reprieved for indefinite period. 1921-22 Op. Att'y Gen. 80.

Pardons are to be construed liberally in favor of the pardonee. 1970 Op. Att'y Gen. No. 70-85.

Comparable provisions. — Idaho Const., art. IV, § 7.

Iowa Const., art. IV, § 16.

Montana Const., art. VI, § 12.

Utah Const., art. VII, § 12.

Wyoming Const., art. IV, § 5.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 59 Am. Jur. 2d Pardon and Parole §§ 14 to 16, 22, 26 to 30.

Contempt, executive power to pardon for, 23 A.L.R. 524, 26 A.L.R. 21, 38 A.L.R. 171, 63 A.L.R. 226.

Statute authorizing court to suspend sentence as infringing executive pardoning power, 26 A.L.R. 400, 101 A.L.R. 402.

Lieutenant-governor, exercise of pardon power in absence or disability of governor, 32 A.L.R. 1162.

Formal requisites of pardon, 34 A.L.R. 212.

Statute permitting suspension of sentence for wife or family abandonment or nonsupport as encroachment on pardoning power of governor, 48 A.L.R. 1198.

Consent of convict as essential to pardon, commutation or reprieve, 52 A.L.R. 835.

Effect of pardon on previous offenses or punishment therefor, 57 A.L.R. 443.

Conditional pardons, 60 A.L.R. 1410.

Statute restoring competency of convicts as witnesses as infringing governor's pardoning power, 63 A.L.R. 982.

Judicial investigation of pardon by governor, 65 A.L.R. 1471.

Fine or penalty imposed in addition to imprisonment, pardon as affecting, 74 A.L.R. 1118.

Impeachment: pardon as affecting impeachment by proof of conviction of crime, 30 A.L.R.2d 893.

Habitual criminal statute, pardon as affecting consideration of earlier conviction in applying, 31 A.L.R.2d 1186.

Jury: procedure to be followed where jury requests information as to possibility of pardon or parole from sentence imposed, 35 A.L.R.2d 769.

Offenses and convictions covered by pardon, 35 A.L.R.2d 1261.

Governor's authority to remit forfeited bail bond, 77 A.L.R.2d 988.

Jury: prejudicial effect of instruction of court as to possibility of pardon or parole, 12 A.L.R.3d 832.

Pardon as restoring public office or license or eligibility therefor, 58 A.L.R.3d 1191.

State pardon as affecting "convicted" status of one accused of violations of Gun Control Act of 1968 (18 USC §§ 921 et seq.), 44 A.L.R. Fed. 692.

67A C.J.S. Pardon and Parole §§ 6 to 10.

Sec. 7. [Succession to governorship.]

If at the time fixed for the beginning of the term of the governor, the governor-elect shall have died, the lieutenant governor-elect shall become governor. If a governor shall not have been chosen before the time fixed for the beginning of his term, or if the governor-elect shall have failed to qualify, then the lieutenant governor-elect shall act as governor until a governor shall have qualified; and the legislature may by law provide for the case wherein neither a governor-elect nor a lieutenant governor-elect shall have qualified, declaring who shall then act as governor, or the manner in which one who is to act shall be selected, and such person shall act accordingly until a governor or lieutenant governor shall have qualified.

If after the governor-elect has qualified a vacancy occurs in the office of governor, the lieutenant governor shall succeed to that office, and to all the powers, duties and emoluments thereof, provided he has by that time qualified for the office of lieutenant governor. In case the governor is absent from the state, or is for any reason unable to perform his duties, the lieutenant governor shall act as governor, with all the powers, duties and emoluments of that office until such disability be removed. In case there is no

lieutenant governor, or in case he is for any reason unable to perform the duties of governor, then the secretary of state shall perform the duties of governor, and, in case there is no secretary of state, then the president pro tempore of the senate, or in case there is no president pro tempore of the senate, or he is for any reason unable to perform the duties of governor, then the speaker of the house shall succeed to the office of governor, or act as governor as hereinbefore provided. (As amended November 2, 1948.)

ANNOTATIONS

Cross references. — As to compensation of successor to governor's office, or person serving as acting governor, see 8-1-1 NMSA 1978.

As to serving as member of cabinet, see 9-1-3 NMSA 1978.

For disaster successors to governor and his constitutional successors, see 12-11-4 NMSA 1978.

The 1948 amendment, which was proposed by S.J.R. No. 14 (Laws 1947) and adopted at the general election held on November 2, 1948, with a vote of 35,730 for and 22,193 against, rewrote this section, adding the first paragraph and making numerous changes in the second paragraph. Prior to amendment, the section read: "In case of a vacancy in the office of governor, the lieutenant governor shall succeed to that office, and to all the powers, duties and emoluments thereof. In case the governor is absent from the state, or is for any reason unable to perform his duties, the lieutenant governor shall act as governor, with all the powers, duties and emoluments of that office until such disability be removed. In case there is no lieutenant governor, or in case he is for any reason unable to perform the duties of governor, then the secretary of state or, in case there is no secretary of state, or he is for any reason unable to perform the duties of governor, then the president pro tempore of the senate shall succeed to the office of governor, or act as governor as hereinbefore provided."

Succession to entire unexpired term. — If the office of governor should become vacant prior to the 1972 election, the lieutenant governor would fill the entire unexpired term to which the governor had been elected. 1971 Op. Att'y Gen. No. 71-5.

Lieutenant governor may constitutionally execute delegated duties assigned by governor. 1971 Op. Att'y Gen. No. 71-15.

Comparable provisions. — Idaho Const., art. IV, §§ 12, 14.

Iowa Const., art. IV, § 17; amendment 20.

Montana Const., art. VI, §§ 4, 6.

Utah Const., art. VII, § 11.

Wyoming Const., art. IV, § 6 (secretary of state to be acting governor).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 38 Am. Jur. 2d Governor §§ 12 to 15.

Devolution, in absence of governor, of veto and approval powers upon lieutenant governor or other officer, 136 A.L.R. 1047.

81A C.J.S. States §§ 87 to 90.

Sec. 8. [Lieutenant governor to be president of senate.]

The lieutenant governor shall be president of the senate, but shall vote only when the senate is equally divided.

ANNOTATIONS

When lieutenant governor to vote. — The lieutenant governor must vote when the senate is equally divided on any question other than a joint resolution which proposes an amendment to the constitution. 1971 Op. Att'y Gen. No. 71-31.

The lieutenant governor is under a duty to cast vote authorized under this section, when the senate is evenly divided on a matter not a constitutional amendment. 1959-60 Op. Att'y Gen. No. 59-73.

Lieutenant governor may constitutionally execute delegated duties assigned by governor. 1971 Op. Att'y Gen. No. 71-15.

Comparable provisions. — Idaho Const., art. IV, § 13.

Iowa Const., art. IV, § 18.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 81A C.J.S. States § 131.

Sec. 9. [Public accounts and reports.]

Each officer of the executive department and of the public institutions of the state shall keep an account of all moneys received by him and make reports thereof to the governor under oath, annually, and at such other times as the governor may require, and shall, at least thirty days preceding each regular session of the legislature, make a full and complete report to the governor, who shall transmit the same to the legislature.

ANNOTATIONS

Federal funds received by institutions of higher education. — State institutions of higher learning receiving federal funds must make full and complete reports thereof to the governor, who in turn must transmit these reports to the legislature; however, the

fact that these reports are made available to the legislature for its information and use in the performance of its proper legislative functions does not confer on the legislature the power to limit or control the use or disbursement of these funds, which power rests with the boards of regents, subject to applicable law. State ex rel. Sego v. Kirkpatrick, 86 N.M. 359, 524 P.2d 975 (1974).

Comparable provisions. — Idaho Const., art. IV, § 17.

Law reviews. — For article, "The Executive," see 7 Nat. Resources J. 267 (1967).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 63A Am. Jur. 2d Public Officers and Employees §§ 353 to 355.

Clerks, assistants or deputies, liability of public officer for the defaults and misfeasance of, 1 A.L.R. 222, 102 A.L.R 174, 116 A.L.R. 1064, 71 A.L.R.2d 1140.

Constitutionality of statute relieving public officer from liability for loss of public funds, 38 A.L.R. 1512, 96 A.L.R. 295.

Imprisonment for withholding of state funds by public officer, 40 A.L.R. 82.

Diversion of money from one fund to another, liability of municipal officers for, 96 A.L.R. 664.

Settlement or compromise agreement with other officials or board or committee as affecting liability of officer in respect of public funds, 103 A.L.R. 1048.

Employee or subordinate, statutes relating to offenses in respect of public money in charge of officer as applicable to, 144 A.L.R. 590.

Payments made without compliance with procedure prescribed for payment of claims, liability of officer in respect of, 146 A.L.R. 762.

Interest or earnings received on public money in officer's possession, accountability for, 5 A.L.R.2d 257.

Validity and construction of statute authorizing or requiring governmental unit to indemnify public officer or employee for liability arising out of performance of public duties, 71 A.L.R.3d 90.

67 C.J.S. Officers and Public Employees § 214; 81A C.J.S. States §§ 123, 229.

Sec. 10. [State seal.]

There shall be a state seal which shall be called the "Great Seal of the State of New Mexico," and shall be kept by the secretary of state.

ANNOTATIONS

Cross references. — For design of seal, see 12-3-1 NMSA 1978.

Use of seal limited. — Use of the great seal of the state by anyone other than by the state of New Mexico, for any purpose, is not permitted. 1951-52 Op. Att'y Gen. No. 5569.

Removal from state not proper. — It would be a violation of the law of this state for the great seal of the state of New Mexico, or any replica thereof, to be transferred out of the state of New Mexico at any time. 1955-56 Op. Att'y Gen. No. 6261 (in response to proposal to take the seal to New York city for use in validating state bonds).

Comparable provisions. — Idaho Const., art. IV, § 15.

Iowa Const., art. IV, § 20.

Utah Const., art. VII, § 20.

Wyoming Const., art. IV, § 15.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 81A C.J.S. States § 39.

Sec. 11. [Commissions.]

All commissions shall issue in the name of the state, be signed by the governor and attested by the secretary of state, who shall affix the state seal thereto.

ANNOTATIONS

Commission as prima facie evidence of entitlement to office. — An appointment to office by the executive is complete upon delivery of the commission. When governor of territory appointed and commissioned an officer, he gave him prima facie title to the office, as the commission, when issued, must be taken at least as prima facie evidence that the person holding it is lawfully entitled to the office. Conklin v. Cunningham, 7 N.M. 445, 38 P. 170 (1894).

Comparable provisions. — Idaho Const., art. IV, § 16.

Iowa Const., art. IV, § 21.

Utah Const., art. VII, § 19.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 63A Am. Jur. 2d Public Officers and Employees §§ 121 to 126.

67 C.J.S. Officers and Public Employees § 44; 81A C.J.S. States § 84.

Sec. 12. [Compensation of executive officers.]

The annual compensation to be paid to the officers mentioned in Section One of this article shall be as follows: governor, five thousand dollars [($5,000)]; secretary of state, three thousand dollars [($3,000)]; state auditor, three thousand dollars [($3,000)]; state treasurer, three thousand dollars [($3,000)]; attorney general, four thousand dollars [($4,000)]; superintendent of public instruction, three thousand dollars [$3,000)]; and commissioner of public lands, three thousand dollars [($3,000)]; which compensation shall be paid to the respective officers in equal quarterly payments.

The lieutenant governor shall receive ten dollars [($10.00)] per diem while acting as presiding officer of the senate, and mileage at the same rate as a state senator.

The compensation herein fixed shall be full payment for all services rendered by said officers and they shall receive no other fees or compensation whatsoever.

The compensation of any of said officers may be increased or decreased by law after the expiration of ten years from the date of the admission of New Mexico as a state.

ANNOTATIONS

Cross references. — For present salary schedule, see 8-1-1 NMSA 1978.

Compiler's notes. — An amendment to this section proposed by H.J.R. No. 15, § 2 (Laws 1961), which would have provided that the compensation for officers mentioned in N.M. Const., art. V, § 1, be as set by law, was submitted to the people at the special election held on September 19, 1961. It was defeated by a vote of 17,649 for and 31,697 against.

The superintendent of public instruction, referred to in this section, was deleted from the enumeration of executive officers in Section 1 of this article by the 1958 amendment thereto.

Quarterly payments. — Officers whose salaries are fixed and payable quarterly are not entitled to receive them, nor are they due, except at end of each quarter. 1931-32 Op. Att'y Gen. 27.

Lieutenant governor's salary. — The legislature of the state of New Mexico may provide a salary for the lieutenant governor of the state of New Mexico which would, in effect, be more than $10.00 per diem while acting as presiding officer of the senate. 1971 Op. Att'y Gen. No. 71-15.

What additional payments to governor prohibited. — This section merely prohibits the governor from receiving any fees or compensation for services rendered by him as governor, and does not preclude his use of the contingent fund for the obligations of his official position, nor payment for nonofficial services. 1912-13 Op. Att'y Gen. 29.

Employment benefits. — Payments by the state, for a state official, for social security, group insurance and public employees' retirement association membership are not payments of additional fees or compensation in violation of this section. 1968 Op. Att'y Gen. No. 68-1.

Section does not prohibit state officer from holding another office not inconsistent with his elective office, nor to receive compensation therefor. 1912-13 Op. Att'y Gen. 19.

Comparable provisions. — Idaho Const., art. IV, § 19.

Montana Const., art. VI, § 5.

Utah Const., art. VII, § 18.

Wyoming Const., art. IV, § 13.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 38 Am. Jur. 2d Governor § 3; 63A Am. Jur. 2d Public Officers and Employees §§ 431 to 471.

Per diem compensation, 1 A.L.R. 276.

New duties imposed on officer, increasing compensation for during term, 21 A.L.R. 256, 51 A.L.R. 1522, 170 A.L.R. 1438.

Nonconstitutional officer, constitutional inhibition against increase or decrease of compensation during term as applicable to, 31 A.L.R. 1316, 86 A.L.R. 1263.

Administrative officer or board, power to change compensation of employee or subordinate, 70 A.L.R. 1055.

Constitutional provision creating office and forbidding change in compensation during term as appropriation, 88 A.L.R. 1054.

Constitutional inhibition of change of officer's compensation as applicable to allowance for expenses or disbursements, 106 A.L.R. 779.

Validity and effect of agreement by public officer or employee to accept less than compensation or fees fixed by law, or of acceptance of reduced amount, 118 A.L.R. 1458, 160 A.L.R. 490.

Constitutional provision against increase or decrease of compensation of public officer as affecting power of legislature to effect decrease by means of administrative procedure or consent of officer, 127 A.L.R. 529.

Operation of statute fixing public officer's salary on basis of population or of the valuation of the taxable property, as contravening a constitutional provision that the salary of a public officer shall not be increased or diminished during his term, 139 A.L.R. 737.

Constitutional provision against increase in compensation of public officer during term of office as applicable to statute providing for first time for compensation for office, 144 A.L.R. 685.

Validity of contract by officer with public for rendition of new or special services to be paid for in addition to regular compensation, 159 A.L.R. 606.

Constitutional or statutory inhibition of change of compensation of public officer as applicable to one appointed or elected to fill vacancy, 166 A.L.R. 842.

Constitutional provision against increasing compensation during term of office as applicable where new duties are imposed on officer after taking office, 170 A.L.R. 1438.

Constitutional provision fixing or limiting salary of public officer as precluding allowance for expenses or disbursements, 5 A.L.R.2d 1182.

67 C.J.S. Officers and Public Employees §§ 218 to 242; 81A C.J.S. States §§ 104 to 119.

Sec. 13. [Residence of public officers; election from equal districts.]

All district and municipal officers, county commissioners, school board members and municipal governing body members shall be residents of the political subdivision or district from which they are elected or for which they are appointed.

Counties, school districts and municipalities may be divided by their governing bodies into districts composed of populations as nearly equal as practicable for the purpose of electing the members of the respective governing bodies. (As amended November 8, 1960 and November 4, 1986.)

ANNOTATIONS

Cross references. — As to qualifications for holding public office, see N.M. Const., art. VII, § 2.

For constitutional provision relating to municipal home rule, see N.M. Const., art. X, § 6.

For governor's power to fill vacancy in office of county commissioner, see N.M. Const., art. XX, § 4.

As to county commission districts, see 4-38-3 NMSA 1978.

The 1960 amendment, which was proposed by H.J.R. No. 8 (Laws 1959) and adopted at the general election held on November 8, 1960, with a vote of 58,477 for and 58,102 against, added the second and third sentences.

The 1986 amendment, which was proposed by H.J.R. No. 9 (Laws 1985) and adopted at the general election held on November 4, 1986, by a vote of 181,880 for and 84,964 against, repealed existing Section 13 relating to the residence of public officers and adopted a new Section 13.

Purpose. — A reason for restricting candidates to residents of the district from which they seek election is to insure that each elected commissioner had knowledge of the problems and the needs of the district from which he is elected; it is properly within the spirit of such restriction, and will promote efficient filing administration, to require that a candidate be a resident of the district from which he seeks election at the time his name is certified. State ex rel. Rudolph v. Lujan, 85 N.M. 378, 512 P.2d 951 (1973).

"Residence". — The word "residence" means to be in residence, one's place of abode, as distinguished from a place where one is employed or an office or place devoted strictly to commercial enterprise. 1972 Op. Att'y Gen. No. 72-6.

"Residence," within the meaning of this section of the constitution, has traditionally been construed as synonymous with "domicile." 1955-56 Op. Att'y Gen. No. 6445.

Determination of residency. — Doubt concerning residence is to be resolved in favor of permanency of residence in precinct wherein one casts his ballot. State ex rel. Magee v. Williams, 57 N.M. 588, 261 P.2d 131 (1953).

Dual abodes. — There is no reason, why, within the meaning of this section and N.M. Const., art. VII, § 2, a person may not have more than one place to reside in. State ex rel. Magee v. Williams, 57 N.M. 588, 261 P.2d 131 (1953).

Municipal judge, resident of the municipality for over 30 years, who votes and has property and business interests therein, is qualified to hold elective office in that municipality despite fact that he is employed fulltime at a bank some distance away, where he has an additional residence in which he on occasion remains overnight; any doubt is resolved in favor of the permanency of residence in the precinct wherein the judge casts his ballot. 1975 Op. Att'y Gen. No. 75-26.

Restrictions on office-holding not to be increased. — The only restriction against the right of a citizen of the United States who is a resident of and a qualified voter within this state to hold any public office is that he must reside within the political subdivision

for which he is elected or appointed. The legislature has no power to add restrictions upon the right to hold office beyond those provided in the constitution. Gibbany v. Ford, 29 N.M. 621, 225 P. 577 (1924).

The legislature has no power to add restrictions upon the right to hold public office beyond those provided in the constitution. 1959-60 Op. Att'y Gen. No. 60-222.

Laws 1919, ch. 111, § 3, requiring forfeiture of office of alderman when the holder moved beyond his ward, was void as it added restrictions to the right to hold public office in addition to those required by this section and N.M. Const., art. VII, § 2. Gibbany v. Ford, 29 N.M. 621, 225 P. 577 (1924).

Section refers only to officer's qualification at time of election. 1915-16 Op. Att'y Gen. 353.

The removal of a county commissioner from the district from which he was elected to another part of the county did not create a vacancy in the office. 1912-13 Op. Att'y Gen. 110; 1915-16 Op. Att'y Gen. 103; 1919-20 Op. Att'y Gen. 12.

Interim appointee to be resident. — Person appointed to fill vacancy in office of county commissioner must, at the time of appointment, be a resident of the commissioner district from which his predecessor was elected. 1915-16 Op. Att'y Gen. 335.

Town board of trustees. — Any citizen who is a resident and qualified elector of the state and a resident of a town may hold office as a member of its board of trustees. 1933-34 Op. Att'y Gen. 119.

Municipal judge must be resident of municipality which he serves. 1969 Op. Att'y Gen. No. 69-11.

Members of municipal housing authority must be residents of political subdivision for which they are appointed. 1969 Op. Att'y Gen. No. 69-138.

Members of municipal planning commission must be residents of municipality which they are serving and one city or town could not designate the planning commission of another city or town to serve as its planning commission. 1959-60 Op. Att'y Gen. No. 59-201.

Municipal manager is not public officer of municipality for purposes of this section. 1979 Op. Att'y Gen. No. 79-28.

Municipal clerk not officer of municipality. — The duties of a municipal clerk are essentially ministerial and do not involve the delegation of any of the sovereign power of the municipality; this necessary element to establish the position of municipal clerk as an officer of the municipality is not present. 1979 Op. Att'y Gen. No. 79-28.

Municipal attorney not public officer. — None of the indicia of public office attach to the position of municipal attorney. 1979 Op. Att'y Gen. No. 79-28.

Police officers are employees, and not public officers, of municipality. 1979 Op. Att'y Gen. No. 79-28.

Ward residency requirements invalid in municipalities not under home rule. — As to municipalities which do not operate under the constitutional home-rule provision, a ward residency requirement, no matter by whom imposed, would add an additional, and therefore unconstitutional, restriction on the right to hold public office. 1973 Op. Att'y Gen. No. 73-76.

The legislature may not constitutionally require each city commissioner to reside in the district he represents. 1969 Op. Att'y Gen. No. 69-23.

Wards of a municipality are not "political subdivisions" within this section. Gibbany v. Ford, 29 N.M. 621, 225 P. 577 (1924). But see, N.M. Const., art. X, § 6, relating to municipal home rule.

Districts in home-rule municipalities to be represented by residents. — When districting of a municipality has been accomplished pursuant to N.M Const., art. X, § 6, each member of the governing body must be a resident of and elected by the registered qualified electors in his district. 1971 Op. Att'y Gen. No. 71-26. See also, 1971 Op. Att'y Gen. No. 71-118.

Irrigation districts are not "municipal corporations" within meaning of this section. Davy v. McNeill, 31 N.M. 7, 240 P. 482 (1925).

School district is a political subdivision of the state. 1969 Op. Att'y Gen. No. 69-16.

A county school district is a political subdivision and district as those terms are employed in this section. 1957-58 Op. Att'y Gen. No. 57-183.

School board member must be resident of school district which he represents. 1963-64 Op. Att'y Gen. No. 64-20.

It is a prerequisite for holding office as a member of a municipal school board that the individual municipal school board member be a bona fide resident of the municipal school district. 1963-64 Op. Att'y Gen. No. 64-6.

A person who lives outside a school district may not serve on that district's school board. 1969 Op. Att'y Gen. No. 69-16.

Patrons of rural school district who are not residents thereof cannot hold office of its school director nor vote in its school election. 1931-32 Op. Att'y Gen. 151.

School board election proposal unconstitutional. — House bill purporting to divide the municipal school district in class A counties into five school board districts using senatorial districts to draw the lines which would require that members of the board of education be residents of and be elected by the qualified electors of a separate school board district would violate this section. 1967 Op. Att'y Gen. No. 67-33.

District attorneys. — The constitution did not create a new class of officers to be known as "district officers," so the district attorney is a state, not a district, officer, and is precluded from receiving any compensation, fees, allowances or emoluments for or on account of his office, but is to have a salary appropriated for him. State ex rel. Ward v. Romero, 17 N.M. 88, 125 P. 617 (1912).

Justices of the peace. — Justices of the peace (now magistrate courts) are precinct, not county, officers. Territory ex rel. Welter v. Witt, 16 N.M. 335, 117 P. 860 (1911).

Justices of the peace are recognized as precinct officers. 1965 Op. Att'y Gen. No. 65-33.

Filing. — In order for a candidate for county commission or state representative to qualify for those offices, he must file in the district where he resides. 1966 Op. Att'y Gen. No. 66-30.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 56 Am. Jur. 2d Municipal Corporations, Counties, and Other Political Subdivisions §§ 247, 248; 63A Am. Jur. 2d Public Officers and Employees §§ 60 to 62.

Validity of requirement that candidate or public officer have been resident of governmental unit for specified period, 65 A.L.R.3d 1048.

20 C.J.S. Counties § 99; 62 C.J.S. Municipal Corporations § 479; 67 C.J.S. Officers and Employees § 26.

Sec. 14. [State transportation commission.]

There is created a "state transportation commission". The members of the state transportation commission shall be appointed, shall have such power and shall perform such duties as may be provided by law. Notwithstanding the provisions of Article 5, Section 5 of the constitution of New Mexico, state transportation commissioners shall only be removed as provided by law. (As repealed and re-enacted November 7, 1967; as amended November 5, 2002.)

ANNOTATIONS

Cross references. — For legislation relating to appointment, removal and powers of the highway commission, and creating a state highway department exercising much of the authority formerly vested in the commission, see 67-3-1 NMSA 1978.

For provision giving supreme court exclusive original jurisdiction over removal of highway commissioners, see 67-3-5 NMSA 1978.

For rule governing removal of public officials where jurisdiction has been conferred on the supreme court, see Rule 12-604.

The 1949 amendment, which was proposed by H.J.R. No. 2 (Laws 1949) and was adopted by the people at a special election held on September 20, 1949, with a vote of 18,696 for and 9,618 against, added a Section 14 to N.M. Const., art. V. As adopted in 1949, the section read:

"A permanent commission to consist of five (5) members is hereby created, which shall be known as the 'state highway commission'.

"A. The state highway commission is empowered and charged with the duty of determining all matters of policy relating to state highways and public roads. It shall have general charge and supervision of all highways and bridges which are constructed or maintained in whole or in part with state aid. It shall have complete charge of all matters pertaining to the expenditure of state funds for the construction, improvement and maintenance of public roads and bridges. It shall have charge of all matters pertaining to highway employees. It shall have the power to institute any legal proceedings deemed necessary to the exercise of its powers. It shall have all powers which are now or which may hereafter be conferred on it by law.

"B. There are hereby created five (5) highway commission districts as follows, to wit:

"District No. 1 which shall be composed of the counties of Catron, Socorro, Grant, Sierra, Dona Ana, Luna and Hidalgo.

"District No. 2 which shall be composed of the counties of Lea, Eddy, Chaves, Roosevelt, Curry, De Baca, Lincoln and Otero.

"District No. 3 which shall be composed of the counties of San Juan, McKinley, Valencia, Sandoval and Bernalillo.

"District No. 4 which shall be composed of the counties of Colfax, Union, Mora, Harding, San Miguel, Quay and Guadalupe.

"District No. 5 which shall be composed of the counties of Rio Arriba, Taos, Santa Fe, Torrance and Los Alamos.

"The state legislature in the event of the creation of any new county or counties, shall have the power to attach any such county or counties to any of the above districts to which said county or counties may be contiguous.

"C. The members of the commission shall be appointed by the governor with the advice and consent of the senate for overlapping terms of six (6) years each. One member shall be appointed from each of the five (5) aforesaid highway commission districts and such member shall reside in the district from which he shall be appointed. Change of residence of a highway commissioner to a place outside of the highway district from which he was appointed shall automatically terminate the term of such commissioner. No more than three (3) of the said commissioners shall belong to the same political party. Each of the said commissioners, in order to qualify as such, shall take the usual oath and execute in favor of the state a surety company bond, in a form approved by the attorney general, in the amount of twenty-five thousand dollars ($25,000.00) conditioned upon the faithful performance of his duties.

"The governor shall submit the appointment of commissioners to the state senate for confirmation not later than the 5th day of each regular session of the legislature. A three-fifths (3/5's) vote of the senate shall be required for confirmation. The appointment of such commissioner or commissioners shall become effective upon the date of confirmation by the senate and no commissioner shall be appointed in any event without confirmation of the senate except that commissioners may be appointed by a majority of the remaining members of the highway commission, to fill vacancies until the next regular session of the legislature, at which time an appointment shall be made for the balance of the unexpired term.

"In the event the governor should refuse or fail to submit the highway commissioners to the senate for confirmation in the manner above provided, the senate shall appoint and confirm the highway commissioners.

"The members first appointed shall determine by lot from among their group two (2) members to serve two (2) year terms, two (2) members to serve six (6) year terms, and one (1) member to serve a four (4) year term.

"D. Highway commissioners shall not be removed except for incompetence, neglect of duty or malfeasance in office. Provided, however, no removal shall be made without notice of hearing and an opportunity to be heard having first been given such commissioner. The supreme court of the state of New Mexico is hereby given exclusive original jurisdiction over proceedings to remove highway commissioners under such rules as it may promulgate and its decision in connection with such matters shall be final.

"The state highway commission shall appoint a competent chief highway engineer, who shall be chief administrator of the highway commission and shall have charge of the hiring and firing of employees of the highway commission subject to the control and supervision of the highway commission." Section 2 of the resolution provided that the amendment should become effective the January 1st next following its adoption and that the governor should submit his appointments to the senate for confirmation at the next regular session of the legislature, which was the 1951 session.

The 1955 amendment, which was proposed by S.J.R. No. 11 (Laws 1955) amended Subsection A of § 14 as it then read, to read:

"A. The state highway commission is empowered and charged with the duty of determining all matters of policy relating to the design, construction, location, and maintenance of state highways and public roads. It shall have general charge and supervision of all the highways and bridges which are constructed or maintained in whole or in part with state aid. It shall have charge, subject to such regulation as may hereafter be provided by law, of all matters pertaining to the expenditure of highway funds. It shall have the power to institute any legal proceedings deemed necessary to the exercise of its powers. It shall have all powers which are now or which may hereafter be conferred on it by law."

The 1967 amendment of this section, which was proposed by S.J.R. No. 3, § 1 (Laws 1967) and was adopted at the special election held on November 7, 1967, with a vote of 27,598 for and 25,338 against, repealed the former N.M. Const., art. V, § 14, and enacted the above section, creating a state highway commission to be appointed and removed and have such powers and duties as might be provided by law.

The 2002 amendment, which was proposed by H.J.R. No. 27 (Laws 2001) and adopted at the general election held on November 5, 2002, by a vote of 216,751 for and 205,494 against, substituted "state transportation" for "state highway" in three places.

Compiler's notes. — An amendment proposed by S.J.R. No. 17, § 1 (1959), which would have added a Section 15 to this article, concerning location of state offices, was submitted to the people at the general election held on November 8, 1960. It failed to pass because it did not receive the necessary majority.

An amendment proposed by S.J.R. No. 2, § 2 (Laws 1959), which would have added a new and separate section to this article, concerning terms of state officers, was submitted to the people at the general election held on November 8, 1960. It failed to pass because it did not receive the necessary majority.

An amendment proposed by S.J.R. No. 13, § 2 (Laws 1961), which would have added a new and separate section to this article, concerning terms of state officers, was submitted to the people at the special election held on September 19, 1961. It was defeated by a vote of 22,377 for and 29,483 against.

An amendment to this section proposed by H.J.R. No. 4, § 1 (Laws 1961), relating to the appointment of highway commissioners, was submitted to the people at the special election held on September 19, 1961. It was defeated by a vote of 24,658 for and 25,658 against.

An amendment proposed by S.J.R. No. 18, § 1 (Laws 1963), which would have repealed and reenacted a new Section 14 to provide for highway director and highway

commission, was submitted to the people at the general election held on November 3, 1964. It was defeated by a vote of 54,547 for and 63,306 against.

Sections 67-3-2 to 67-3-8 NMSA 1978, enacted by Laws 1967, ch. 266, and based upon the adoption of the repeal and reenactment of art. V, § 14 proposed by S.J.R. No. 3, § 1 (Laws 1967), took effect when the constitutional provision was adopted November 7, 1967.

An amendment proposed by H.J.R. No. 2 (Laws 1993), which would have substituted "state transportation commission" for "state highway commission", was submitted to the people in the general election held on November 8, 1994. It was defeated by a vote of 174,276 for and 223,455 against.

Office of highway commissioner is a "civil office" within the meaning of N.M. Const., art. IV, § 28, limiting appointment of legislators to civil office. 1957-58 Op. Att'y Gen. No. 57-20 (opinion rendered prior to 1967 repeal and reenactment of this section).

Privileges and immunities. — Individual members of the New Mexico highway commission, while participating in a meeting thereof, enjoy all the privileges and immunities of the body as a whole. Adams v. Tatsch, 68 N.M. 446, 362 P.2d 984 (1961) (case decided prior to 1967 repeal and reenactment of this section).

Powers of state transportation commission formerly. — The state highway commission [state transportation commission], created by this section as it read prior to its 1967 repeal and reenactment, was empowered and charged with the duty of determining all matters of policy relating to state highways and given general charge and supervision of all of highways and bridges; it had complete charge of all matters pertaining to the expenditure of state funds for the construction and maintenance of public roads and bridges. State ex rel. State Hwy. Comm'n v. City of Albuquerque, 67 N.M. 383, 355 P.2d 925 (1960).

Removal proceedings moot. — Since the constitutional provision creating the office of highway commissioner and setting forth details concerning it was repealed in 1967, and provision made for a new commission which, to become operative, had to be implemented by legislation which might or might not create a similar or comparable body, a commissioner whose removal was being attempted prior to the 1967 repeal and reenactment did not thereafter still hold the same office from which his removal was being attempted; hence, the court's jurisdiction over the removal proceeding was terminated and the action itself became moot. In re Thaxton, 78 N.M. 668, 437 P.2d 129 (1968).

Injunctive relief. — Petition brought by state highway commission [state transportation commission], seeking injunctive relief to compel removal of encroachments from a highway right-of-way, stated a cause of action, and the city in which the portion of the highway in question was located was not an indispensable party to the cause. State ex

rel. State Hwy. Comm'n v. Ford, 74 N.M. 18, 389 P.2d 865 (1964) (case decided under this section as it read prior to the 1969 repeal and reenactment).

Law reviews. — For article, "An Administrative Procedure Act For New Mexico," see 8 Nat. Resources J. 114 (1968).

For article, "Constitutional Limitations on the Exercise of Judicial Functions by Administrative Agencies," see 7 Nat. Resources J. 599 (1967).

For comment, "Constitutional Law - Delegation of Power - New Mexico Bypass Law," see 4 Nat. Resources J. 160 (1964).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 39 Am. Jur. 2d Highways, Streets and Bridges § 13.

39A C.J.S. Highways §§ 154, 155, 157.

ARTICLE VI
Judicial Department

Section 1. [Judicial power vested.]

The judicial power of the state shall be vested in the senate when sitting as a court of impeachment, a supreme court, a court of appeals, district courts; probate courts, magistrate courts and such other courts inferior to the district courts as may be established by law from time to time in any district, county or municipality of the state. (As amended September 28, 1965, and November 8, 1966.)

ANNOTATIONS

Cross references. — As to impeachment by the senate, see N.M. Const., art. IV, §§ 35, 36.

As to supreme court, see N.M. Const., art. VI, §§ 2 to 11 and 34-2-1 NMSA 1978 et seq.

As to district courts, see N.M. Const., art. VI, §§ 12 to 22 and 34-6-1 NMSA 1978 et seq.

For provisions relating to probate courts and jurisdiction thereof, see N.M. Const., art. VI, § 23 and 45-1-302 NMSA 1978.

As to magistrate courts, see N.M. Const., art. VI, § 26 and 35-1-1 NMSA 1978 et seq.

As to court of appeals, see N.M. Const., art. VI, § 29 and 34-5-1 NMSA 1978 et seq.

For provision establishing childrens' courts as division of district courts, see 32A-1-5 NMSA 1978.

As to municipal courts, see 35-14-1 NMSA 1978.

The 1965 amendment, which was proposed by S.J.R. No. 5, § 1 (Laws 1965) and adopted at a special election held on September 28, 1965, with a vote of 31,582 for and 18,477 against, added the words "a court of appeals" after "a supreme court."

The 1966 amendment, which was proposed by H.J.R. No. 34, § 1 (Laws 1965) and adopted at a general election held on November 8, 1966, with a vote of 81,055 for and 26,317 against, substituted "magistrate courts" for "justices of the peace" after "probate courts," inserted "district," preceding "county or municipality" and deleted "including juvenile courts" at the end of the section.

Creation of courts limited. — The framers of the state constitution in this section limited the creation of courts to those named therein, and "such courts inferior to the district courts as may be established by law from time to time in any county or municipality of the state, including juvenile courts." State ex rel. Hovey Concrete Prods. Co. v. Mechem, 63 N.M. 250, 316 P.2d 1069 (1957), overruled on other grounds Wylie Corp. v. Mowrer, 104 N.M. 751, 726 P.2d 1381 (1986).

Establishment of inferior courts to be by general law. — Declaration in this section that inferior courts not enumerated might be established by law meant they might be established by general legislative enactments; it did not permit a city-manager city to establish a police court, provide for the election of a police magistrate and confer jurisdiction to decide cases involving violations of city ordinances. Stout v. City of Clovis, 37 N.M. 30, 16 P.2d 936 (1932).

Inherent power in absence of express authority. – This section grants courts an inherent power to exercise authority essential to their judicial function and management of their caseload, even absent express statutory authority or court rule. State v. Rendleman, 2003-NMCA-150, 134 N.M. 744, 82 P.3d 554, cert. denied, 2003-NMCERT-003, 135 N.M. 51, 84 P.3d 668.

As a constitutional matter, the district court has a duty to conduct an independent review to ensure that protected speech is not criminalized; thus, a court has a duty to make a threshold determination of whether material that is alleged to be obscene is the type of hard core pornography that is unprotected speech. State v. Rendleman, 2003-NMCA-150, 134 N.M. 744, 82 P.3d 554, cert. denied, 2003-NMCERT-003, 135 N.M. 51, 84 P.3d 668.

Juvenile court as division of district court. — The juvenile court provided for in the 1955 Juvenile Code (former 13-8-19, 1953 Comp. et seq) was part and parcel of the district court and not an inferior court, and it was not violative of this section. Peyton v. Nord, 78 N.M. 717, 437 P.2d 716 (1968).

Appeals from juvenile court. — Legislature could not validly provide for direct appeal from juvenile court to supreme court, the juvenile court being a court inferior to the district court under this section (as it read prior to amendment). State v. Eychaner, 41 N.M. 677, 73 P.2d 805 (1937).

Controversies between individuals for courts. — The right to determine controversies between individual litigants stems from the state constitution and this power rests alone with the courts. State ex rel. Hovey Concrete Prods. Co. v. Mechem, 63 N.M. 250, 316 P.2d 1069 (1957), distinguished in Gray v. Armijo, 70 N.M. 245, 372 P.2d 821 (1962).

Presumption of retroactivity for new rules imposed by judicial decision in civil cases. — The supreme court has the power to apply a new rule prospectively, whether the rule is derived from overruling a past precedent or fashioning a new precedent, even though the decision announcing the rule has already been applied retroactively to the conduct of the litigants in the case in which the rule was announced. However, because of the desirability of treating similarly situated parties alike, a presumption of retroactivity for a new rule imposed by a judicial decision in a civil case is adopted. Beavers v. Johnson Controls World Servs., Inc., 118 N.M. 391, 881 P.2d 1376 (1994).

Exercise of judicial powers by executive and legislature unconstitutional. — Any statutory scheme under which the executive and legislative branches of a municipal government can control or exercise the inherent powers of the judiciary would be violative of the state constitution. Mowrer v. Rusk, 95 N.M. 48, 618 P.2d 886 (1980).

Legislature may confer "quasi-judicial" power on administrative boards for the protection of the rights and interests of the public in general, the orders of which are not to be overruled if supported by substantial evidence, but nowhere does this power extend to a determination of rights and liabilities between individuals. State ex rel. Hovey Concrete Prods. Co. v. Mechem, 63 N.M. 250, 316 P.2d 1069 (1957), distinguished in Gray v. Armijo, 70 N.M. 245, 372 P.2d 821 (1962).

Unlawful delegation of judicial power. — The Workmen's Compensation Act of 1957 (Laws 1957, ch. 246, §§ 1 through 96, former 59-10-36 through 59-10-125, 1953 Comp.) was unconstitutional in that it constituted an unlawful delegation of judicial power to the commission in violation of N.M. Const., art. III, § 1 and this section. State ex rel. Hovey Concrete Prods. Co. v. Mechem, 63 N.M. 250, 316 P.2d 1069 (1957), distinguished in Gray v. Armijo, 70 N.M. 245, 372 P.2d 821 (1962).

Compulsory arbitration. — The "principle of check," which entails courts retaining power to make enforceable, binding judgments through review of agency determinations, requires that courts have an opportunity to review decisions of arbitrators in statutorily compelled arbitration such as required by 22-10-17.1 NMSA 1978. Board of Educ. v. Harrell, 118 N.M. 470, 882 P.2d 511 (1994).

Reclamation contract infringing on court's power. — Provision in reclamation contract between the United States and conservancy district that if any assessment be judicially determined to be void, or the district be enjoined from making or collecting any assessment on such land, then such tract or water user should have no right to the benefits of the contract or the water made available, was illegal, as it purported to permit the secretary of the interior to override the court's decision and enforce his own mandate whether legal or illegal. Middle Rio Grande Water User's Ass'n v. Middle Rio Grande Conservancy Dist., 57 N.M. 287, 258 P.2d 391 (1953).

Power of disbarment. — Portion of former 36-2-7 NMSA 1978 which purported to confer judicial power of suspension and disbarment on board of commissioners, was void insofar as it attempted to create an inferior tribunal with such judicial powers. In re Gibson, 35 N.M. 550, 4 P.2d 643 (1931).

Board of loan commissioners. — Laws 1912, ch. 16, investing board of loan commissioners with power to ascertain and determine territorial and county debts and liabilities which were assumed by state under the constitution, did not confer judicial power upon the board. State v. Kelly, 27 N.M. 412, 202 P. 524 (1921).

Courts are not constituted as reviewing authority over other departments of the state or as guardian of the constitution. State ex rel. Gomez v. Campbell, 75 N.M. 86, 400 P.2d 956 (1965).

Review of other departments limited. — Power of the courts is a judicial power, to hear and determine causes of action, and they cannot generally review or interfere with the acts of the legislative or executive departments, being empowered to enforce the supremacy of the constitution only when legislative enactments or executive proceedings are plainly violative thereof, and then only upon suit by one directly and adversely affected thereby. State ex rel. Gomez v. Campbell, 75 N.M. 86, 400 P.2d 956 (1965).

Courts not to consider wisdom of legislation. — It is not part of the duty of the courts to inquire into the wisdom, the policy or the justness of an act of the legislature; the court's duty is to ascertain and declare the intention of the legislature, and to give effect to the legislative will as expressed in the laws. Raton Pub. Serv. Co. v. Hobbes, 76 N.M. 535, 417 P.2d 32 (1966).

Justices of the peace. — Under this section prior to amendment, a justice of the peace (now magistrate court) was a court, when publicly administering justice delegated to him by law. State v. Lazarovich, 27 N.M. 282, 200 P. 422 (1921).

Conservancy districts. — Laws 1927, ch. 45 (73-14-1 NMSA 1978 et seq.), establishing conservancy districts, does not create a new court in violation of this section. Gutierrez v. Middle Rio Grande Conservancy Dist., 34 N.M. 346, 282 P. 1, 70 A.L.R. 1261 (1929), cert. denied, 280 U.S. 610, 50 S. Ct. 158, 74 L. Ed. 653 (1930).

Indian's rights to invoke jurisdiction of courts. — An Indian has the same rights as are accorded to any other person to invoke the jurisdiction of the state courts to protect his legal rights in matters not affecting either the federal government or tribal relations. Paiz v. Hughes, 76 N.M. 562, 417 P.2d 51 (1966).

Comparable provisions. — Idaho Const., art. V, § 2.

Iowa Const., art. V, § 1.

Montana Const., art. VII, § 1.

Utah Const., art. VIII, § 1.

Wyoming Const., art. V, § 1.

Law reviews. — For article, "Separation of Powers and the Judicial Rule-Making Power in New Mexico: The Need for Prudential Restraints," see 15 N.M.L. Rev. 407 (1985).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 16 Am. Jur. 2d Constitutional Law §§ 306 to 317, 334; 20 Am. Jur. 2d Courts § 1 et seq.

Revocation of license of physician, surgeon or dentist, statute providing for, as encroachment on judicial power, 5 A.L.R. 94, 79 A.L.R. 323.

Limiting the power of courts to declare a statute unconstitutional, 15 A.L.R. 331, 66 A.L.R. 1466.

Taxes illegally or erroneously exacted, statute providing for refund of, as exercise of judicial function by legislature, 98 A.L.R. 286.

Power of court to prescribe rules of pleadings, practice or procedure, 110 A.L.R. 22, 158 A.L.R. 705.

Superintending control over inferior tribunals, 112 A.L.R. 1351.

Power and duty of court where legislature renders constitutional mandate ineffectual by failing to enact statute necessary to make it effective or by repealing or amending statute previously passed for that purpose, 153 A.L.R. 552, 166 A.L.R. 1308.

Power to confer original jurisdiction on courts to revoke or suspend public license, 168 A.L.R. 826.

Constitutionality of statute fixing time within which court or judge shall or shall not act, 168 A.L.R. 1125.

Mob or riot, statute creating municipal liability for, as a usurpation of judicial powers, 26 A.L.R.3d 1142.

16 C.J.S. Constitutional Law §§ 169 to 214; 21 C.J.S. Courts §§ 93, 94; 81A C.J.S. States §§ 20 to 22.

Sec. 2. [Supreme court; appellate jurisdiction.]

Appeals from a judgment of the district court imposing a sentence of death or life imprisonment shall be taken directly to the supreme court. In all other cases, criminal and civil, the supreme court shall exercise appellate jurisdiction as may be provided by law; provided that an aggrieved party shall have an absolute right to one appeal. (As amended September 28, 1965.)

ANNOTATIONS

Cross references. — As to supreme court's original jurisdiction, supervisory control and power to issue extraordinary writs, see N.M. Const., art. VI, § 3.

As to appellate jurisdiction of supreme court, see 34-5-14 NMSA 1978.

As to appeals from magistrate court, see 35-13-1 NMSA 1978.

As to appeals from district court, see 39-3-2 to 39-3-7 NMSA 1978.

The 1965 amendment, which was proposed by S.J.R. No. 5, § 2 (Laws 1965) and adopted at a special election held on September 28, 1965, with a vote of 31,582 for and 18,477 against, amended this section to provide for a direct appeal to the supreme court in certain criminal cases and for other appeals to the supreme court as provided by law, and to guarantee an absolute right to one appeal. Prior to amendment, this section read: "The appellate jurisdiction of the supreme court shall be coextensive with the state, and shall extend to all final judgments and decisions of the district courts, and said court shall have such appellate jurisdiction of interlocutory orders and decisions of the district courts as may be conferred by law."

Appeal from final judgment exception. — A state constitutional exception to the rule that an appeal may only be taken from a final judgment has been permitted. State v. Griego, 2004-NMCA-107, 136 N.M. 272, 96 P.3d 1192.

Phrase "provided by law" generally means "provided by statutes." State v. Watson, 82 N.M. 769, 487 P.2d 197 (Ct. App. 1971).

"Aggrieved party" is one whose personal interests are adversely affected by an order of the court. State v. Castillo, 94 N.M. 352, 610 P.2d 756 (Ct. App. 1980).

State made "aggrieved party" by criminal disposition contrary to law. — Since the state is a party to every criminal proceeding in the district courts, a claim of disposition contrary to law is a valid and legal grievance which indisputably makes the state "an aggrieved party." State v. Santillanes, 96 N.M. 482, 632 P.2d 359 (Ct. App. 1980), aff'd in part, rev'd on other grounds, 96 N.M. 477, 632 P.2d 354 (1981).

The state constitution guarantees the state's right to appeal a disposition that is contrary to law if the state is aggrieved by that disposition. State v. Griego, 2004-NMCA-107, 136 N.M. 272, 96 P.3d 1192.

Such as when fair jury verdict set aside. — When the jury reaches a verdict after a trial which is fair and free from error, and such a verdict is set aside, the state is "aggrieved" within the meaning of this section, and, thus, has authority to appeal an order granting a new trial. State v. Chavez, 98 N.M. 682, 652 P.2d 232 (1982).

And by ruling that sentencing statute is unconstitutional. — The state is an "aggrieved party" where the trial court refuses to enforce a state sentencing statute on the basis that it is unconstitutional, and the state has a constitutional right to an appeal. State v. Aguilar, 95 N.M. 578, 624 P.2d 520 (1981).

State does not have absolute right to appeal in every situation in which it may feel "aggrieved" by a trial court's ruling. State v. Aguilar, 95 N.M. 578, 624 P.2d 520 (1981).

When state can appeal order granting new criminal trial. — Although the state may appeal an order granting a new trial in a criminal case, an immediate appeal is limited to an order in which it is claimed that either: the grant of a new trial was based on an erroneous conclusion; or prejudicial legal error occurred during the trial; or, newly-discovered evidence warranted a new trial. Thus, an immediate appeal by the state of an order granting a new criminal trial is limited to issues of law. State v. Griffin, 117 N.M. 745, 877 P.2d 551 (1994).

Right to appeal criminal contempt conviction. — Under this section, as amended, the supreme court can no longer deny to an aggrieved party the right to an appeal; despite former supreme court rule denying appeal to one convicted of criminal contempt committed in the presence of the court, defendant had right to appeal such a conviction. State v. Watson, 82 N.M. 769, 487 P.2d 197 (Ct. App. 1971).

Right to appeal denial of motion implicating constitutional rights. — Under this section, the defendant had the right to appeal from an order denying a motion to dismiss a charge on the ground that trial of the charge would subject the defendant to double jeopardy. State v. Apodaca, 1997-NMCA-051, 123 N.M. 372, 940 P.2d 478.

No direct appeal where indictment procedure challenged. — The right conferred by N.M. Const., art. II, § 14 is satisfied by an indictment valid on its face and returned by a legally constituted grand jury. Once such an indictment is returned, there exists no right for immediate review pursuant to a writ of error or pursuant to this section. State v.

Augustin M., 2003-NMCA-065, 133 N.M. 636, 68 P.3d 182, cert. granted, 133 N.M. 727, 69 P.3d 237 (2003).

Right to appeal sentence. — Upon conviction defendant, who pleaded guilty, had an undoubted right to appeal his sentence. Rodriguez v. District Court, 83 N.M. 200, 490 P.2d 458 (1971).

Right to appeal involuntary commitment. — A person involuntarily committed to a mental hospital under 43-1-11 NMSA 1978 has a right to appeal under this section even though no appeal is provided for by statute. State v. Pernell, 92 N.M. 490, 590 P.2d 638 (Ct. App. 1979).

New trial mandated where appeal on record impossible. — Where defendant, convicted of larceny, gave timely notice of appeal, but due to unexplained technical difficulties, court reporter was unable to prepare a transcript of proceedings in the cause, and it was impossible to reconstruct a record of the proceedings because of trial counsel's inability to recall events at trial, defendant would be granted a new trial; to deny him a new trial would be to deny him his constitutional right of appeal. State v. Moore, 87 N.M. 412, 534 P.2d 1124 (Ct. App. 1975).

Supreme Court determines death sentence proportionality. — The determination of death sentence proportionality is a matter to be addressed by the Supreme Court on appeal and is, by implication, within the Supreme Court's exclusive constitutional jurisdiction over death sentence appeals. Determinations of this type require review of the facts in the trial record pertaining to the crime, including evidence of aggravation and mitigation which is not fully developed until after conviction. State v. Wyrostek, 117 N.M. 514, 873 P.2d 260 (1994).

Discharge of prisoner not accorded right to appeal. — Where judgment and order was entered in habeas corpus proceeding on June 15, 1971, requiring petitioner's unconditional release unless prior to June 30, he was allowed his right to appeal his conviction based upon a timely motion for appeal filed pro se the previous November, and due to the state's neglect the requisite order of the district court permitting an appeal came too late, being entered on June 30 itself and furthermore, the state did not attempt by motion to seek relief from the June 15 order until September 27, 1971, petitioner would be released; writ of prohibition seeking to prohibit his discharge was not available to the state. Rodriguez v. District Court, 83 N.M. 200, 490 P.2d 458 (1971).

Dismissal for rule violations not abridgement of right to appeal. — The right of appeal is provided for in the constitution while the means for exercising that right are properly controlled by rules of procedure, and the defendant's constitutional right to appeal was not abridged by the dismissal for failure to follow procedural rules. Olguin v. State, 90 N.M. 303, 563 P.2d 97 (1977).

Dismissal of appeal because of actions of defendant. — If a defendant's former fugitive status has significantly interfered with the operation of the appellate process,

dismissal of the defendant's appeal is appropriate. Here, because the defendant's fugitive status caused the administrative purging of the record of his trial nine years after the trial, thus preventing the orderly disposition of his case, his appeal is dismissed. State v. Brown, 116 N.M. 705, 866 P.2d 1172 (Ct. App. 1993).

Time for appeal. — The amendment to this section did not alter the effect of the court rule fixing the time in which the guaranteed right to appeal should be exercised; that the appeal should be within a reasonable time, fixed at 30 days, is a procedural requirement and not in any sense a deprivation of a guaranteed right. State v. Garlick, 80 N.M. 352, 456 P.2d 185 (1969).

Appeal right not forfeited by escape. — A person convicted of a crime does not forfeit his right to appeal simply because he has escaped from confinement. He still has a right to have his conviction reversed if he was erroneously convicted or if his constitutional rights were violated. Mascarenas v. State, 94 N.M. 506, 612 P.2d 1317 (1980).

Right of appeal was not granted by section prior to amendment. Jordan v. Jordan, 29 N.M. 95, 218 P. 1035 (1923); State v. Rosenwald Bros. Co., 23 N.M. 578, 170 P. 42 (1918); State v. Chacon, 19 N.M. 456, 145 P. 125 (1914).

Appeals by state. — This section, as it read prior to 1965 amendment, did not give state right to appeal from judgment sustaining plea in abatement to an indictment. Ex parte Carrillo, 22 N.M. 149, 158 P. 800 (1916).

Under this section as it read prior to 1965 amendment, state could not appeal from district court judgment sustaining demurrer to an information charging trespass on a school section. State v. Dallas, 22 N.M. 392, 163 P. 252 (1917).

Appeals from suppression orders. — Since the state has no constitutional appeal as of right from a suppression order, the time for filing such an appeal is governed by the ten-day limit set forth in 39-3-3B(2) NMSA 1978 and not the thirty-day limit provided for in Rule 12-201A. State v. Alvarez, 113 N.M. 82, 823 P.2d 324 (Ct. App. 1991).

Appeals from conditional pleas. — A conditional plea agreement is a proper procedure to enable a defendant to reserve a significant pretrial issue for appeal in a case in which conviction seems certain unless the defendant prevails on the pretrial issue. State v. Hodge, 118 N.M. 410, 882 P.2d 1 (1994).

Appeals from grant of jury trial in delinquency proceedings. — Trial court's grant of a jury trial to a child in delinquency proceedings was not reviewable because the state's interest was not compelling enough to justify an exception to the final judgment rule. In re Larry K., 1999-NMCA-078, 127 N.M. 461, 982 P.2d 1060.

Section does not require written opinion; court of appeals' memorandum opinion, authorized by Rule 601(b)(1), N.M.R. App. P. (Crim.) (see now Rule 12-405 B(1)

NMRA), did not deprive defendant of right to appeal. Hudson v. State, 89 N.M. 759, 557 P.2d 1108 (1976), cert. denied, 431 U.S. 924, 97 S. Ct. 2198, 53 L. Ed. 2d 238 (1977).

Authority to remand for new sentence. — Appellate courts have the authority to remand a case for entry of judgment on the lesser included offense and resentencing rather than retrial when the evidence does not support the offense for which the defendant was convicted but does support a lesser included offense. The rationale for this holding is that there is no need to retry a defendant for a lesser included offense when the elements of a lesser offense necessarily were proven to a jury beyond a reasonable doubt in the course of convicting the defendant of the greater offense. State v. Haynie, 116 N.M. 746, 867 P.2d 416 (1994).

Certiorari to court of appeals in criminal case. — The supreme court has the authority to issue writs of certiorari directed to the court of appeals in a criminal case where the conditions of 34-5-14 NMSA 1978 are met. State v. Gunzelman, 85 N.M. 295, 512 P.2d 55 (1973), overruled on other grounds, State v. Orosco, 113 N.M. 780, 833 P.2d 1146 (1992).

Refusal to hear issues denies appeal right. — For the supreme court to refuse on appeal to hear the issues which it once declined to review by writ of certiorari would be to effectively deny the defendant his right to appeal his conviction to that court. State v. Luna, 93 N.M. 773, 606 P.2d 183 (1980).

Section applies to review of original jurisdiction cases. — Section 39-3-1.1E NMSA 1978, vesting the court of appeals with discretionary review authority of appeals to district court, does not violate this provision because Article 6, Section 2 applies only to appeals of original jurisdiction cases from district court and not to review of the district court acting in an appellate capacity. VanderVossen v. City of Espanola, 2001-NMCA-016, 130 N.M. 287, 24 P.3d 319.

Juvenile courts. — In face of this article legislature could not provide for direct appeal to supreme court from courts inferior to district court, including, at that time, juvenile courts (case decided under this section as it read prior to 1965 amendment). State v. Eychaner, 41 N.M. 677, 73 P.2d 805 (1937).

Habeas corpus. — Laws 1937, ch. 197 (39-3-7 NMSA 1978), authorizing appeals in special proceedings, does not authorize an appeal in habeas corpus proceedings from district court order remanding relator to custody of sheriff, since habeas corpus is not a special statutory proceeding. In re Forest, 45 N.M. 204, 113 P.2d 582 (1941).

Conservancy districts. — Laws 1923, ch. 140, § 903 (since repealed), relating to conservancy districts, did not deprive an appellant of the privilege of appeal, for Subdivision 2 thereof provided for appeals from all orders and decrees of the district court. In re Proposed Middle Rio Grande Conservancy Dist., 31 N.M. 188, 242 P. 683 (1925).

Court's review limited. — The supreme court's review of the evidence is only for the purpose of determining whether there was substantial evidence to support the trier of the facts. Ammerman v. Hubbard Broadcasting, Inc., 89 N.M. 307, 551 P.2d 1354 (1976), cert. denied, 436 U.S. 906, 98 S. Ct. 2237, 56 L. Ed. 2d 404 (1978).

No power in supreme court to review de novo. — The constitution gives the supreme court appellate jurisdiction and also original jurisdiction and superintending control, but these powers do not include the power to review de novo the factual basis for the orders or judgments of district courts. Ammerman v. Hubbard Broadcasting, Inc., 89 N.M. 307, 551 P.2d 1354 (1976), cert. denied, 436 U.S. 906, 98 S. Ct. 2237, 56 L. Ed. 2d 404 (1978).

While the legislature has the power to determine in what district court cases, civil and criminal, the supreme court shall exercise appellate jurisdiction (except where a sentence of death or life imprisonment has been imposed, in which cases appellate jurisdiction is directly conferred on the court), the legislature has no power to substitute a de novo hearing for an appeal from a judgment or order of the district court, and has no power to fix the time within which an appeal must be heard by the supreme court. Ammerman v. Hubbard Broadcasting, Inc., 89 N.M. 307, 551 P.2d 1354 (1976), cert. denied, 436 U.S. 906, 98 S. Ct. 2237, 56 L. Ed. 2d 404 (1978).

Summary calendar system of appeal constitutional. — There was no factual or legal basis for defendant's allegation of a due process violation due to New Mexico's summary calendar system of appeal, since assignment of a case to the summary calendar, which strictly limits the length of and time for submissions to the appellate court, does not violate due process as long as the defendant is able to properly present issues raised on appeal. State v. Ibarra, 116 N.M. 486, 864 P.2d 302 (Ct. App. 1993), cert. denied, 513 U.S. 1157, 115 S. Ct. 1116, 130 L. Ed. 2d 1080 (1995).

Defendant was not prejudiced by the trial court's limitation of the record, in light of the evidence and stipulations of the parties. See State v. Martin, 94 N.M. 251, 609 P.2d 333 (Ct. App.), cert. denied, 94 N.M. 628, 614 P.2d 545 (1980).

Section 29-9-8B NMSA 1978 partially unconstitutional. - The last sentence in 29-9-8B NMSA 1978, allowing the discovery of the records of the governor's organized crime prevention commission only by supreme court order, is unconstitutional, as the legislature lacks the power to prescribe and regulate practice, pleading and procedure. In re Motion for a Subpoena Duces Tecum, 94 N.M. 1, 606 P.2d 539 (1980).

Comparable provisions. — Idaho Const., art. V, § 9.

Iowa Const., art. V, § 4.

Montana Const., art. VII, § 2.

Utah Const., art. VIII, § 3.

Wyoming Const., art. V, § 2.

Law reviews. — For article, "Survey of New Mexico Law, 1979-80: Civil Procedure," see 11 N.M.L. Rev. 53 (1981).

For annual survey of New Mexico law relating to criminal procedure, see 12 N.M.L. Rev. 271 (1982).

For article, "New Mexico's Summary Calendar for Disposition of Criminal Appeals: An Invitation for Inefficiency, Ineffectiveness and Injustice," see 24 N.M.L. Rev. 27 (1994).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 20 Am. Jur. 2d Courts § 54 et seq.

New trial, grant of, by appellate court because of inability to perfect record for appeal, 13 A.L.R. 107, 16 A.L.R. 1158, 107 A.L.R. 603.

Superintending control over inferior tribunals, 112 A.L.R. 1351.

Issue of certiorari in exercise of power of superintending control, 112 A.L.R. 1370.

Issue of mandamus in exercise of power of superintending control, 112 A.L.R. 1371.

Appellate court's discretion to refuse exercise of its original jurisdiction to issue writs of mandamus, 165 A.L.R. 1431.

Power to confer original jurisdiction on courts to revoke or suspend public license, 168 A.L.R. 826.

21 C.J.S. Courts § 12 et seq.

Sec. 3. [Supreme court; original jurisdiction; supervisory control; extraordinary writs.]

The supreme court shall have original jurisdiction in quo warranto and mandamus against all state officers, boards and commissions, and shall have a superintending control over all inferior courts; it shall also have power to issue writs of mandamus, error, prohibition, habeas corpus, certiorari, injunction and all other writs necessary or proper for the complete exercise of its jurisdiction and to hear and determine the same. Such writs may be issued by direction of the court, or by any justice thereof. Each justice shall have power to issue writs of habeas corpus upon petition by or on behalf of a person held in actual custody, and to make such writs returnable before himself or before the supreme court, or before any of the district courts or any judge thereof.

ANNOTATIONS

I. GENERAL CONSIDERATION.

Cross references. — As to certiorari to the court of appeals, see N.M. Const., art. VI, § 13, and Rule 12-502 NMRA.

For Uniform Certification of Questions of Law Act, see Chapter 39, Article 7 NMSA 1978.

As to habeas corpus, see 44-1-1 NMSA 1978 et seq.

For provisions relating to mandamus, see 44-2-1 NMSA 1978.

As to quo warranto, see 44-3-1 NMSA 1978.

For rule regarding writs of error, see Rule 12-503 NMRA.

As to issuance of extraordinary writs, see Rule 12-504.

Certiorari to court of appeals in criminal case. — Supreme court has authority to issue writs of certiorari directed to court of appeals in a criminal case where the conditions of 34-5-14 NMSA 1978 are met. State v. Gunzelman, 85 N.M. 295, 512 P.2d 55 (1973), overruled on other grounds, State v. Orosco, 113 N.M. 780, 833 P.2d 1146 (1992).

No power of de novo review. — Powers of appellate jurisdiction and original jurisdiction and superintending control do not include the power to review de novo the factual basis for the orders or judgments of district courts. Ammerman v. Hubbard Broadcasting, Inc., 89 N.M. 307, 551 P.2d 1354 (1976), cert. denied, 436 U.S. 906, 98 S. Ct. 2237, 56 L. Ed. 2d 404 (1978).

Lower court order imposing media ban in criminal case. — The news media has standing in the supreme court to intervene in a criminal case to question the validity of a lower court order impairing its ability to report the news. The proper approach lies in a separate action for declaratory judgment, mandamus or prohibition. State ex rel. New Mexico Press Ass'n v. Kaufman, 98 N.M. 261, 648 P.2d 300 (1982).

Section 29-9-8B NMSA 1978 partially unconstitutional. - The last sentence in 29-9-8B NMSA 1978, allowing the discovery of the records of the governor's organized crime prevention commission only by supreme court order, is unconstitutional, as the legislature lacks the power to prescribe and regulate practice, pleading and procedure. In re Motion for a Subpoena Duces Tecum, 94 N.M. 1, 606 P.2d 539 (1980).

Attorneys' fees on settled appeal. — Where appellant and appellee compromised a case on appeal, without the intervention of their attorneys, and agreed to and prayed for dismissal of the appeal, a petition of attorneys for appellant asking court to modify district court decree to provide for attorneys' fees invoked the original jurisdiction of the supreme court in a manner not authorized by this section and could not be entertained. Thurman v. Grimes, 35 N.M. 498, 1 P.2d 972 (1931).

Supreme court may order a change of venue when remanding a case. Marsh v. State, 95 N.M. 224, 620 P.2d 878 (1980).

Writ of error as appropriate means for invoking collateral order doctrine. See Carrillo v. Rostro, 114 N.M. 607, 845 P.2d 130 (1992).

Comparable provisions. — Idaho Const., art. V, § 9.

Iowa Const., art. V, § 4.

Montana Const., art. VII, § 2.

Utah Const., art. VIII, § 3.

Wyoming Const., art. V, § 3.

Law reviews. — For article, "Prisoners Are People," see 10 Nat. Resources J. 869 (1970).

For article, "Mandamus in New Mexico," see 4 N.M. L. Rev. 155 (1974).

For article, "The Writ of Prohibition in New Mexico," see 5 N.M. L. Rev. 91 (1974).

For article, "Medical Malpractice Legislation in New Mexico," see 7 N.M. L. Rev. 5 (1976-77).

For comment on Sender v. Montoya, 73 N.M. 287, 387 P.2d 860 (1963), see 4 Nat. Resources J. 413 (1964).

For article, "Habeas Corpus in New Mexico," see 11 N.M.L. Rev. 291 (1981).

For article, "Separation of Powers and the Judicial Rule-Making Power in New Mexico: The Need for Prudential Restraints," see 15 N.M.L. Rev. 407 (1985).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 20 Am. Jur. 2d Courts §§ 72 et seq.

Raising question of the jurisdiction of the inferior court, as a condition precedent to an application for a writ of prohibition, 35 A.L.R. 1090.

Superintending control over inferior tribunals, 51 A.L.R. 111, 68 A.L.R. 635, 91 A.L.R. 1295, 110 A.L.R. 1, 112 A.L.R. 1351, 125 A.L.R. 879.

Mandamus to governor, 105 A.L.R. 1124.

Powers of court to prescribe rules of pleadings, practice or procedure, 110 A.L.R. 22, 158 A.L.R. 705.

Injunction by appellate court to protect subject matter of appeal or status quo as between the parties, 133 A.L.R. 1105.

Discretion of appellate court to refuse exercise of its original jurisdiction to issue writs of mandamus, 165 A.L.R. 1431.

Power to confer original jurisdiction on courts to revoke or suspend public license, 168 A.L.R. 826.

Propriety of federal court's considering state prisoner's petition under 28 USC § 2254 where prisoner has exhausted state remedies as to some, but not all, claims in petition, 43 A.L.R. Fed. 631.

21 C.J.S. Courts § 12 et seq.

II. SUPERINTENDING CONTROL.

Superintending control explained. — The power of superintending control is the power to control the course of ordinary litigation in inferior courts, as exercised at common law by the Court of Kings' Bench and by the use of writs specifically mentioned in the constitution, and other writs there referred to or authorized. State v. Roy, 40 N.M. 397, 60 P.2d 646, 110 A.L.R. 1 (1936).

Power of superintending control is distinct from appellate and original jurisdiction of supreme court; therefore, even though petitioners had taken an appeal to this court from the orders of the trial court denying their motions to set aside the amended decree, the extremely unusual circumstances of this case made petitioners' remedy by appeal substantially inadequate. State ex rel. DuBois v. Ryan, 85 N.M. 575, 514 P.2d 851 (1973).

Not substitute for appeal. — The superintending control will not be invoked merely to perform the office of an appeal. State Game Comm'n v. Tackett, 71 N.M. 400, 379 P.2d 54 (1962).

Control over administrative functions of inferior courts. — The constitutional grant of "superintending control" gives the New Mexico Supreme Court control over administrative functions of inferior courts. Russillo v. Scarborough, 727 F. Supp. 1402 (D.N.M. 1989), aff'd, 935 F.2d 1167 (10th Cir. 1991).

The supreme court has ultimate authority over administrative matters of the courts. Russillo v. Scarborough, 935 F.2d 1167 (10th Cir. 1991).

The power of superintending control includes the authority to order the metropolitan court to terminate its court administrator. Russillo v. Scarborough, 935 F.2d 1167 (10th Cir. 1991).

Superintending power will not be exercised except under unusual circumstances. State Game Comm'n v. Tackett, 71 N.M. 400, 379 P.2d 54 (1962).

When superintending control exercised. — The supreme court's superintending control will be exercised if the remedy by appeal is wholly or substantially inadequate, or if the exercise thereof will prevent irreparable mischief, great, extraordinary or exceptional hardship, costly delays or unusual burdens in the form of expenses. State ex rel. DuBois v. Ryan, 85 N.M. 575, 514 P.2d 851 (1973); Williams v. Sanders, 80 N.M. 619, 459 P.2d 145 (1969); State ex rel. Anaya v. Scarborough, 75 N.M. 702, 410 P.2d 732 (1966); Montoya v. McManus, 68 N.M. 381, 362 P.2d 771 (1961); Rutledge v. Fort, 104 N.M. 7, 715 P.2d 455 (1986), overruled on other grounds Reese v. State, 106 N.M. 498, 745 P.2d 1146 (1987).

Superintending control is limited to control over inferior courts and does not restrict legislative powers to establish procedures for workers' compensation proceedings, including the authority of the worker's compensation administrator to appoint a workers' compensation judge pro tem. Carrillo v. Compusys, Inc., 1997-NMCA-003, 122 N.M. 720, 930 P.2d 1172.

Duty of court to uphold respect for courts. — The duty of the court under its power of superintending control is to make certain, insofar as humanly possible, that the traditional respect and high regard in which courts generally are held will in no way be encroached upon; the courts must not only be impartial, unbiased and fair, but, in addition, no suspicions to the contrary may be permitted to creep in. State ex rel. Anaya v. Scarborough, 75 N.M. 702, 410 P.2d 732 (1966).

Actions or proceedings under court's superintending control are for court alone and are not a proper consideration for the bar commission. In re Board of Comm'rs of State Bar, 65 N.M. 332, 337 P.2d 400 (1959).

Inherent power in supreme court to regulate procedure. — Supreme court's power of superintending control over all inferior courts carries with it the inherent power to regulate all pleading, practice and procedure affecting the judicial branch of government. Ammerman v. Hubbard Broadcasting, Inc., 89 N.M. 307, 551 P.2d 1354 (1976), cert. denied, 436 U.S. 906, 98 S. Ct. 2237, 56 L. Ed. 2d 404 (1978); State ex rel. Anaya v. McBride, 88 N.M. 244, 539 P.2d 1006 (1975).

The supreme court of New Mexico has superintending control over all inferior courts, and thus the power to regulate and to promulgate rules regarding the pleadings, practice and procedure affecting the judicial branch of government. Hudson v. State, 89 N.M. 759, 557 P.2d 1108 (1976), cert. denied, 431 U.S. 924, 97 S. Ct. 2198, 53 L. Ed. 2d 238 (1977).

Supreme court has a superintending control over all inferior courts as well as jurisdiction and power to issue writs of certiorari; this constitutional power and jurisdiction carries with it the power to regulate pleading, practice and procedure in inferior courts and the

circumstances under which such writs, including writs of certiorari, may issue. Alexander v. Delgado, 84 N.M. 717, 507 P.2d 778 (1973).

The power to provide rules of pleading, practice and procedure for the conduct of litigation in the district courts, as well as rules of appellate procedure, is lodged in the supreme court under its power of superintending control. The constitutional grant of power to issue the writs by means of which the power of superintending control is exercised comprehends and carries with it the authority to exercise such powers to the extent that it can be exerted by those writs and other processes essential to its complete exercise. State v. Roy, 40 N.M. 397, 60 P.2d 646, 110 A.L.R. 1 (1936).

By Laws 1933, ch. 84 (38-1-1, 38-1-2 NMSA 1978), authorizing the supreme court to promulgate rules of procedure, the legislature merely withdrew from the rule-making field wherein it had theretofore functioned as a coordinate branch of government with the court. The act was not a delegation of legislative power, but rather a mere abdication or withdrawal from the rule-making field, and the rules promulgated thereafter were issued pursuant to the supreme court's inherent power to prescribe such rules of practice, pleading and procedure as would facilitate the administration of justice. State v. Roy, 40 N.M. 397, 60 P.2d 646, 110 A.L.R. 1 (1936).

Establishing pretrial procedure for evaluating aggravating circumstances. — The supreme court has the inherent authority to establish a pretrial procedure for evaluating aggravating circumstances under its power of superintending control over lower state courts. State v. Ogden, 118 N.M. 234, 880 P.2d 845, cert. denied, 513 U.S. 936, 115 S. Ct. 336, 130 L. Ed. 2d 294 (1994).

Exclusion of control by executive or legislature unconstitutional. — Any action of the executive or legislative branch of a municipal government which would preclude the supreme court or the district court from exercising its superintending or supervisory authority over the municipal court violates the state constitution. Mowrer v. Rusk, 95 N.M. 48, 618 P.2d 886 (1980).

Legislature lacks power to prescribe rules of practice and procedure, although it has in the past attempted to do so. State ex rel. Anaya v. McBride, 88 N.M. 244, 539 P.2d 1006 (1975).

In the absence of the clearest language to the contrary in the constitution, the powers essential to the functioning of the courts are to be taken as committed solely to the supreme court to avoid a confusion in the methods of procedure and to provide uniform rules of pleading and practice. Ammerman v. Hubbard Broadcasting, Inc., 89 N.M. 307, 551 P.2d 1354 (1976), cert. denied, 436 U.S. 906, 98 S. Ct. 2237, 56 L. Ed. 2d 404 (1978).

Statutes purporting to regulate practice and procedure in the courts cannot be made binding, for the constitutional power is vested exclusively in the supreme court. Ammerman v. Hubbard Broadcasting, Inc., 89 N.M. 307, 551 P.2d 1354 (1976), cert.

denied, 436 U.S. 906, 98 S. Ct. 2237, 56 L. Ed. 2d 404 (1978); State ex rel. Anaya v. McBride, 88 N.M. 244, 539 P.2d 1006 (1975).

Statutory rule of evidence invalid. — In view of the clear and unambiguous assertion of the supreme court in Rule 501, N.M.R. Evid. (see now Rule 11-501 NMRA) that no person has a privilege, except as provided by constitution or rule of the court, and since under the New Mexico constitution the legislature lacks power to prescribe by statute rules of evidence and procedure, which power is vested exclusively in the supreme court, the journalistic privilege purportedly created by former 20-1-12.1 A, 1953 Comp., is constitutionally invalid and cannot be relied upon or enforced in judicial proceedings. Ammerman v. Hubbard Broadcasting, Inc., 89 N.M. 307, 551 P.2d 1354 (1976), cert. denied, 436 U.S. 906, 98 S. Ct. 2237, 56 L. Ed. 2d 404 (1978).

Legislature has no power to substitute de novo hearing for appeal from a judgment or order of the district court, and has no power to fix the time within which an appeal must be heard by the supreme court. Ammerman v. Hubbard Broadcasting, Inc., 89 N.M. 307, 551 P.2d 1354 (1976).

Issuance of writ held appropriate. — The question of whether the state was barred by the double jeopardy clause from prosecuting an individual for driving under the influence (DWI) once the individual had been subjected to an administrative hearing for driver's license revocation based on the same offense was one of great public importance requiring use of the supreme court's power of superintending control. State ex rel. Schwartz v. Kennedy, 120 N.M. 619, 904 P.2d 1044 (1995).

Issuance of writ held inappropriate. — Issuance of an alternative writ of superintending control restraining a district court from enforcing the portion of its sentence against a defendant awarding him meritorious good-time credit against his sentence for the period he spent in presentence confinement was inappropriate, where the state filed and then voluntarily withdrew an appeal of the district court's order and where the public interest in the orderly administration of the criminal justice system was served by another decision of the Supreme Court of New Mexico. State ex rel. Schiff v. Murdoch, 104 N.M. 344, 721 P.2d 770 (1986).

Power of superintending control would be exercised in election contest involving office of lieutenant-governor. Montoya v. McManus, 68 N.M. 381, 362 P.2d 771 (1961).

Review of interlocutory order. — The supreme court will not invoke its extraordinary power of superintending control over all inferior courts to review an interlocutory order that plaintiff was real party in interest, where there is no great hardship in forcing the parties to await review of the final judgment. Albuquerque Gas & Elec. Co. v. Curtis, 43 N.M. 234, 89 P.2d 615 (1939).

Vacation of court order. — Supreme court was warranted in exercising its superintending control by vacating an order of the district court allowing an appeal from ad valorem tax valuation and enjoining the state tax commission from certifying tax

assessments to county assessors, as entry of the order was an abuse of discretion under the provisions of Rules 65 and 66, N.M.R. Civ. P. (see now Rules 1-065 and 1-066 NMRA). State ex rel. State Tax Comm'n v. First Judicial Dist. Court, 69 N.M. 295, 366 P.2d 143 (1961).

Game commission controversy. — In a case brought to enjoin and restrain the state game commission from authorizing its permittees and licensees to go upon state leased lands for the purpose of hunting wild game, where a writ of prohibition would issue as a matter of right had the order of the district court been threatened but not issued, the supreme court should exercise its right of superintending control. State Game Comm'n v. Tackett, 71 N.M. 400, 379 P.2d 54 (1962).

Removal or discipline of judges. — This section and N.M. Const., art. VI, § 32, provide for removal or discipline (but not recall) of any justice, judge or magistrate for willful misconduct in office, willful and persistent failure to perform his duties or habitual intemperance. 1973 Op. Att'y Gen. No. 73-3.

The superintending control of the supreme court over inferior courts affords a present avenue for removal of any municipal judge should the situation so warrant. 1973 Op. Att'y Gen. No. 73-3.

The board of bar commissioners of state of New Mexico and its grievance or disciplinary committee have no jurisdiction as to a complaint made against a district judge with respect to the judge's actions in rebuking a grand jury. In re Board of Comm'rs of State Bar, 65 N.M. 332, 337 P.2d 400 (1959).

III. QUO WARRANTO.

Purpose of quo warranto. — Purpose of quo warranto is to ascertain whether a public officer is constitutionally and legally authorized to perform any act in or exercise any functions of the office to which he lays claim. State ex rel. Anaya v. McBride, 88 N.M. 244, 539 P.2d 1006 (1975).

Jurisdiction in mandamus and quo warranto concurrent with district courts. — Under this section and N.M. Const., art. VI, § 13, the supreme and district courts each have original jurisdiction in quo warranto and mandamus against all state officers, boards and commissions in all cases, whether the proceeding was instituted by the attorney general, ex officio, in behalf of the state, or brought by some private person for the assertion of some private right. The supreme court will decline jurisdiction in absence of controlling necessity therefor, and will do so in all cases brought at instance of a private suitor. State ex rel. Owen v. Van Stone, 17 N.M. 41, 121 P. 611 (1912).

Construing this section and N.M. Const., art. VI, § 13, the jurisdiction of the supreme court in quo warranto against state commissions and officers, while original, was concurrent with that of the district courts and not exclusive. State ex rel. Owen v. Van Stone, 17 N.M. 41, 121 P. 611 (1912).

Liberal interpretation of quo warranto statutes. — Statutes such as those concerning quo warranto are remedial in character, and as such should be liberally interpreted to effectuate the objects intended. State ex rel. Anaya v. McBride, 88 N.M. 244, 539 P.2d 1006 (1975).

Statute inconsistent with court's powers. — The supreme court would not give approval to the portion of 44-3-6 NMSA 1978 which requires the name of the person rightfully entitled to the office involved in a quo warranto proceeding to be set forth in the complaint, at least not if it is meant to affect the subject matter jurisdiction of the court, especially since the statute is inconsistent with Rule 12(a), N.M.R. App. P. (Civ.), (see now Rule 12-504 A NMRA) since in any situation where a vacancy was filled by appointment under such reasoning the court would be shorn of its constitutional powers vis-a-vis quo warranto, and presumably, with additional bits of legislative ingenuity, of its powers to issue other extraordinary writs as well. State ex rel. Anaya v. McBride, 88 N.M. 244, 539 P.2d 1006 (1975).

State indispensable party to quo warranto. — The state, through the attorney general, is an indispensable party plaintiff in a quo warranto proceeding to challenge the propriety of an election contest. State ex rel. Anaya v. McBride, 88 N.M. 244, 539 P.2d 1006 (1975).

IV. MANDAMUS.

Mandamus against officers, boards and commissions. — The supreme court of New Mexico exercises constitutionally invested original jurisdiction in mandamus against all state officers, boards and commissions. State ex rel. Sego v. Kirkpatrick, 86 N.M. 359, 524 P.2d 975 (1974).

A mandamus petition for an order precluding the governor from implementing compacts and revenue-sharing agreements with Indian tribes which would permit gaming on Indian lands pursuant to the federal Indian Gaming Regulatory Act was properly brought before the supreme court in an original proceeding. State ex rel. Clark v. Johnson, 120 N.M. 562, 904 P.2d 11 (1995).

A writ of mandamus was an appropriate means of vacating an unconstitutional order of the public service commission. State ex rel. Sandel v. New Mexico Pub. Util. Comm'n, 1999-NMSC-019, 127 N.M. 272, 980 P.2d 55.

Supreme Court had original jurisdiction of writ of mandamus brought to compel governor to cease implementation of public assistance program which petitioners alleged exceeded his authority and failed to get required legislative approval. State ex rel. Taylor v. Johnson, 1998-NMSC-015, 125 N.M. 343, 961 P.2d 768.

Mandamus lies to compel performance of statutory duty only when it is clear and indisputable. Witt v. Hartman, 82 N.M. 170, 477 P.2d 608 (1970).

Mandamus to restore rights or privileges. — Mandamus is defined to include an order directing the restoration to the complainant of rights or privileges of which he has been illegally deprived. State ex rel. Bird v. Apodaca, 91 N.M. 279, 573 P.2d 213 (1977).

Mandamus directing district court to act. — Under its power of superintending control, supreme court could by mandamus direct district court to act, even though remedy by appeal or writ of error existed, where such remedy was entirely inadequate. State ex rel. Meyers Co. v. Raynolds, 22 N.M. 473, 164 P. 830 (1917).

Mandamus was available to enforce provisions of Enabling Act in view of acceptance of act's provisions by adoption of N.M. Const., art. XXI, §§ 9 and 10. State ex rel. Shepard v. Mechem, 56 N.M. 762, 250 P.2d 897 (1952).

Publication of proposed amendments. — Supreme court had original jurisdiction at instance of individual voter to mandamus secretary of state to publish proposed amendments to state constitution. Hutcheson v. Gonzales, 41 N.M. 474, 71 P.2d 140 (1937).

Mandamus was proper remedy for attacking constitutionality of statute in view of the possible inadequacy of other remedies and the necessity of an early decision on question of great public importance. Thompson v. Legislative Audit Comm'n, 79 N.M. 693, 448 P.2d 799 (1968).

Constitutionality of legislative act may be determined in mandamus action. State ex rel. Shepard v. Mechem, 56 N.M. 762, 250 P.2d 897 (1952).

Right to tenure is not enforceable by mandamus, as in absence of positive provision of law it is not a clear legal right. Lease v. Board of Regents of N.M. State Univ., 83 N.M. 781, 498 P.2d 310 (1972).

No jurisdiction to mandamus election recount by district judge. — The supreme court is without jurisdiction to mandamus a district judge to certify that a recount of ballots was made in his presence, since he is not a state officer, board or commission, or of an inferior court, but only a recount official performing a ministerial function. State ex rel. Scott v. Helmick, 35 N.M. 219, 294 P. 316 (1930). But see, 1-14-21 NMSA 1978.

V. PROHIBITION.

Prohibition defined. — The writ of prohibition is best defined as an extraordinary writ, issued by a superior court to an inferior court to prevent the latter from exceeding its jurisdiction, either by prohibiting it from assuming jurisdiction of a matter over which it has no control, or from going beyond its legitimate powers in a matter in which it has jurisdiction. State ex rel. Harvey v. Medler, 19 N.M. 252, 142 P. 376 (1914).

District court is an "inferior court" within meaning of this section giving to supreme court jurisdiction to grant writ of prohibition. State ex rel. Harvey v. Medler, 19 N.M. 252, 142 P. 376 (1914).

But not state corporation commission (now public regulation commission). — Since state corporation commission (now public regulation commission) is not an "inferior court," supreme court's original jurisdiction does not extend to a prohibitory action against such commission. Atchison, T. & S.F. Ry. v. State Corp. Comm'n, 43 N.M. 503, 95 P.2d 676 (1939).

When writ of prohibition issued. — Even though the issuance of a writ of prohibition is within supreme court's discretion, the writ is issued almost as a matter of right when the trial court is totally lacking in jurisdiction, or has exceeded its jurisdiction or is about to do so. When the order has already been issued, or when the court has jurisdiction but the order is erroneous, arbitrary and tyrannical, or would be gross injustice, or might result in irreparable injury, and there is no plain, speedy and adequate remedy unless it is issued, the supreme court may do so under power of superintending control by virtue of this section. State v. Zinn, 80 N.M. 710, 460 P.2d 240 (1969).

If the inferior court or tribunal has jurisdiction of both the subject matter and of the person, where necessary, the writ of prohibition will not issue, but lacking such jurisdiction the writ will issue as a matter of right. State Game Comm'n v. Tackett, 71 N.M. 400, 379 P.2d 54 (1962); Gilmore v. District Court, 35 N.M. 157, 291 P. 295 (1930).

Where jurisdiction of both the subject matter and the parties is present, ordinarily prohibition will not issue; the question is not whether the court had a right to decide the issue in a particular way, but whether it had the right to decide it at all. State Racing Comm'n v. McManus, 82 N.M. 108, 476 P.2d 767 (1970); State ex rel. Kermac Nuclear Fuels Corp. v. Larrazolo, 70 N.M. 475, 375 P.2d 118 (1962).

Prohibition invokable under exceptional circumstances. — Supreme court's power of supervisory control will be invoked by writ of prohibition where the remedy by appeal is inadequate or where irreparable mischief, great, extraordinary or exceptional hardship, costly delay and unusual burdens of expense would otherwise result. State ex rel. Transcontinental Bus Serv., Inc. v. Carmody, 53 N.M. 367, 208 P.2d 1073 (1949).

Prohibition is properly invoked only against an inferior court to prevent such a court from acting either without jurisdiction or in excess of its jurisdiction. State ex rel. Bird v. Apodaca, 91 N.M. 279, 573 P.2d 213 (1977).

Judicial discretion. — Prohibition is not a writ of right, granted ex debito justitiae, but rather one of sound judicial discretion, to be granted or withheld according to the circumstances of each particular case; it is to be used with great caution for the furtherance of justice when none of the ordinary remedies provided by law are applicable. State ex rel. Harvey v. Medler, 19 N.M. 252, 142 P. 376 (1914).

Writ of prohibition may not be utilized for piecemeal review, or as a substitute for an appeal and an even greater violation of the judicial process would be to use it with an incomplete record to substitute supreme court's judgment for that of the trial court. State v. Zinn, 80 N.M. 710, 460 P.2d 240 (1969).

Undoing of act performed is not purpose of prohibition in its usual sense. State Game Comm'n v. Tackett, 71 N.M. 400, 379 P.2d 54 (1962).

Use of prohibition limited. — Generally, writ of prohibition cannot be used to correct mere irregularities, or to perform functions of an appeal or writ of error. State ex rel. Harvey v. Medler, 19 N.M. 252, 142 P. 376 (1914).

Jurisdiction over state officers limited. — As to state officers, the supreme court's original jurisdiction is confined to mandamus and quo warranto; prohibition will not lie against the state corporation commission (now public regulation commission) at least in absence of controlling necessity therefor. Atchison, T. & S.F. Ry. v. State Corp. Comm'n, 43 N.M. 503, 95 P.2d 676 (1939).

Prohibition to stay court proceedings pending adjudication of constitutionality. — Where conflict existed in New Mexico judicial districts as to constitutionality of death penalty and allowing the situation to remain would result in unequal justice, a writ of prohibition to stop proceedings in conflicting cases until a determination of constitutionality could be made in the instant case was proper and would be made permanent. State ex rel. Serna v. Hodges, 89 N.M. 351, 552 P.2d 787 (1976), overruled on other grounds, State v. Rondeau, 89 N.M. 408, 553 P.2d 688 (1976).

Issuance of writ proper. — The presence of an unauthorized person before the grand jury requires dismissal of the indictment without the necessity of showing prejudice, and writ of prohibition was properly issued under such circumstances. Davis v. Traub, 90 N.M. 498, 565 P.2d 1015 (1977).

Although writ of prohibition should not interfere with discretion of trial judge, where respondent trial judge had not exercised his discretion but had ruled that the defendants were entitled to grand jury testimony, police reports and witness statements as a matter of law, the writ was proper. State v. Zinn, 80 N.M. 710, 460 P.2d 240 (1969).

Resort to power of superintending control. — Where problem was of importance to the state, and the supreme court's refusal to entertain jurisdiction might amount to a denial of justice, it would resort to the extraordinary writ and examine the entire matter in order to determine what result should have been reached, under its power of superintending control, as a true writ of prohibition would not be the proper remedy, since the court could not prohibit that which had already been done. State Racing Comm'n v. McManus, 82 N.M. 108, 476 P.2d 767 (1970).

Expense burden insufficient rationale for writ. — Fact that fairly unusual burdens of expense will have to be borne by relators, though unfortunate, was frequently a

necessary adjunct to litigation of the type involved and was therefore insufficient to warrant issuance of a writ of prohibition. State ex rel. Oil Conservation Comm'n v. Brand, 65 N.M. 384, 338 P.2d 113 (1959).

As is potential for wrong decision. — Fact that the district court might be about to decide matters wrongly was of no concern of the supreme court in merely investigating jurisdiction, nor was it material that the supreme court might on review be compelled to reverse the case. State ex rel. Oil Conservation Comm'n v. Brand, 65 N.M. 384, 338 P.2d 113 (1959).

Writ not available. — Where judgment and order was entered in habeas corpus proceeding on June 15, 1971, requiring petitioner's unconditional release unless prior to June 30 he was allowed his right to appeal his conviction based upon a timely motion for appeal filed pro se the previous November, and due to the state's neglect the requisite order of the district court permitting an appeal came too late, being entered on June 30, and furthermore, the state did not attempt by motion to seek relief from the June 15 order until September 27, 1971, petitioner would be released; writ of prohibition seeking to prohibit his discharge was not available to the state. Rodriguez v. District Court, 83 N.M. 200, 490 P.2d 458 (1971).

Person seeking writ must prove essential allegations of petition; the court will presume that the action of the inferior court was correct and within the scope of its authority. State v. Zinn, 80 N.M. 710, 460 P.2d 240 (1969).

Application for writ of prohibition should recite grounds for granting of the relief to the exclusion of allegations of evidence heard by the trial court. State v. Zinn, 80 N.M. 710, 460 P.2d 240 (1969).

VI. HABEAS CORPUS.

Section gives supreme court original jurisdiction in habeas corpus proceedings. Peyton v. Nord, 78 N.M. 717, 437 P.2d 716 (1968).

Exercise of habeas corpus jurisdiction. — In absence of controlling necessity, the concurrent jurisdiction of this court in habeas corpus will not be exercised, and the petitioner will be relegated to an application in district court of county where he is restrained. Ex parte Nabors, 33 N.M. 324, 267 P. 58 (1928).

Prisoner must apply to district court for habeas corpus before an original proceeding may be brought in the New Mexico supreme court. Cox v. Raburn, 314 F.2d 856 (10th Cir.), cert. denied, 374 U.S. 853, 83 S. Ct. 1920, 10 L. Ed. 2d 1074 (1963).

New habeas proceeding in supreme court after petitioner's remand below. — An appeal from district court order in habeas corpus, remanding relator to sheriff's custody, will not lie in absence of statute, but relator may institute an original proceeding in habeas corpus under this section. In re Forest, 45 N.M. 204, 113 P.2d 582 (1941).

Remand of petitioner by district court not res judicata. — That district court remands petitioner for habeas corpus is not a bar to, nor res judicata in, a like proceeding in supreme court. Ex parte Nabors, 33 N.M. 324, 267 P. 58 (1928).

Sec. 4. [Supreme court; selection of chief justice.]

The supreme court of the state shall consist of at least five justices who shall be chosen as provided in this constitution. One of the justices shall be selected as chief justice as provided by law. (As amended November 8, 1988.)

ANNOTATIONS

Cross references. — For power of legislature to increase number of justices to five, see N.M. Const., art. VI, § 10.

As to vacancy in office of supreme court or district court justice, see N.M. Const., art. XX, § 4.

As to governor's power to designate three disaster successors for each judge of the supreme court and district courts, see 12-11-7 NMSA 1978.

The 1988 amendment, which was proposed by S.J.R. No. 1, § 1 (Laws 1988) and adopted at the general election held on November 8, 1988, by a vote of 203,509 for and 159,957 against, rewrote this section to the extent that a detailed comparison would be impracticable. For former provisions, see Original Pamphlet.

Compiler's notes. — An amendment to this section, proposed by S.J.R. No. 2 (Laws 1981), which would have repealed the present section and added a new section to read "The supreme court consists of not less than five justices. One of the justices shall be selected as chief justice as provided by law," was submitted to the people at the general election on November 2, 1982. It was defeated by a vote of 117,601 for and 139,643 against.

Number of justices. — The number of justices of the supreme court was increased to five by Laws 1929, ch. 9, § 1 (34-2-1 NMSA 1978), under the authority granted by N.M. Const., art. VI, § 10.

Staggered terms. — This section and N.M. Const., art. VI, § 10 make clear the intent that staggered terms be maintained for the office of supreme court judge. State ex rel. Swope v. Mechem, 58 N.M. 1, 265 P.2d 336 (1954) (decided prior to 1988 amendment, which rewrote this section).

Comparable provisions. — Idaho Const., art. V, § 6.

Iowa Const., art. V, § 2; amendment 21.

Montana Const., art. VII, § 3.

Utah Const., art. VIII, § 2.

Wyoming Const., art. V, § 4.

Law reviews. — For comment on State ex rel. Palmer v. Miller, 74 N.M. 129, 391 P.2d 416 (1964), see 4 Nat. Resources J. 606 (1964).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 20 Am. Jur. 2d Courts § 2; 46 Am. Jur. 2d Judges §§ 8, 9.

Successor judge, authority in dealing with unfinished business of previous judge, 54 A.L.R. 952, 58 A.L.R. 848.

Judgment, power to enter or authenticate, 58 A.L.R. 848.

Judge holding over without authority after expiration of term as a de facto officer, 71 A.L.R. 848.

Court's power to remove judges, 118 A.L.R. 171.

Right of party, in course of litigation, to challenge title or authority of judge or of person acting as judge, 144 A.L.R. 1207.

Power of successor judge taking office during term time to vacate, etc., judgment entered by his predecessor, 11 A.L.R.2d 1117.

Power of court to remove or suspend judge, 53 A.L.R.3d 882.

Power of successor judge taking office during term time to vacate, set aside, or annul judgment entered by his or her predecessor, 51 A.L.R.5th 747.

Power of successor or substituted judge, in civil case, to render decision or enter judgment on testimony heard by predecessor, 84 A.L.R.5th 399.

21 C.J.S. Courts § 123; 48A C.J.S. Judges § 13.

Sec. 5. [Supreme court; quorum; majority concurring in judgments.]

A majority of the justices of the supreme court shall be necessary to constitute a quorum for the transaction of business, and a majority of the justices must concur in any judgment of the court.

ANNOTATIONS

Comparable provisions. — Utah Const., art. VIII, § 2.

Wyoming Const., art. V, § 4.

Law reviews. — For comment, "Courts - Number of Justices Concurring in Opinion - Some Dangers of New Mexico's 'Three-Judge Court'," see 5 Nat. Resources J. 403 (1965).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 20 Am. Jur. 2d Courts § 38.

21 C.J.S. Courts § 137.

Sec. 6. [Supreme court; absent or disqualified justice.]

When a justice of the supreme court shall be interested in any case, or be absent, or incapacitated, the remaining justices of the court may, in their discretion, call in any district judge of the state to act as a justice of the court.

ANNOTATIONS

Cross references. — As to disqualification of justice, judge or magistrate to sit in certain causes, except with consent of parties thereto, see N.M. Const., art. VI, § 18.

As to authority of chief justice to designate judge of the court of appeals to act as supreme court justice, see N.M. Const., art. VI, § 28.

As to disqualification of judge in proceedings where his impartiality might be questioned, see Rule 21-400.

Comparable provisions. — Idaho Const., art. V, § 6.

Montana Const., art. VII, § 3.

Utah Const., art. VIII, § 2.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 46 Am. Jur. 2d Judges §§ 86 et seq., 248 et seq.

Constitutionality of statute making mere filing of affidavit of bias or prejudice sufficient to disqualify judge, 5 A.L.R. 1275, 46 A.L.R. 1179.

Residence or ownership of property in city or other political subdivision which is party to or interested in action as disqualifying judge, 33 A.L.R. 1322.

Number of changes of judges, statute limiting, 104 A.L.R. 1494.

Criminal case, substitution of judge in, 114 A.L.R. 1214.

Constitutionality of statute which disqualifies judge upon peremptory challenge, 115 A.L.R. 855.

Party's right, in course of litigation, to challenge title or authority of substitute judge, 144 A.L.R. 1214.

Relationship of judge to one who is party in an official or representative capacity as disqualification, 10 A.L.R.2d 1307.

Mandamus as remedy to compel assertedly disqualified judge to recuse himself or to certify his disqualification, 45 A.L.R.2d 937, 56 A.L.R. Fed. 494.

Relationship to attorney as disqualifying judge, 50 A.L.R.2d 143.

Disqualification of judge in proceedings to punish contempt against or involving himself or court of which he is a member, 64 A.L.R.2d 600, 37 A.L.R.4th 1004.

Prior representation or activity as attorney or counsel as disqualifying judge, 72 A.L.R.2d 443, 16 A.L.R.4th 550.

Time for asserting disqualification, 73 A.L.R.2d 1238.

Propriety and permissibility of judge engaging in practice of law, 89 A.L.R.2d 886.

Intervenor's right to disqualify judge, 92 A.L.R.2d 1110.

Disqualification of judge for having decided different case against litigant, 21 A.L.R.3d 1369.

Disqualification of judge on ground of being a witness in the case, 22 A.L.R.3d 1198.

Disqualification of judge for bias against counsel for litigant, 23 A.L.R.3d 1416.

Disqualification of judge because of his or another's holding or owning stock in corporation involved in litigation, 25 A.L.R.3d 1331.

Disqualification of judge by state in criminal case for bias or prejudice, 68 A.L.R.3d 509.

Affidavit or motion for disqualification of judge as contempt, 70 A.L.R.3d 797.

Fine, penalty or forfeiture imposed upon defendant, disqualification of judge or one acting in judicial capacity by pecuniary interest in, 72 A.L.R.3d 375.

Membership in fraternal or social club or order affected by a case as ground for disqualification of judge, 75 A.L.R.3d 1021.

Illness or incapacity of judge, prosecuting officer or prosecution witness as justifying delay in bringing accused speedily to trial in state cases, 78 A.L.R.3d 297.

Disqualification of judge for bias against counsel for litigant, 54 A.L.R.5th 575.

Power of successor or substituted judge, in civil case, to render decision or enter judgment on testimony heard by predecessor, 84 A.L.R.5th 399.

Prior representation or activity as prosecuting attorney as disqualifying judge from sitting or acting in criminal case, 85 A.L.R.5th 471.

48A C.J.S. Judges §§ 98 to 185.

Sec. 7. [Supreme court; terms, sessions and recesses.]

The supreme court shall hold one term each year, commencing on the second Wednesday in January, and shall be at all times in session at the seat of government; provided, that the court may, from time to time, take such recess as in its judgment may be proper.

ANNOTATIONS

Cross references. — As to terms, sessions and hearings of supreme court, see Rule 23-101.

Control of judgments entered during term. — Supreme court had authority to set aside an order of dismissal two days after it was made, since both actions were in the same term, and court had full control of judgment entered during that term. Henderson v. Dreyfus, 26 N.M. 262, 191 P. 455 (1920).

Comparable provisions. — Idaho Const., art. V, § 8.

Wyoming Const., art. V, § 7.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 20 Am. Jur. 2d Courts § 21 et seq.

Governor's calling of special or extra term of court, 16 A.L.R. 1308.

21 C.J.S. Courts §§ 111 to 123.

Sec. 8. [Supreme court; qualifications of justices.]

No person shall be qualified to hold the office of justice of the supreme court unless that person is at least thirty-five years old and has been in the actual practice of law for at least ten years preceding that person's assumption of office and has resided in this state for at least three years immediately preceding that person's assumption of office. The actual practice of law shall include a lawyer's service upon the bench of any court of this state. The increased qualifications provided by this 1988 amendment shall not apply to justices and judges serving at the time this amendment passes or elected at the general election in 1988. (As amended November 8, 1988.)

ANNOTATIONS

Cross references. — For ineligibility of supreme court justice to be nominated or elected to nonjudicial office, see N.M. Const., art. VI, § 19.

As to qualifications for holding office, see N.M. Const., art. VII, § 2.

The 1988 amendment, which was proposed by S.J.R. No. 1, § 1 (Laws 1988) and adopted at the general election held on November 8, 1988, by a vote of 203,509 for and 159,957 against, rewrote this section to the extent that a detailed comparison would be impracticable. For former provisions, see Original Pamphlet.

Requirements. — The qualified judge must be practicing law and residing in New Mexico immediately prior to taking office and he must have been doing so for at least the preceding three (now 10) years. Hannett v. Jones, 104 N.M. 392, 722 P.2d 643 (1986).

Comparable provisions. — Montana Const., art. VII, § 9.

Utah Const., art. VIII, § 7.

Wyoming Const., art. V, § 8.

Law reviews. — For survey, "Article VII of the New Probate Code: In Pursuit of Uniform Trust Administration," see 6 N.M. L. Rev. 213 (1976).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 46 Am. Jur. 2d Judges § 6 et seq.

Incompatibility of office of judge and office in the military service, 26 A.L.R. 143, 132 A.L.R. 254, 147 A.L.R. 1419, 148 A.L.R. 1399, 150 A.L.R. 1444.

Eligibility to office of judge of one who was not an attorney, 50 A.L.R. 1156.

Right of party in course of litigation to challenge eligibility of judge, 144 A.L.R. 1207.

Power to appoint public officer for term commencing at or after expiration of term of appointing officer or body, 75 A.L.R.2d 1277.

Validity and construction of constitutional or statutory provision making legal knowledge a condition of eligibility for judicial office, 71 A.L.R.3d 498.

48A C.J.S. Judges §§ 15 to 18.

Sec. 9. [Supreme court; officers.]

The supreme court may appoint and remove at pleasure its reporter, bailiff, clerk and such other officers and assistants as may be prescribed by law.

ANNOTATIONS

Cross references. — As to employment of a law clerk by each justice, see 34-2-7 NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 20 Am. Jur. 2d Courts § 1.

Clerk of court: liability of clerk of court or surety on bond for negligent or wrongful acts of deputies or assistants, 71 A.L.R.2d 1140.

21 C.J.S. Courts §§ 93 to 110.

Sec. 10. [Supreme court; additional justices.]

After the publication of the census of the United States in the year nineteen hundred and twenty, the legislature shall have power to increase the number of justices of the supreme court to five; provided, however, that no more than two of said justices shall be elected at one time, except to fill a vacancy.

ANNOTATIONS

Cross references. — As to original number of supreme court justices, and term and election of same, see N.M. Const., art. VI, § 4.

Compiler's notes. — The number of justices of the supreme court was increased from three to five by Laws 1929, ch. 9, § 1 (34-2-1 NMSA 1978), under the authority granted by this section.

An amendment to this section, proposed by S.J.R. No. 2 (Laws 1981), which would have repealed this section, was submitted to the people at the general election held on November 2, 1982. It was defeated by a vote of 117,601 for and 139,643 against.

Staggered terms. — New Mexico Const., art. VI, § 4 and this section make clear the intent that staggered terms be maintained for the office of supreme court judge. State ex rel. Swope v. Mechem, 58 N.M. 1, 265 P.2d 336 (1954) (decided prior to 1988 amendment of N.M. Const., art. VI, § 4, which rewrote that section).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 46 Am. Jur. 2d Judges §§ 4, 5.

21 C.J.S. Courts § 123.

Sec. 11. [Supreme court; salary of justices.]

The justices of the supreme court shall each receive such salary as may hereafter be fixed by law. (As amended September 15, 1953.)

ANNOTATIONS

Cross references. — As to salaries of justices, see 34-1-9 NMSA 1978.

The 1953 amendment, which was proposed by H.J.R. No. 15 (Laws 1953) and adopted at a special election held on September 15, 1953, with a vote of 14,727 for and 12,114 against, amended this section to provide that salaries of supreme court justices should be fixed by law. Prior to amendment, the section provided for an annual salary of $6,000, payable quarterly.

Compensation. — The salaries of the judges of constitutionally established courts are not subject to the constitutional prohibition against an increase in compensation during the term for which they were elected. 1979 Op. Att'y Gen. No. 79-27.

Comparable provisions. — Idaho Const., art. V, § 17.

Iowa Const., amendment 21.

Montana Const., art. VII, § 7.

Utah Const., art. VIII, § 14.

Wyoming Const., art. V, § 17.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 46 Am. Jur. 2d Judges § 54 et seq.

48A C.J.S. Judges §§ 75 to 81, 84.

Sec. 12. [Judicial districts; district judges.]

The state shall be divided into judicial districts as may be provided by law. One or more judges shall be chosen for each district as provided in this constitution. (As amended November 8, 1988.)

ANNOTATIONS

Cross references. — For power of legislature to increase the number of judges in any judicial district, to rearrange judicial district and increase the number thereof, see N.M. Const., art. VI, § 16.

For designation of original judicial districts, see N.M. Const., art. VI, § 25.

For vacancies on the District Court and Supreme Court, see N.M. Const., art. VI, §§ 34, 35 and 36.

For present division of state into 13 judicial districts, and number of judges in each district, see 34-6-1, 34-6-4 to 34-6-16 NMSA 1978.

The 1988 amendment, which was proposed by S.J.R. No. 1, § 1 (Laws 1988) and adopted at the general election held on November 8, 1988, by a vote of 203,509 for and 159,957 against, substituted the present provisions for the former provisions which read "The state shall be divided into eight judicial districts and a judge shall be chosen for each district by the qualified electors thereof at the election for representatives in congress. The terms of office of the district judges shall be six years."

Compiler's notes. — New Mexico Const., art. VI, § 16, empowers the legislature to increase the number of judges in any judicial district, and to rearrange the districts, increase the number thereof and make provision for a district judge for any additional district. Pursuant to this authority, the number of judicial districts has been increased by the legislature to 13. See 34-6-1 NMSA 1978.

An amendment to this section, proposed by S.J.R. No. 2 (Laws 1981), which would have, in the first sentence, substituted "at least thirteen" for "eight," substituted "one or more judges" for "a judge" and substituted "as provided in this constitution" for "by the qualified electors thereof at the election for representatives in congress" and would have deleted the last sentence, was submitted to the people at the general election held on November 2, 1982. It was defeated by a vote of 117,601 for and 139,643 against.

Concurrent terms. — Framers of the constitution intended for the terms of district judges to begin and end at the same time. State ex rel. Swope v. Mechem, 58 N.M. 1, 265 P.2d 336 (1954) (decided prior to 1988 amendment, which rewrote this section).

District judges appointed pursuant to legislative act increasing the number of judges in certain districts and elected in the first general election following their appointment, hold office not for six years from date of election, but only until expiration of the terms of all other district judges. State ex rel. Swope v. Mechem, 58 N.M. 1, 265 P.2d 336 (1954) (decided prior to 1988 amendment, which rewrote this section).

Comparable provisions. — Idaho Const., art. V, § 11.

Iowa Const., amendment 21.

Montana Const., art. VII, §§ 7, 8.

Utah Const., art. VIII, §§ 8, 9.

Wyoming Const., art. V, § 19.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 46 Am. Jur. 2d Judges §§ 6, 9.

Right of party in course of litigation to challenge title or authority of judge or of person acting as judge, 114 A.L.R. 1207.

Court's power to remove judges, 118 A.L.R. 171, 53 A.L.R.3d 882.

Pardon as restoring judge to office forfeited by conviction, 58 A.L.R.3d 1191.

Validity and construction of constitutional or statutory provision making legal knowledge or experience a condition of eligibility for judicial office, 71 A.L.R.3d 498.

21 C.J.S. Courts §§ 93 to 106; 48A C.J.S. Judges §§ 12 to 14.

Sec. 13. [District court; jurisdiction and terms.]

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.

ANNOTATIONS

I. GENERAL CONSIDERATION.

Cross references. — As to terms of district court, see 34-6-2 NMSA 1978.

As to appeals from magistrate courts to district courts, see 35-13-1 NMSA 1978.

For provisions relating to habeas corpus, see 44-1-1 NMSA 1978 et seq.

As to mandamus, see 44-2-1 NMSA 1978 et seq.

As to quo warranto proceedings, see 44-3-1 NMSA 1978 et seq.

For injunction procedure, see Rule 1-066.

Legislature may regulate court's contempt power. — Legislative directives may act to regulate the inherent power of a court to punish for contempt provided that the court retains sufficient power to protect itself and effectively administer its functions under the Code. State v. Julia S., 104 N.M. 222, 719 P.2d 449 (Ct. App. 1986).

"Inferior courts". — District courts are inferior to supreme court, although term "inferior court" is usually applied to courts of limited or special jurisdiction. State ex rel. Harvey v. Medler, 19 N.M. 252, 142 P. 376 (1914).

There are no fixed terms for nonjury trials; however, unless waived by the parties, a case must be tried in the county required by the venue statute. Peisker v. Chavez, 46 N.M. 159, 123 P.2d 726 (1942).

Failure to state cause of action has no jurisdictional effect. — The failure of a complaint to state a cause of action does not interfere with or detract from the court's subject-matter jurisdiction. Such a failure has no jurisdictional effect. Sundance Mechanical & Util. Corp. v. Atlas, 109 N.M. 683, 789 P.2d 1250 (1990).

Expungement of arrest records. — Assuming an inherent power of the courts to expunge arrest records, the power must be exercised sparingly and only in extraordinary circumstances. Toth v. Albuquerque Police Dep't, 1997-NMCA-079, 123 N.M. 637, 944 P.2d 285.

Comparable provisions. — Idaho Const., art. V, § 20.

Iowa Const., art. V, § 6.

Montana Const., art. VII, § 4.

Utah Const., art. VIII, § 5.

Wyoming Const., art. V, §§ 10, 24.

Law reviews. — For comment on State ex rel. State Corp. Comm'n v. Zinn, 72 N.M. 29, 380 P.2d 182 (1963), see 3 Nat. Resources J. 356 (1963).

For article, "Prisoners Are People," see 10 Nat. Resources J. 869 (1970).

For article, "The Writ of Prohibition in New Mexico," see 5 N.M. L. Rev. 91 (1974).

For article, "Medical Malpractice Legislation in New Mexico," see 7 N.M. L. Rev. 5 (1976-77).

For survey, "Article VII of the New Probate Code: In Pursuit of Uniform Trust Administration," see 6 N.M. L. Rev. 213 (1976).

For note, "Mandamus Proceedings Against Public Officials: State of New Mexico ex rel. Bird v. Apodaca," see 9 N.M.L. Rev. 195 (1978-79).

For article, "Survey of New Mexico Law, 1979-80: Administrative Law," see 11 N.M.L. Rev. 1 (1981).

For article, "Habeas Corpus in New Mexico," see 11 N.M.L. Rev. 291 (1981).

For annual survey of New Mexico law relating to civil procedure, see 12 N.M.L. Rev. 97 (1982).

For comment, "The Subject Matter Jurisdiction of New Mexico District Courts over Civil Cases Involving Indians," see 15 N.M.L. Rev. 75 (1985).

For article, "Statutory Adoption of Several Liability in New Mexico: A Commentary and Quasi-Legislative History," see 18 N.M.L. Rev 483 (1988).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 20 Am. Jur. 2d Courts §§ 21, 54.

Conferring power to abate public nuisances upon chancery courts, validity, 5 A.L.R. 1474, 22 A.L.R. 542, 75 A.L.R. 1298.

Mandamus to governor, 105 A.L.R. 1124.

Power of court to prescribe rules of pleadings, practice or procedure, 110 A.L.R. 22, 158 A.L.R. 705.

Power to confer original jurisdiction on courts to revoke or suspend public license, 168 A.L.R. 826.

Availability of writ of prohibition or similar remedy against acts of public prosecutor, 16 A.L.R.4th 112.

Modern status of rule relating to jurisdiction of state court to try criminal defendant brought within jurisdiction illegally or as result of fraud or mistake, 25 A.L.R.4th 157.

Family court jurisdiction to hear contract claims, 46 A.L.R.5th 735.

Effect, on jurisdiction of state court, of 28 USCS § 1446(e), relating to removal of civil case to federal court, 38 A.L.R. Fed. 824.

Propriety of federal court's considering state prisoner's petition under 28 USCS § 2254 where prisoner has exhausted state remedies as to some, but not all, claims in petition, 43 A.L.R. Fed. 631.

Removal to federal court, under 28 USCS § 1441(d), of civil action brought in state court against foreign state, 63 A.L.R. Fed. 808.

Existence of pendent jurisdiction of federal court over state claim when joined with claim arising under laws, treaties, or Constitution of United States, 75 A.L.R. Fed. 600.

21 C.J.S. Courts § 12 et seq.

II. ORIGINAL AND APPELLATE JURISDICTION.

Constitutional claims. – Without question, the district court has the authority to consider constitutional claims in the first instance. Maso v. State Taxation & Revenue Dep't, 2004-NMCA-025, 135 N.M. 152, 85 P.3d 276, cert. granted, 2004-NMCERT-002, 135 N.M. 169, 86 P.3d 47 (2004).

Constitutional grant of "original jurisdiction" means the district courts are courts of general jurisdiction. Sanchez v. Attorney Gen., 93 N.M. 210, 598 P.2d 1170 (Ct. App. 1979).

Original equity jurisdiction is in district courts and not justice courts (now magistrate courts). Durham v. Rasco, 30 N.M. 16, 227 P. 599 (1924).

Reduction of excessive fees. — It is clearly within the equitable power of the court to consider and reduce an excessive fee; thus if the trial court determines that the amount of attorney's fees specified in a contract is reasonable, it may order such amount paid, but when the reasonableness is challenged, it is incumbent upon the court to determine the value of the services rendered. Budagher v. Sunnyland Enterprises, Inc., 90 N.M. 365, 563 P.2d 1158 (1977).

Inherent power to appoint receivers. — Laws 1933, ch. 32 (now repealed) providing that "court to which the application is made shall appoint the state bank examiner as such receiver" amounted to no more in a judicial proceeding in a court of equity, than a recommendation to the judiciary to appoint him in the interests of economy and business management. Otherwise, the enactment would be unconstitutional in view of this section and N.M. Const., art. III, § 1, for courts of equity have inherent power to appoint receivers for corporations, and such appointment is a judicial function. Cooper v. Otero, 38 N.M. 164, 29 P.2d 341 (1934).

Jurisdiction in damage suit against utility. — The trial court correctly retained jurisdiction of a case seeking tort and contract damages against utility for failure to supply water meeting certain minimal standards of quality, since the environmental improvement agency (now the environmental improvement division of the health and

environment department) and public service commission had no expertise in considering tort and contractual claims and was without power to grant the relief that plaintiffs asked; 74-6-13 NMSA 1978 of the Water Quality Act evidences the legislative intent that common-law remedies against water pollution be preserved. O'Hare v. Valley Util., Inc., 89 N.M. 105, 547 P.2d 1147 (Ct. App.), rev'd in part on other grounds, 89 N.M. 262, 550 P.2d 274 (1976).

Jurisdiction to try title to property. — Probate courts in New Mexico have no jurisdiction to try or determine title to either real or personal property as between an estate or heirs and devisees on the one hand and strangers to the estate on the other; this jurisdiction is vested exclusively in the district court. Conley v. Quinn, 58 N.M. 771, 276 P.2d 906 (1954); McCann v. McCann, 46 N.M. 406, 129 P.2d 646 (1942).

Where a widow was incidentally an heir but her claim to one-half of the property involved was not the claim of an heir in administration, but was a claim arising under the community property system, the probate court was without jurisdiction to try her controverted claim of title to one-half the real estate involved as her share of the community. Conley v. Quinn, 58 N.M. 771, 276 P.2d 906 (1954).

Jurisdiction in probate matter. — District courts had no original jurisdiction to allow a claim against an administrator and surety on his bond, where the probate court had jurisdiction and the claim had been filed, allowed and paid in part, and no appeal was taken from the action of such probate court, and where the complaint neither alleged grounds for nor prayed equitable relief, but asked a money judgment only. Michael v. Bush, 26 N.M. 612, 195 P. 904 (1921) (case decided prior to 1975 enactment of Probate Code, Chapter 45 NMSA 1978).

Charitable Solicitations Act. -Where the Foundation does not point to any language in any federal statute expressly displacing the Charitable Solicitations Act, and the Foundation has failed to demonstrate Congress' intent to preempt the field covered by the Act, the Foundation's argument that the Act does not apply to it is rejected and the district court had subject matter jurisdiction to enforce the civil investigative demands. The Coulston Foundation v. Madrid, 2004-NMCA-060, 135 N.M.667, 92 P.3d 679.

Authority to issue garnishment. — Since garnishment is both a special proceeding, and a remedial writ, ancillary to the main action, the district courts have jurisdiction to issue writs of garnishment in the exercise of their jurisdiction in the main action only to the extent that jurisdiction over such special proceedings as garnishment is conferred by law; therefore, district court did not have jurisdiction to issue writ of garnishment where the amount in question was not in excess of the jurisdictional amount of magistrate courts having venue within the county. Postal Fin. Co. v. Sisneros, 84 N.M. 724, 507 P.2d 785 (1973).

Jurisdiction over felony offense. — Former 64-22-2, 1953 Comp., insofar as it purported to give justice of the peace authority to accept a guilty plea for felony offense

of driving under the influence of liquor, violated this section and N.M. Const., art. VI, § 23. State v. Klantchnek, 59 N.M. 284, 283 P.2d 619 (1955).

Former 13-8-2, 1953 Comp., was unconstitutional insofar as it sought to confer "exclusive original jurisdiction" over those contributing to juvenile delinquency in juvenile courts, since constitution vests sole and exclusive jurisdiction for trial of felony cases in the district courts. State v. McKinley, 53 N.M. 106, 202 P.2d 964 (1949).

Under this section, sole and exclusive jurisdiction for the trial of felony cases is in the district courts. State v. Garcia, 93 N.M. 51, 596 P.2d 264 (1979).

Misdemeanor charges relating to felony must be tried in district court. — Because district court has original jurisdiction over all felony charges, when misdemeanor charges brought in magistrate's court are linked to a felony charge arising out of the same transaction, the trial should be in the district court. State v. Muise, 103 N.M. 382, 707 P.2d 1192 (Ct. App. 1985), overruled on other grounds, State v. Laguna, 1999-NMCA-152, 128 N.M. 345, 992 P.2d 896.

Jurisdiction is acquired in criminal case by filing of information. State v. Vaughn, 74 N.M. 365, 393 P.2d 711 (1964).

Where the prosecution was commenced by the filing of the information, upon that filing, the district court had jurisdiction; that jurisdiction was not lost by the failure of the trial court to note the date of filing on the information, where there was nothing showing defendant was prejudiced in his defense on the merits. State v. Vigil, 85 N.M. 328, 512 P.2d 88 (Ct. App. 1973).

Effect on jurisdiction of remand of accused for preliminary hearing. — The district court does not lose jurisdiction of the information theretofore filed by abating it and remanding the accused to the magistrate for a proper preliminary hearing, nor is there any requirement for the filing of a new information after such new preliminary examination. State v. Vaughn, 74 N.M. 365, 393 P.2d 711 (1964).

District courts may perform pretrial review of death penalty aggravating circumstances. State v. Ogden, 118 N.M. 234, 880 P.2d 845, cert. denied, 513 U.S. 936, 115 S. Ct. 336, 130 L. Ed. 2d 294 (1994).

Failure to provide preliminary hearing. — Jurisdiction may be lost "in the course of the proceeding" by failure of the court to remand for a preliminary examination when its absence is timely brought to the attention of the district court; but defendant may waive his right to the examination. State v. Vaughn, 74 N.M. 365, 393 P.2d 711 (1964).

Burden of proof in attacking jurisdiction. — Burden was upon Indian defendant claiming through pretrial motions a lack of jurisdiction in the district court to try him, to prove the same, and having presented no evidence as to lack of jurisdiction, defendant

did not meet his burden. State v. Cutnose, 87 N.M. 307, 532 P.2d 896 (Ct. App.), cert. denied, 87 N.M. 299, 532 P.2d 888 (1974).

Jurisdiction over juveniles. — Provision allowing creation of inferior courts does not in any sense require that the jurisdiction of district courts over juveniles established by this section be transferred to a court inferior to the district court; to the contrary, the jurisdiction was placed in the district courts and was to remain there until an inferior juvenile court was created. Peyton v. Nord, 78 N.M. 717, 437 P.2d 716 (1968).

District court is one of general jurisdiction under this section, and the fact that proceedings were instituted against defendant for murder committed when defendant was a juvenile after he had attained his majority did not preclude prosecution for the crime of murder. Trujillo v. State, 79 N.M. 618, 447 P.2d 279 (1968).

Sex offenders. — Under its broad grant of jurisdiction and under the Sex Offender Registration and Notification Act, 29-11A-1 NMSA 1978 et seq., a district court has jurisdiction to determine whether a defendant is a sex offender and to give the defendant written notice of the registration requirements in 29-11A-7A NMSA 1978; however, the court is not authorized to order the defendant to comply with the registration requirements - that duty is legislatively mandated by 29-11A-4 NMSA 1978. State v. Brothers, 2002-NMCA-110, 133 N.M. 36, 59 P.3d 1268, cert. denied, 133 N.M. 30, 59 P.3d 1262 (2002).

Juvenile court part of district court. — Juvenile court (now 32A-1-5 NMSA 1978 with the childrens' court, a division of the district court) was part and parcel of the district court, not an inferior court created pursuant to N.M. Const., art. VI, § 1, and was invulnerable to attack as violative of either N.M. Const., art. VI, § 1 or this section. Peyton v. Nord, 78 N.M. 717, 437 P.2d 716 (1968).

Court has jurisdiction over guardianship, paternity and parental rights. — The district court, whether or not sitting as the children's court, has jurisdiction over disputes concerning guardianship, paternity and termination of parental rights. Thatcher v. Arnall, 94 N.M. 306, 610 P.2d 193 (1980).

Rule 10-111 NMRA limits inherent power of district judge to appoint a special master in children's court. State v. Doe, 93 N.M. 621, 603 P.2d 731 (Ct. App. 1979).

Not precluded from holding commitment hearing away from county seat. — Absent a showing by the "developmentally disabled" person that his substantive rights have in any way been abridged if his involuntary commitment hearing is not held at the county seat, the district court is not precluded from adopting the practice of holding such hearings at the commitment facility when, in its discretion, such practice would better serve the public convenience. 1979 Op. Att'y Gen. No. 79-20.

State court was without jurisdiction to restrain picketing which allegedly constituted unfair labor practices where there was no suggestion directly or indirectly that the

picketing was attended by violence, as this matter has been preempted by federal legislation. Your Food Stores of Santa Fe, Inc. v. Retail Clerks Local 1564, 121 F. Supp. 339 (D.N.M. 1954). See also, Retail Clerks Local 1564 v. Your Food Stores of Santa Fe, Inc., 225 F.2d 659 (10th Cir. 1955).

Primary jurisdiction is essentially doctrine of comity between the courts and administrative agencies, and depends on whether the questions presented are exclusively factual issues within the peculiar expertise of the commission or if statutory interpretation or issues of law are significant, and specific legislative declarations that common-law remedies are unimpaired are uniformly respected when primary jurisdiction questions arise in the field of public nuisance. O'Hare v. Valley Util., Inc., 89 N.M. 105, 547 P.2d 1147 (Ct. App.), rev'd in part on other grounds, 89 N.M. 262, 550 P.2d 274 (1976).

Jurisdiction of utility condemnation proceedings. – Because the 2000 amendment to 62-6-4A NMSA 1978 exempted generation and transmission cooperatives from the regulatory jurisdiction of the Public Regulation Commission, the district court had jurisdiction under this section to consider an application under 42A-1-9 NMSA 1978 by a generation and transmission cooperative to enter and survey land for condemnation suitability studies. Tri-State Generation & Transmission Ass'n. v. King, 2003-NMSC-029, 134 N.M. 467, 78 P.3d 1226.

Jurisdiction of review of state board decision. — Legislatively-created boards, while clothed with certain quasi-judicial powers to administer agencies, are not courts, and in this instance the board was not acting in its quasi-judicial capacity. Because the board did not act as an inferior court or tribunal in denying benefits to the retiree, the district court's jurisdiction was not limited by this section. Rainaldi v. Public Employees Retirement Bd., 115 N.M. 650, 857 P.2d 761 (1993).

Licensing act. — Act to create boards for the licensing of contractors, and to vest them with administrative powers, did not contravene this section, vesting original jurisdiction of all matters and causes in the district courts. Fischer v. Rakagis, 59 N.M. 463, 286 P.2d 312 (1955).

Exhausting of administrative remedies. — The requirement of the Public Utility Act (62-3-1 NMSA 1978 et seq.) that a person first exhaust his administrative remedies before resorting to the courts does not violate this section, granting general jurisdiction to the district courts except as elsewhere limited by the constitution. Smith v. Southern Union Gas Co., 58 N.M. 197, 269 P.2d 745 (1954), explained in Southwestern Pub. Serv. Co. v. Artesia Alfalfa Growers' Ass'n, 67 N.M. 108, 353 P.2d 62 (1960).

Review by commissioners not final. — Action of county commissioners in reviewing discretion of county superintendent as to creation of a new school district under Laws 1907, ch. 97, § 22 (since repealed) could not be final, notwithstanding that statute. 1914 Op. Att'y Gen. 164.

Appellate jurisdiction over justice of peace courts. — District courts had appellate jurisdiction over all cases originating in justice of peace courts (now magistrate courts). Lea County State Bank v. McCaskey Register Co., 39 N.M. 454, 49 P.2d 577 (1935).

Magistrate court order suppressing evidence. — The state does not have the statutory authority or constitutional right to immediately appeal a magistrate court order suppressing evidence to the district court. State v. Heinsen, 2004-NMCA-110, 136 N.M. 295, 97 P.3d 627, cert. granted, 2004-NMCERT-008, 136 N.M. 492, 100 P.3d 198.

Preclusion of supervisory authority by executive or legislature unconstitutional. — Any action of the executive or legislative branch of a municipal government which would preclude the supreme court of the district court from exercising its superintending or supervisory authority over the municipal court violates the state constitution. Mowrer v. Rusk, 95 N.M. 48, 618 P.2d 886 (1980).

Appeal where district court sits as inferior court. — No provision is made by the constitution for an appeal from the district court sitting as an inferior tribunal to itself sitting as the district court. State ex rel. Weltmer v. Taylor, 42 N.M. 405, 79 P.2d 937 (1938).

Authority relative to arbitrations. — Once an arbitration award is granted, whether or not by a court-supervised process, the Uniform Arbitration Act provides a mechanism for the courts to take jurisdiction to confirm the award, to vacate, modify or correct the award, within narrow statutory limits, to enforce an arbitration agreement under the act and to enter judgment on an award and to take appeals from various types of orders, including an order confirming or denying confirmation of an award, an order modifying or correcting an award or an order vacating an award without directing a rehearing. Daniels Ins. Agency, Inc. v. Jordan, 99 N.M. 297, 657 P.2d 624 (1982).

III. ISSUANCE OF WRITS.

Concurrent habeas corpus jurisdiction. — Supreme court and district court have concurrent jurisdiction in habeas corpus cases, and in absence of controlling necessity in the first instance, relator will be relegated to district court; the decision in the district court is not res judicata on a subsequent application to supreme court. Ex parte Nabors, 33 N.M. 324, 267 P. 58 (1928).

What court may grant writ of habeas. — One district court of this state may grant a writ of habeas corpus for the release from the state penitentiary of a prisoner held therein under a commitment from another district court; as intervenor was being detained within the first judicial district, there can be no question that the court in that district had jurisdiction to consider intervenor's petition for habeas corpus. State ex rel. Hanagan v. District Court of First Judicial Dist. ex rel. County of Santa Fe, 75 N.M. 390, 405 P.2d 232 (1965).

Evidence in habeas proceeding. — To establish absence or loss of jurisdiction in trial court through denial of petitioner's constitutional rights, evidence outside the record may be received in habeas corpus proceedings. Orosco v. Cox, 75 N.M. 431, 405 P.2d 668 (1965).

Habeas corpus is not "special statutory proceeding" within meaning of Laws 1937, ch. 197 (39-3-7 NMSA 1978) permitting appeal of such proceedings, and supreme court had no jurisdiction of appeal from district court order remanding relator to sheriff's custody, but he could thereafter institute proceedings in habeas corpus in the supreme court. In re Forest, 45 N.M. 204, 113 P.2d 582 (1941).

Habeas corpus to attack adoption judgment. — A writ of habeas corpus is a permissible collateral attack on a judgment of adoption. Normand ex rel. Normand v. Ray, 107 N.M. 346, 758 P.2d 296 (1988).

Jurisdiction over state officers, boards and commissions. — Under this section and N.M. Const., art. VI, § 3, supreme and district courts each have original jurisdiction in quo warranto and mandamus against all state officers, boards and commissions in all cases, whether the proceeding was instituted by the attorney general ex officio, in behalf of the state for some prerogative purpose, or brought by some private person for the assertion of some private right; the supreme court will decline jurisdiction in absence of some controlling necessity therefor, and will do so in all cases brought at instance of a private suitor. State ex rel. Owen v. Van Stone, 17 N.M. 41, 121 P. 611 (1912).

Right to tenure may not be enforced by mandamus, since in absence of positive provision of law it is not a clear legal right. Lease v. Board of Regents of N.M. State Univ., 83 N.M. 781, 498 P.2d 310 (1972).

Authority over canvassing board. — Under general power conferred upon it by constitution, district court had authority to make order compelling county canvassing board to canvass votes which had been delivered to it late, to cancel certificates of election issued before entire vote was canvassed and to issue new certificates if final canvass showed others to be elected. Board of County Comm'rs v. Chavez, 41 N.M. 300, 67 P.2d 1007 (1937). See also, 1-14-21 NMSA 1978.

Recount order. — Recount provisions of former Election Code (Laws 1929, ch. 41) constituted a special case or proceeding created by legislature in compliance with this section, enlarging jurisdiction of district court, but the judicial functions vested did not go beyond the order of recount, and additional functions vested in the district judge were ministerial. State ex rel. Scott v. Helmick, 35 N.M. 219, 294 P. 316 (1930).

Injunctions are granted to prevent irreparable injury for which there is no adequate and complete remedy at law. If an interference is of a continuous nature, the constant recurrence of which renders a remedy at law inadequate, except by a multiplicity of suits, then a sufficient ground for relief by injunction is afforded. Kennedy v. Bond, 80 N.M. 734, 460 P.2d 809 (1969).

Legislature may not deprive district courts of power to issue writs of injunction unless it provides an adequate remedy at law as a substitute; a statutory remedy for assessment of privilege tax requiring taxpayer who objects to validity of tax to bring an action every 60 days to recover payments made under protest, until final determination, is not an adequate remedy. Lougee v. New Mexico Bureau of Revenue Comm'r, 42 N.M. 115, 76 P.2d 6 (1937).

Sua sponte injunction inappropriate. — A district court may not issue an injunction on its own, without process and without prior notice. State v. Bailey, 118 N.M. 466, 882 P.2d 57 (Ct. App. 1994).

Quo warranto against judge. — Quo warranto proceeding against person holding office of district judge is personal against the individual, not in his official character, and is within jurisdiction of district court. State ex rel. Holloman v. Leib, 17 N.M. 270, 125 P. 601 (1912).

Election contest remedy. — In adopting an election contest procedure as an exclusive private remedy, legislature has committed no offense against jurisdiction of district courts to issue writs of quo warranto. State ex rel. Abercrombie v. District Court, 37 N.M. 407, 24 P.2d 265 (1933).

District courts may issue writs of certiorari as ancillary process in aid of their jurisdiction. Lea County State Bank v. McCaskey Register Co., 39 N.M. 454, 49 P.2d 577 (1935).

Certiorari distinguished from appeal. — Appeals and writs of error are in no sense to be compared to certiorari, and, generally speaking, the presence of the right to appeal makes inappropriate and unavailable the right to certiorari. Roberson v. Board of Educ., 78 N.M. 297, 430 P.2d 868, appeal after remand, 80 N.M. 672, 459 P.2d 834 (1969).

Use of certiorari to bring up transcript. — For purpose of exercising their jurisdiction of whatever kind or nature, the district courts are specifically authorized to issue various writs, including writ of certiorari. A writ of this nature may be employed by district court to bring up "a transcript of all entries made in his docket relating to the case" where a justice of peace fails to file this transcript. Rixey v. Burgin, 39 N.M. 176, 42 P.2d 1118 (1935).

Certiorari to bar commissioners. — District court has power to issue, hear and determine a writ of certiorari, directed to board of commissioners of state bar, and inquire into its jurisdiction to suspend an attorney from practice, since latter board is a tribunal inferior to district court. State ex rel. Board of Comm'rs of State Bar v. Kiker, 33 N.M. 6, 261 P. 816 (1927).

Certiorari to review licensing board decisions. — Because the Uniform Licensing Act (61-1-1 NMSA 1978 et seq.) did not provide a retired psychologist with a basis for appealing a decision of the New Mexico board of psychologist examiners to require an

oral examination for reinstatement of her license, she could request a writ of certiorari to obtain review of the board's alleged due process violations. Mills v. New Mexico State Bd. of Psychologist Exmrs., 1997-NMSC-028, 123 N.M. 421, 941 P.2d 502.

Challenge of driver's license revocation. — Driver's challenge of the revocation of his driver's license by Motor Vehicle Division had to be in the form of a writ of certiorari, since his license was mandatorily revoked due to three DWI convictions and he had no other statutory means of appeal; because the remedy was a writ of certiorari, he was required to follow the jurisdictional requirements of Rule 1-075 NMRA. Masterman v. State Taxation & Revenue Dep't, 1998-NMCA-126, 125 N.M. 705, 964 P.2d 869.

Prohibition defined. — Writ of prohibition is best defined as an extraordinary writ, issued by superior court to inferior court to prevent latter from exceeding its jurisdiction, either by prohibiting it from assuming jurisdiction of a matter over which it has no control, or from going beyond its legitimate powers in a matter of which it has jurisdiction. State ex rel. Harvey v. Medler, 19 N.M. 252, 142 P. 376 (1914).

Prohibition is preventive and not curative writ, and where garnishment proceedings in the magistrate court were an accomplished fact before the application for prohibition had been filed in the district court, a writ of prohibition could not properly issue to undo or correct that which had already been accomplished. State ex rel. Alfred v. Anderson, 87 N.M. 106, 529 P.2d 1227 (1974).

Writ to be used with caution. — Prohibition is not a writ of right, granted ex debito justitiae, but rather one of sound judicial discretion, to be granted or withheld according to circumstances of each particular case; it is to be used with great caution for the furtherance of justice when none of the ordinary remedies provided by law are applicable. State ex rel. Harvey v. Medler, 19 N.M. 252, 142 P. 376 (1914).

Absent inferior court jurisdiction, prohibition to issue. — If the inferior court or tribunal has jurisdiction of both the subject matter and of the person where necessary, writ of prohibition will not issue, but absent such jurisdiction, the writ will issue as a matter of right. Gilmore v. District Court, 35 N.M. 157, 291 P. 295 (1930).

Prohibition cannot be used to correct mere irregularities, or to perform functions of an appeal or writ of error, as a general rule. State ex rel. Harvey v. Medler, 19 N.M. 252, 142 P. 376 (1914).

Prohibition against district court proceedings. — Mandamus and injunction proceedings were within jurisdiction of the respondent district court under the provisions of this section, and the supreme court would not prohibit the lower court from proceeding unless its jurisdiction was being exceeded or, in the exercise of superintending control, the supreme court was moved to do so to prevent irreparable mischief, exceptional hardship, costly delay and undue burdens of expense, or where the remedy by appeal was grossly inadequate. State ex rel. State Bd. of Educ. v. Montoya, 73 N.M. 162, 386 P.2d 252 (1963).

Where prisoner had been ordered discharged from custody of warden of penitentiary and the order was not appealed, it was final, and respondent-district court judge, sitting in the district in which prisoner was being detained, had jurisdiction to consider petition for habeas corpus; hence remedy of prohibition was not available to the state. Rodriguez v. District Court, 83 N.M. 200, 490 P.2d 458 (1971).

Wrongful issuance of search warrant. — Police officers and assistant district attorney were immune from liability for alleged wrongful issuance and service of a search warrant which was valid on its face, in which court ordered police officers to search for child being unlawfully held by parent, take him into custody, keep him safely and make a return of the proceedings on the warrant. Torres v. Glasgow, 80 N.M. 412, 456 P.2d 886 (Ct. App. 1969).

Contempt sanction warranted. — Trial judge properly invoked his inherent power to issue a contempt sanction to preserve the decorum, respect and dignity of the court where defendant refused to obey the trial judge's order to button his top button and fix his tie and by disrupting the proceedings through his disorderly attempts to leave. Purpura v. Purpura, 115 N.M. 80, 847 P.2d 314 (Ct. App. 1993).

Sec. 14. [District court; qualifications and residence requirement of judges.]

The qualifications of the district judges shall be the same as those of justices of the supreme court except that district judges shall have been in the actual practice of law for at least six years preceding assumption of office. Each district judge shall reside in the district for which the judge was elected or appointed. The increased qualifications provided by this 1988 amendment shall not apply to district judges serving at the time this amendment passes or elected at the general election in 1988. (As amended November 8, 1988.)

ANNOTATIONS

Cross references. — For qualifications of supreme court justices, see N.M. Const., art. VI, § 8.

As to qualifications for holding office generally, see N.M. Const., art. VII, § 2.

The 1988 amendment, which was proposed by S.J.R. No. 1, § 1 (Laws 1988) and adopted at the general election held on November 8, 1988, by a vote of 203,509 for and 159,957 against, substituted the present provisions for the former provisions which read "The qualifications of the district judges shall be the same as those of justices of the supreme court. Each district judge shall reside in the district for which he was elected."

Compiler's notes. — An amendment to this section, proposed by S.J.R. No. 2 (Laws 1981), which would have substituted "appointed" for "elected" at the end of the second

sentence, was submitted to the people at the general election held on November 2, 1982. It was defeated by a vote of 117,601 for and 139,643 against.

Comparable provisions. — Idaho Const., art. V, §§ 12, 23.

Montana Const., art. VII, § 9.

Utah Const., art. VIII, § 7.

Law reviews. — For survey, "Article VII of the New Probate Code: In Pursuit of Uniform Trust Administration," see 6 N.M. L. Rev. 213 (1976).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 46 Am. Jur. 2d Judges § 6 et seq.

Incompatibility of office of judge and office of the military service, 26 A.L.R. 143, 132 A.L.R. 254, 147 A.L.R. 1419, 148 A.L.R. 1399, 150 A.L.R. 1444.

Eligibility to office of judge of one who was not an attorney, 50 A.L.R. 1156.

Right of party in course of litigation to challenge eligibility of judge, 144 A.L.R. 1207.

Validity of requirement that candidate or public officer have been resident of governmental unit for specified period, 65 A.L.R.3d 1048.

Constitutional restrictions on nonattorney acting as judge in criminal proceedings, 71 A.L.R.3d 562.

Disqualification of judge, justice of the peace or similar judicial officer for pecuniary interest in fines, forfeitures or fees payable by litigants, 72 A.L.R.3d 375.

48 C.J.S. Judges §§ 14 to 18.

Sec. 15. [District court; judges pro tempore.]

A. Any district judge may hold district court in any county at the request of the judge of such district.

B. Whenever the public business may require, the chief justice of the supreme court shall designate any district judge of the state, or any justice of the supreme court when no district judge may be available within a reasonable time, to hold court in any district, and two or more judges may sit in any district or county separately at the same time.

C. If any district judge is disqualified from hearing any cause or is unable to expeditiously dispose of any cause in the district, the chief justice of the supreme court may designate any retired New Mexico district judge, court of appeals judge or supreme

court justice, with said designees' consent, to hear and determine the cause and to act as district judge pro tempore for such cause.

D. If any judge shall be disqualified from hearing any cause in the district, the parties to such cause, or their attorneys of record, may select some member of the bar to hear and determine said cause, and act as judge pro tempore therein. (As amended November 8, 1938 and November 7, 1978.)

ANNOTATIONS

Cross references. — For disqualification of judges in certain cases, except with consent of parties, see N.M. Const., art. VI, § 18.

As to filing of affidavit of disqualification, see 38-3-9, 38-3-10 NMSA 1978.

As to disqualification of judge in proceedings where his impartiality might be questioned, see Canon 21-400 NMRA.

The 1938 amendment, which was proposed by H.J.R. No. 26 (Laws 1937) and adopted at the general election held on November 8, 1938, by a vote of 44,503 for and 18,601 against, amended this section to allow the designation of a justice of the supreme court to hold court in a district where no district judge will be available within a reasonable time.

The 1978 amendment, which was proposed by S.J.R. No. 4 (Laws 1977) and adopted at the general election held on November 7, 1978, by a vote of 103,611 for and 87,969 against, designated the former first paragraph of this section as the present Subsection A, designated the first sentence of the former second paragraph of this section as present Subsection B, designated the second sentence of the former second paragraph of this section as present Subsection D, and added the present Subsection C.

Judge holding court at request of district judge. — A district judge may hold court outside his district, otherwise than by designation from the chief justice, only after being requested to do so by the judge of the district in which he is to hold court. State ex rel. Sedillo v. Anderson, 53 N.M. 441, 210 P.2d 626 (1949).

A district judge may, by request of another district judge, made orally and without a formal order entered of record, hold court in the district of the latter, under this section. Former Supreme Court Rule 11, § 2, effective March 1, 1928, required a formal order and was to be followed. Massengill v. City of Clovis, 33 N.M. 318, 267 P. 70 (1928).

Powers of nonresident judge sitting at request of resident judge. — When a resident judge requests judge from another judicial district to act for him, the visiting judge has jurisdiction to hear all matters requiring action during the period of his designation whether they were pending in the court at time request was made or were

filed at a later date. State v. Reed, 55 N.M. 231, 230 P.2d 966 (1951), cert. denied, 342 U.S. 932, 72 S. Ct. 374, 96 L. Ed. 694 (1952).

Nonresident judge who sits at request of a resident judge is vested with all the latter's powers, including that of holding preliminary hearings. State v. Encinias, 53 N.M. 343, 208 P.2d 155 (1949).

Rendering default judgment. — Any district judge, generally requested by resident judge to attend to judicial business of latter's district, may render default judgment at any place within the state. Hoffman v. White, 36 N.M. 250, 13 P.2d 553 (1932).

Signing bill of exceptions. — A district judge, sitting in a county outside of his district for and at the request of the resident judge, may settle and sign a bill of exceptions presented to him. State v. Stewart, 32 N.M. 242, 255 P. 393 (1927).

A resident district judge may designate a judge of another district, holding court in the district of the former, to sign and seal a bill of exceptions. First State Bank v. McNew, 32 N.M. 225, 252 P. 997 (1927).

A judge holding court in one county at the request of the judge of the district would not have jurisdiction to adjudicate matters in another county in the district. 1912-13 Op. Att'y Gen. 18.

Record of request. — A recital in the record by one district judge that he is sitting at request of regular judge of the court, under this section, is sufficient evidence to show jurisdiction to act, although better practice would be to have record show fact of such request by the regular presiding judge. State v. Kile, 29 N.M. 55, 218 P. 347 (1923).

Chief justice has power to designate any district judge to hold court in any district whenever, for any reason, the public business may require, or by reason of disqualification of the district judge. State ex rel. Holloman v. Leib, 17 N.M. 270, 125 P. 601 (1912); Vigil v. Reese, 96 N.M. 728, 634 P.2d 1280 (1981).

Although procedure under 38-3-9 NMSA 1978 for certification as to party's failure to agree upon a judge was not followed, it was proper under this section for the chief justice to designate a district judge having proper jurisdiction to try the case after defendant had disqualified all the judges of the district; thus there was no violation of defendant's right to due process when the designated judge overruled his motion to dismiss for lack of jurisdiction. Lohbeck v. Lohbeck, 69 N.M. 203, 365 P.2d 445 (1961).

Term "disqualified" encompasses voluntary recusal. Gerety v. Demers, 92 N.M. 396, 589 P.2d 180 (1978).

Designation as ministerial task. — In designating a judge pro tempore, the chief justice does not perform a judicial act and does not act as a court, but performs a

ministerial task committed to him by the constitution. State ex rel. Sedillo v. Anderson, 53 N.M. 441, 210 P.2d 626 (1949).

Which is mandatory. — Whenever the public business demands, it becomes the mandatory duty of the chief justice to designate a district judge to hold court in any district of the state which so requires it and in event no such judge appears available within a reasonable time he may designate a supreme court justice. State ex rel. Sedillo v. Anderson, 53 N.M. 441, 210 P.2d 626 (1949).

And may be exercised anywhere in state. — Since designation of judges is not a judicial act, the power of designation may be exercised by the chief justice anywhere in the state, and when he is absent from Santa Fe, the seat of the court, this power does not pass automatically to the next justice in order of seniority. State ex rel. Sedillo v. Anderson, 53 N.M. 441, 210 P.2d 626 (1949).

Designation of judge to sign bill of exceptions. — If judge of district court in which a case was tried is unable to settle and sign a bill of exceptions, chief justice may designate another district judge to perform this official act. Schaefer v. Whitson, 31 N.M. 96, 241 P. 31 (1925).

Facts requiring designation must be determined by chief justice, and in doing so he may rely on facts presented to him by a district judge, though he is not confined to obtaining his information in that manner. State ex rel. Sedillo v. Anderson, 53 N.M. 441, 210 P.2d 626 (1949).

It was appropriate to appoint a district judge pro tempore on the basis that the presiding judge was unable to meet the demands of his criminal docket. State v. Madsen, 2000-NMCA-050, 129 N.M. 251, 5 P.3d 573, cert. denied, 129 N.M. 249, 4 P.3d 1240 (2000).

Jurisdiction of designated judge exclusive. — Where chief justice has designated a district judge other than the regular presiding judge of any given district to preside over the trial of any given cause, his jurisdiction of said cause is exclusive, and continues until the cause is disposed of or until his designation is rescinded. State v. Towndrow, 25 N.M. 203, 180 P. 282 (1919).

Powers of designated judge. — Designation by chief justice of a district judge to hold court in another district whenever the public business shall require vests designated judge with the same power as that possessed by regular presiding judge of the district. The designated judge is substituted for the regular presiding judge and for every purpose becomes the presiding judge, and may, when designated for that purpose, sign and settle a bill of exceptions. Ravany v. Equitable Life Assurance Soc'y of United States, 26 N.M. 41, 188 P. 1106 (1920).

Special master appointed bychildren's court pursuant to the authority granted by rule is not a judge pro tempore appointed in violation of this section because the special master's report to the children's court is only a recommendation and the children's court

retains the final decision-making authority. State v. Jason F., 1998-NMSC-010, 125 N.M. 111, 957 P.2d 1145.

Agreement of parties on judge pro tempore. — When a judge has been disqualified upon an affidavit of prejudice under Laws 1933, ch. 184 (38-3-9, 38-3-10 NMSA 1978) the parties may agree upon a member of the bar to act as judge pro tempore. Moruzzi v. Federal Life & Cas. Co., 42 N.M. 35, 75 P.2d 320, 115 A.L.R. 407 (1938).

District judge's act of orally removing himself from a case substantially complied with this section, and the substitute agreed upon by the parties had authority to preside in the case. John Doe v. State, 91 N.M. 51, 570 P.2d 589 (Ct. App. 1977).

It is the public policy of this state, as evidenced by its constitution and laws, that regularly elected or appointed district judges shall preside over its district courts unless, because of disqualification of trial judge, the parties to a suit agree that a member of the bar may try a particular case as judge pro tempore. No other means is provided for the trial of causes in the district courts of this state. State ex rel. Tittmann v. McGhee, 41 N.M. 103, 64 P.2d 825 (1937).

No litigant is entitled to have any particular judge try case for him. State ex rel. Armijo v. Lujan, 45 N.M. 103, 111 P.2d 541 (1941).

Workers' compensation judge pro tem. — While this section does not provide authority for the pro tem appointment of administrative law judges, neither does it bar such appointment by appropriate officials outside the judiciary; thus, the director of the workers' compensation administration has authority to appoint a workers' compensation judge pro tem. Carrillo v. Compusys, Inc., 1997-NMCA-003, 122 N.M. 720, 930 P.2d 1172.

Comparable provisions. — Idaho Const., art. V, § 12.

Montana Const., art. VII, § 6.

Utah Const., art. VIII, § 4.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 46 Am. Jur. 2d Judges §§ 25, 86 et seq., 248 et seq.

Number of changes of judge, statute limiting, 104 A.L.R. 1494.

Power of judge pro tempore or special judge, after expiration of period for which he was appointed, to entertain motion or assume further jurisdiction in case previously tried before him, 134 A.L.R. 1129.

Place of holding sessions of trial court as affecting validity of its proceedings, 18 A.L.R.3d 572.

Power of successor or substituted judge, in civil case, to render decision or enter judgment on testimony heard by predecessor, 84 A.L.R.5th 399.

48A C.J.S. Judges §§ 71, 73, 74, 98 to 185.

Sec. 16. [District court; additional judges; redistricting.]

The legislature may increase the number of district judges in any judicial district, and they shall be elected or appointed as other district judges for that district. At any session after the publication of the census of the United States in the year nineteen hundred and twenty, the legislature may rearrange the districts of the state, increase the number thereof, and make provision for a district judge for any additional district. (As amended November 8, 1988.)

ANNOTATIONS

Cross references. — For constitutional provision dividing state into judicial districts, see N.M. Const., art. VI, § 12.

For designation of original judicial districts, see N.M. Const., art. VI, § 25.

For present division of state into 13 judicial districts, and number of judges in each district, see 34-6-1, 34-6-4 to 34-6-16 NMSA 1978.

The 1988 amendment, which was proposed by S.J.R. No. 1, § 1 (Laws 1988) and adopted at the general election held on November 8, 1988, by a vote of 203,509 for and 159,957 against, substituted "or appointed as other district judges for the district" for "as other district judges" at the end of the first sentence and "any session" for "its first session" near the beginning of the second sentence and deleted "and at the first session after each United States census thereafter" following "in the year nineteen hundred and twenty" in the second sentence.

Compiler's notes. — The number of judicial districts has been increased several times by the legislature. Section 34-6-1 NMSA 1978 now provides for and designates 13 judicial districts; 34-6-4 to 34-6-16 NMSA 1978 specify the number of judges in each district.

An amendment to this section, proposed by S.J.R. No. 2 (Laws 1981), which would have substituted "appointed" for "elected" near the end of the first sentence, was submitted to the people at the general election held on November 2, 1982. It was defeated by a vote of 117,601 for and 139,643 against.

Concurrent terms. — Framers of the constitution intended for the terms of district judges to begin and end at the same time. State ex rel. Swope v. Mechem, 58 N.M. 1, 265 P.2d 336 (1954).

District judges appointed pursuant to legislative act increasing the number of judges in certain districts and elected in the first general election following their appointment, held office not for six years from date of election, but only until expiration of the terms of all other district judges. State ex rel. Swope v. Mechem, 58 N.M. 1, 265 P.2d 336 (1954).

Procedure for filling new judgeship. — A law establishing an additional judgeship creates a vacancy in that office as of the date the post is to be filled, appointment to which is made pursuant to the constitution; a successor to such appointed judge is to be elected at the general election following the appointment, and the term of office for that individual is to end on the same date as all other district judgeships. 1974 Op. Att'y Gen. No. 74-31.

Legislature has no power of appointment of district court judges by implication from this section. State ex rel. Swope v. Mechem, 58 N.M. 1, 265 P.2d 336 (1954).

Comparable provisions. — Idaho Const., art. V, § 11.

Iowa Const., art. V, § 10; amendment 8.

Montana Const., art. VII, § 6.

Utah Const., art. VIII, § 6.

Wyoming Const., art. V, § 21.

Law reviews. — For article, "Medical Malpractice Legislation in New Mexico," see 7 N.M. L. Rev. 5 (1976-77).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 46 Am. Jur. 2d Judges § 4.

48A C.J.S. Judges § 8.

Sec. 17. [District court; judges' compensation.]

The legislature shall provide by law for the compensation of the judges of the district court. (As amended September 15, 1953.)

ANNOTATIONS

Cross references. — For salary of district court judges, see 34-1-9 NMSA 1978.

The 1953 amendment to this section, which was proposed by H.J.R. No. 16 (Laws 1953) and adopted at a special election held on September 15, 1953, by a vote of 13,611 for and 12,998 against, amended this section to provide that the compensation of district judges should be set by the legislature. Prior to amendment the section provided that each judge should receive an annual salary of $4,500 payable quarterly.

Compensation. — The salaries of the judges of constitutionally established courts are not subject to the constitutional prohibition against an increase in compensation during the term for which they were elected. 1979 Op. Att'y Gen. No. 79-27.

District judge may not accrue vacation time, for which he may receive extra compensation upon the termination of his employment, in addition to the salary, provided for by law. 1966 Op. Att'y Gen. No. 66-142.

Comparable provisions. — Idaho Const., art. V, § 17.

Iowa Const., amendment 21.

Montana Const., art. VII, § 7.

Utah Const., art. VIII, § 14.

Wyoming Const., art. V, § 17.

Law reviews. — For article, "Medical Malpractice Legislation in New Mexico," see 7 N.M. L. Rev. 5 (1976-77).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 46 Am. Jur. 2d Judges §§ 54 et seq.

Widow or other relative of deceased judge, appropriation of public funds for benefit of, as violation of constitutional provision as to change in salary or extra compensation, 121 A.L.R. 1317.

Operation of statute fixing salary on basis of population or at valuation of taxable property as contravening constitutional provision against increase or diminution of salary during term, 139 A.L.R. 737.

Constitutional provision fixing or limiting salary of public officer as precluding allowance for expenses or disbursements, 5 A.L.R.2d 1182.

48A C.J.S. Judges §§ 75 to 81, 84.

Sec. 18. [Disqualification of judges or magistrates.]

No justice, judge or magistrate of any court shall, except by consent of all parties, sit in any cause in which either of the parties are 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. (As amended November 8, 1966.)

ANNOTATIONS

Cross references. — As to substitution of district court judge for absent or disqualified supreme court justice, see N.M. Const., art. VI, § 6.

As to selection of district judge pro tempore by parties to cause in which district judge has been disqualified, see N.M. Const., art. VI, § 15.

As to filing of affidavit of disqualification, see 38-3-9, 38-3-10 NMSA 1978.

As to designation of district judge where judge has been excused or recused, see Rules 1-088 and 5-105 NMRA.

As to peremptory challenge to and excusal of district judge, see Rule 1-088.1 NMRA.

As to excusal, recusal, or disability of magistrate, see Rules 2-106 and 6-106 NMRA.

As to excusal, recusal, or disability of metropolitan court judge, see Rules 3-106 and 7-106 NMRA.

As to disqualification or recusal of municipal court judge, see Rule 8-106 NMRA.

As to disqualification of judge in proceedings where his impartiality might be questioned, see Code of Judicial Conduct, Rule 21-400 NMRA.

The 1966 amendment, which was proposed by H.J.R. No. 34, § 2 (Laws 1965) and adopted at the general election held on November 8, 1966, with a vote of 81,055 for and 26,317 against, amended this section by substituting "justice, judge or magistrate of any court" for "judge of any court nor justice of the peace" and "are" for "shall be" preceding "related to him," and deleting "the trial of" preceding "any cause in which either of the parties."

Purpose of this section is to secure to litigants a fair and impartial trial by an impartial and unbiased tribunal. State ex rel. Bardacke v. Welsh, 102 N.M. 592, 698 P.2d 462 (Ct. App. 1985).

Code of Judicial Conduct expands instances of disqualification. — The Code of Judicial Conduct sets up an objective standard (now in 21-400) geared to the appearance of justice, and, thus, expands the instances in which a judge should disqualify himself beyond those set out in this section. State ex rel. Bardacke v. Welsh, 102 N.M. 592, 698 P.2d 462 (Ct. App. 1985).

State is "party" to criminal case and is entitled to file an affidavit of disqualification of a district judge. State ex rel. Tittmann v. Hay, 40 N.M. 370, 60 P.2d 353 (1936).

"Interest". — "Interest" necessary to disqualify a judge must be a present pecuniary interest in the result, or actual bias or prejudice, and not some indirect, remote,

speculative, theoretical or possible interest. State ex rel. Anaya v. Scarborough, 75 N.M. 702, 410 P.2d 732 (1966).

The "interest" which would disqualify a justice of the peace (now magistrate courts) from sitting on a case, or constitute a denial of due process of law, must be more than the indirect possibility of his interest in the costs assessed against one convicted of a misdemeanor. State v. Gonzales, 43 N.M. 498, 95 P.2d 673 (1939).

An "interest" necessary to disqualify a judge under this constitutional provision may be an actual bias or prejudice. United Nuclear Corp. v. General Atomic Co., 96 N.M. 155, 629 P.2d 231 (1980), appeal dismissed, 451 U.S. 901, 101 S. Ct. 1966, 68 L. Ed. 2d 289 (1981).

Disqualifying bias must have extrajudicial source. — To be disqualifying, the alleged bias and prejudice must stem from an extrajudicial source, and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case. United Nuclear Corp. v. General Atomic Co., 96 N.M. 155, 629 P.2d 231 (1980), appeal dismissed, 451 U.S. 901, 101 S. Ct. 1966, 68 L. Ed. 2d 289 (1981).

To be disqualifying, the alleged bias and prejudice must stem from an extrajudicial source and must result in a decision on a personal bias, not on what the judge learned from sitting in the particular case. State ex rel. Bardacke v. Welsh, 102 N.M. 592, 698 P.2d 462 (Ct. App. 1985).

Disqualification of judge on constitutional grounds is a substantive right; and except by consent of all parties, a judge is disqualified to sit in the trial of a case if he comes within any of the grounds for disqualification named in the constitution. Beall v. Reidy, 80 N.M. 444, 457 P.2d 376 (1969).

Prejudiced or biased judge would deprive party of due process of law. Beall v. Reidy, 80 N.M. 444, 457 P.2d 376 (1969).

Appeal not adequate remedy. — Requiring petitioner to stand trial before biased or prejudiced judge and then, if convicted, attempt to gain reversal, does not conform to adequate remedy. State ex rel. Anaya v. Scarborough, 75 N.M. 702, 410 P.2d 732 (1966).

This provision is self-executing; the right to disqualify hereunder does not depend upon statutory enactment. 1970 Op. Att'y Gen. No. 70-100.

But disqualification on grounds named herein is apparently not automatic. 1970 Op. Att'y Gen. No. 70-100.

Section does not contain absolute disqualification, but confers a right upon litigants which they might either exercise or waive by consent. Midwest Royalties, Inc. v. Simmons, 61 N.M. 399, 301 P.2d 334 (1956).

Judge not disqualified in absence of action by party affected. — Where judge, before appointment, had been a member of a firm which had filed answers for several defendants in a quiet title action, and the plaintiff's attorney indicated that he would be disqualified, but no action was ever taken to disqualify the judge, the action of the judge in dismissing the action as to several defendants after a lapse of several years was not outside such judge's jurisdiction as the judge was not disqualified. Midwest Royalties, Inc. v. Simmons, 61 N.M. 399, 301 P.2d 334 (1956).

Procedure for disqualification. — If a litigant chooses to avail himself of his constitutional right, then 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. Midwest Royalties, Inc. v. Simmons, 61 N.M. 399, 301 P.2d 334 (1956).

Affidavit of disqualification. — Laws 1933, ch. 184 (38-3-9, 38-3-10 NMSA 1978), relating to the filing of an affidavit of disqualification, does not violate this provision. State ex rel. Hannah v. Armijo, 38 N.M. 73, 28 P.2d 511 (1933).

Time of filing affidavit. — To disqualify a judge, the affidavit of disqualification called for in 38-3-9 NMSA 1978 must be filed before the court has acted judicially upon a material issue; however, this might not be the case if the grounds for disqualification came to light during or after the hearing. 1975 Op. Att'y Gen. No. 75-28.

It would subvert the judicial and administrative process to allow disqualification of a judge or board member based on impartiality, if a person before a tribunal could file an affidavit of disqualification after the judge or board members had heard the case. 1975 Op. Att'y Gen. No. 75-28.

Trial court's refusal to honor disqualification affidavit filed two days before trial held proper. State v. Sanchez, 58 N.M. 77, 265 P.2d 684 (1954).

Disqualifications named in this section may be waived by the parties, as may the disqualification for prejudice under Laws 1933, ch. 184 (38-3-9, 38-3-10 NMSA 1978), either by implication or specific act of the party having a right to rely on the statute. State ex rel. Lebeck v. Chavez, 45 N.M. 161, 113 P.2d 179 (1941).

This provision does not contain an absolute disqualification, but confers a right on a litigant which he may either exercise or waive by consent; in the instant case, defendant not only waived right to disqualify the sentencing judge (who had been the district attorney who prosecuted defendant in the original proceedings), but actually agreed that he should preside. State v. Miller, 79 N.M. 392, 444 P.2d 577 (1968), cert. denied, 394 U.S. 1002, 89 S. Ct. 1597, 22 L. Ed. 2d 779 (1969).

The constitutional right to disqualify a judge may be waived. State v. Lucero, 104 N.M. 587, 725 P.2d 266 (Ct. App. 1986).

Presumption of bias. — A judge is presumptively partial or biased if he is related to any party to the proceeding, if he has served as counsel or presided as a judge in the trial of the cause in a lower court or if he has a pecuniary interest. State ex rel. Anaya v. Scarborough, 75 N.M. 702, 410 P.2d 732 (1966). See also, State ex rel. Hannah v. Armijo, 38 N.M. 73, 28 P.2d 511 (1933).

Hostility. — A person charged with a crime should not be required to proceed to trial before a presiding judge who has openly expressed animosity or hostility. State ex rel. Anaya v. Scarborough, 75 N.M. 702, 410 P.2d 732 (1966).

Participation in plea bargaining. — Defendant should not be required to face trial before a judge who has participated in any manner in efforts to get him to plead guilty. State ex rel. Anaya v. Scarborough, 75 N.M. 702, 410 P.2d 732 (1966).

Relationship to attorney working for contingent fee. — An attorney for a cause on a contingent fee basis was interested pecuniarily in outcome of the case, and was a party to the extent that such interest disqualified his father from sitting as judge. Defendant did not waive such constitutional disqualification where neither he nor his attorney knew of other attorney's interest until after trial. Tharp v. Massengill, 38 N.M. 58, 28 P.2d 502 (1933).

Judge's relatives having ties to victim and district attorney. — Recusal of the judge at a murder trial was not required where the judge's brother-in-law was the attorney representing the victim's family in a wrongful death action against defendant and the judge's son was employed as a law clerk by the district attorney. State v. Fero, 105 N.M. 339, 732 P.2d 866 (1987).

Judge prohibited from trying case. — To require petitioner to go to trial for first degree murder before judge who held him in contempt at a hearing with no foundation or basis in law would be grossly improper; and under supreme court's power of superintending control, alternative writ of prohibition would be made permanent. State ex rel. Anaya v. Scarborough, 75 N.M. 702, 410 P.2d 732 (1966).

Respondent judge was not disqualified for expressing opinion that state could make out a prima facie case of first-degree murder after reading preliminary hearing transcript in connection with motion by petitioner that he be admitted to bail. State ex rel. Anaya v. Scarborough, 75 N.M. 702, 410 P.2d 732 (1966).

Newspaper articles insufficient to warrant disqualification. — The possible effect of newspaper articles which discuss the impact of a judgment for one party is the very type of indirect, remote, speculative, theoretical or possible interest which is not sufficient to warrant disqualification. United Nuclear Corp. v. General Atomic Co., 96 N.M. 155, 629

P.2d 231 (1980), appeal dismissed, 451 U.S. 901, 101 S. Ct. 1966, 68 L. Ed. 2d 289 (1981).

Refusal to disqualify proper where bias not established. — Where a movant has failed to meet its burden of establishing that the judge has a personal or extrajudicial bias or prejudice against it, the judge's refusal to disqualify himself is proper. United Nuclear Corp. v. General Atomic Co., 96 N.M. 155, 629 P.2d 231 (1980), appeal dismissed, 451 U.S. 901, 101 S. Ct. 1966, 68 L. Ed. 2d 289 (1981).

Municipal or police judge can be disqualified. 1959-60 Op. Att'y Gen. No. 59-207.

A municipal judge may be disqualified by any of the parties to a proceeding before him, if any of the grounds mentioned herein are present. 1970 Op. Att'y Gen. No. 70-100.

Police judge disqualified hereunder may not preside at trial absent consent of all parties thereto. State ex rel. Miera v. Chavez, 70 N.M. 289, 373 P.2d 533 (1962).

But only under this section. — A municipal judge cannot be disqualified under a statute providing for the disqualification of other types of judges, and in absence of a statute providing specifically for disqualification of municipal judges, there can be no disqualification of such judges except by way of the constitution; however, certain duties have been made obligatory on all judges by supreme court's adoption of canons of ethics. 1970 Op. Att'y Gen. No. 70-100.

Disqualification of small claims judge. — Former 34-8-7 NMSA 1978, relating to transfer of case to district court upon disqualification of small claims court judge, was a statutory declaration of this section; court's attention must be directed to a specific constitutional ground for disqualification. Stein v. Speer, 85 N.M. 418, 512 P.2d 1254 (1973).

Sale of grant lands not void. — A district judge's approval of a sale of common lands of Tecolote land grant is not void, although the judge is disqualified as a relative of the purchaser. Kavanaugh v. Delgado, 35 N.M. 141, 290 P. 798 (1930).

Conservancy District Act. — Laws 1927, ch. 45, § 201 (73-14-4 NMSA 1978), providing that a judge shall not be disqualified by reason of holding land benefited by a conservancy district, does not of itself make the act violative of this section. Gutierrez v. Middle Rio Grande Conservancy Dist., 34 N.M. 346, 282 P. 1, 70 A.L.R. 1261 (1929), cert. denied, 280 U.S. 610, 50 S. Ct. 158, 74 L. Ed. 653 (1930).

Assistance of counsel. — Where defendant was aware that the judge who resentenced him had been prosecuting attorney at original proceedings, had been so informed by both the judge and his attorneys and had specifically consented to having the judge sit in the case, he could not claim in post-conviction proceedings that he was denied adequate assistance of counsel in the matter. State v. French, 82 N.M. 209, 478 P.2d 537 (1970).

Law reviews. — For survey, "Children's Court Practice in Delinquency and Need of Supervision Cases Under the New Rules," see 6 N.M. L. Rev. 331 (1976).

For annual survey of New Mexico law relating to civil procedure, see 12 N.M.L. Rev. 97 (1982).

For annual survey of New Mexico law relating to civil procedure, see 13 N.M.L. Rev. 251 (1983).

For article, "Separation of Powers and the Judicial Rule-Making Power in New Mexico: The Need for Prudential Restraints," see 15 N.M.L. Rev. 407 (1985).

For annual survey of New Mexico law of civil procedure, 19 N.M.L. Rev. 627 (1990).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 46 Am. Jur. 2d Judges §§ 86 et seq., 123, 137, 146, 149, 172, 175, 179.

48A C.J.S. Judges §§ 99, 107 to 129.

Constitutionality of statutes making mere filing or affidavit of bias or prejudice sufficient to disqualify judge, 5 A.L.R. 1275, 46 A.L.R. 1179.

Necessity as justifying action by judicial officer otherwise disqualified to act in particular case, 39 A.L.R. 1476.

Right of judge not legally disqualified to decline to act in legal proceeding upon personal grounds, 96 A.L.R. 546.

Constitutionality of statute which disqualifies judge upon peremptory challenge, 115 A.L.R. 855.

Modification of decree of divorce, statute providing for change of judge on ground of bias or prejudice as applicable to proceedings for, 143 A.L.R. 411.

Disqualification of judge in pending case as subject to revocation or removal, 162 A.L.R. 641.

Relationship of judge to one who is party in an official or representative capacity as disqualification, 10 A.L.R.2d 1307.

Mandamus as remedy to compel assertedly disqualified judge to recuse himself or to certify his disqualification, 45 A.L.R.2d 937, 56 A.L.R. Fed. 494.

Relationship to attorney as disqualifying judge, 50 A.L.R.2d 143.

Disqualification of judge in proceedings to punish contempt against or involving himself or court of which he is a member, 64 A.L.R.2d 600, 37 A.L.R.4th 1004.

Time for asserting disqualification of judge, and waiver of disqualification, 73 A.L.R.2d 1238.

Propriety and permissibility of judge engaging in practice of law, 89 A.L.R.2d 886.

Intervenor's right to disqualify judge, 92 A.L.R.2d 1110.

Disqualification of judge for having decided different case against litigant, 21 A.L.R.3d 1369.

Disqualification of judge on ground of being a witness in the case, 22 A.L.R.3d 1198.

Disqualification of judge for bias against counsel for litigant, 23 A.L.R.3d 1416.

Disqualification of judge because of his or another's holding or owning stock in corporation involved in litigation, 25 A.L.R.3d 1331.

Disqualification of original trial judge to sit on retrial after reversal or mistrial, 60 A.L.R.3d 176.

State's right to file affidavit disqualifying judge for bias or prejudice, 68 A.L.R.3d 509.

Constitutional restrictions on nonattorney acting as judge in criminal proceedings, 71 A.L.R.3d 562.

Fine, penalty or forfeiture imposed upon defendant, disqualification of judge or one acting in judicial capacity by pecuniary interest in, 72 A.L.R.3d 375.

Membership in fraternal or social club or order affected by case as a ground for disqualification of judge, 75 A.L.R.3d 1021.

Illness or incapacity of judge, prosecuting officer or prosecution witness as justifying delay in bringing accused speedily to trial in state cases, 78 A.L.R.3d 297.

Disqualification of judge because of assault or threat against him by party or person associated with party, 25 A.L.R.4th 923.

Disqualification of judge because of political association or relation to attorney in case, 65 A.L.R.4th 73.

Disqualification of judge for bias against counsel for litigant, 54 A.L.R.5th 575.

Prior representation or activity as prosecuting attorney as disqualifying judge from sitting or acting in criminal case, 85 A.L.R.5th 471.

Laws governing judicial recusal or disqualification in state proceeding as violating federal or state constitution, 91 A.L.R.5th 437.

Disqualification of judge under 28 U.S.C.A. § 455(b)(4), providing for disqualification where judge has financial or other interest in proceeding, 163 A.L.R. Fed. 575.

Sec. 19. [Ineligibility of justices or judges for nonjudicial offices.]

No justice of the supreme court, judge of the court of appeals, judge of the district court or judge of a metropolitan court, while serving, shall be nominated, appointed or elected to any other office in this state except a judicial office. (As amended November 8, 1988.)

ANNOTATIONS

Cross references. — As to governor's appointive and removal power, including interim appointees, see N.M. Const., art. V, § 5.

As to division of state into judicial districts with judge chosen for each district, see N.M. Const., art. VI, § 12.

As to magistrate districts and selection of magistrates, see N.M. Const., art. VI, § 26.

The 1988 amendment, which was proposed by S.J.R. No. 1, § 1 (Laws 1988) and adopted at the general election held on November 8, 1988, by a vote of 203,509 for and 159,957 against, substituted the present provisions for the former provisions which read "No judge of the supreme or district courts shall be nominated or elected to any other than a judicial office in this state."

Chairman of municipal consolidation commission. — The appointment, under authority of the Joint Powers Agreement Act (11-1-1 to 11-1-7 NMSA 1978), of a district judge to be chairman of a joint commission for consolidation of two municipalities does not contravene this section; there is no incompatibility between the two positions, and the fact that some day an action of the commission might be before a court was not enough to make the positions incompatible. 1968 Op. Att'y Gen. No. 68-67.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 46 Am. Jur. 2d Judges § 44 et seq.

48A C.J.S. Judges §§ 31, 43; 67 C.J.S. Officers and Public Employees §§ 27, 28, 32.

Sec. 20. [Style of writs and processes.]

All writs and processes shall issue, and all prosecution shall be conducted in the name of "The State of New Mexico."

ANNOTATIONS

Cross references. — For rule relating to process and service thereof, see Rule 1-004 NMRA.

Comparable provisions. — Iowa Const., art. V, § 8.

Wyoming Const., art. V, § 15.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 62B Am. Jur. 2d Process §§ 66 to 104.

Who is "person of suitable age and discretion" under statutes or rules relating to substituted service of process, 91 A.L.R.3d 827.

72 C.J.S. Process §§ 11, 13.

Sec. 21. [Judges as conservators of the peace; preliminary examinations in criminal cases.]

Justices of the supreme court, in the state, and district judges and magistrates, in their respective jurisdictions, shall be conservators of the peace. District judges and other judges or magistrates designated by law may hold preliminary examinations in criminal cases. (As amended November 8, 1966.)

ANNOTATIONS

Cross references. — For right to preliminary hearing of one held on an information, see N.M. Const., art. II, § 14.

As to preliminary hearing procedure, see Rules 5-302 and 6-202.

The 1966 amendment, which was proposed by H.J.R. No. 34, § 3 (Laws 1965) and adopted at the general election held on November 8, 1966, with a vote of 81,055 for and 26,317 against, amended this section, substituting "and district judges . . . jurisdictions" for "district judges in their respective districts and justices of the peace in their respective counties" and "other judges or magistrates designated by law" for "justices of the peace."

Driving while intoxicated was breach of the peace, over which justice of the peace had jurisdiction. State v. Rue, 72 N.M. 212, 382 P.2d 697 (1963).

Payment of autopsies with court funds. — The district courts are constitutionally designated as conservators of the peace. As such, and when autopsies are warranted

in pursuit of that design, district court funds may be disbursed in payment of autopsies, on proper approval. 1957-58 Op. Att'y Gen. No. 58-83.

Power of nonresident judge to hold preliminary hearing. — Nonresident judge who sits at request of a resident judge is vested with all the latter's powers, including that of holding preliminary hearings. State v. Encinias, 53 N.M. 343, 208 P.2d 155 (1949).

Comparable provisions. — Iowa Const., art. V, § 7.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 46 Am. Jur. 2d Judges § 22.

48A C.J.S. Judges § 53.

Sec. 22. [County clerk as district and probate court clerk.]

Until otherwise provided by law, a county clerk shall be elected in each county who shall, in the county for which he is elected perform all the duties now performed by the clerks of the district courts and clerks of the probate courts.

ANNOTATIONS

Compiler's notes. — Laws 1968, ch. 69, § 20 (34-6-19 NMSA 1978) provides for appointment of a clerk for each county of a judicial district and for appointment of deputy clerks as needed.

Powers of county clerk. — The county clerk succeeding to the offices of clerk of the district court and the probate clerk, pursuant to this section, could perform all duties and exercise all powers formerly devolving upon the court clerks, including the taking of acknowledgments. 1914 Op. Att'y Gen. 106.

County clerk was entitled to salary specified by law but not to additional compensation for performing duties of clerk of district court, but deputy could be employed if duties required it. 1931-32 Op. Att'y Gen. 96.

Certification of transcript. — A transcript of judgment may properly be certified by a county clerk unless a statutory change of designation has been made. Cannon v. First Nat'l Bank, 35 N.M. 193, 291 P. 924 (1930).

Probate files. — As probate clerk, the county clerk is required to keep a record of decedents' estates and other probate matters; there is no statutory provision for the storage of such probate files at a place other than the county clerk's office. 1961-62 Op. Att'y Gen. No. 61-127. See also, 34-7-20, 34-7-21 NMSA 1978.

Comparable provisions. — Idaho Const., art. V, § 16.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 15A Am. Jur. 2d Clerks of Court §§ 1, 2, 21, 28.

Per diem compensation of court clerks, 1 A.L.R. 280.

Civil service laws as applicable to court clerks, 14 A.L.R. 637.

Assistance, right of clerk of court to issue writs of, 21 A.L.R. 357.

Money paid to clerk of court by virtue of his office, liability for, 59 A.L.R. 60.

Records, discretion of clerk as to permitting examination or use of, by abstractor or insurer of title, 80 A.L.R. 773.

Removal of clerk, court's power as to, 118 A.L.R. 171.

Liability of county clerk or prothonotary, or surety on bond, for negligent or wrongful acts of deputies or assistants, 71 A.L.R.2d 1140.

21 C.J.S. Courts §§ 249 to 255.

Sec. 23. [Probate court.]

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 heretofore exercised by the probate courts of New Mexico and shall also have jurisdiction to determine heirship with respect to real property in all proceedings for the administration of decedents' estates. The legislature shall have power from time to time to confer upon the probate court in any county in this state jurisdiction to determine heirship in all probate proceedings, and shall have power also 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 three thousand dollars ($3,000.00) exclusive of interest and cost; nor in any action for malicious prosecution, 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, except as title to real property may be affected by the determination of heirship; 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 cannot be imprisonment in the penitentiary, or in which the fine cannot be in excess of one thousand dollars ($1,000). A jury for the trial of such cases shall consist of six men. The legislature shall prescribe the qualifications and fix the compensation of probate judges. (As amended September 20, 1949.)

ANNOTATIONS

Cross references. — As to salaries of probate judges, determined according to county classifications, see 4-44-1 NMSA 1978 et seq.

For Probate Code, see Chapter 45 NMSA 1978.

The 1949 amendment, which was proposed by S.J.R. No. 13 (Laws 1949) and adopted at the special election held on September 20, 1949, by a vote of 16,649 for and 10,771 against, amended this section to provide for jurisdiction in the probate courts to determine heirship with respect to real property in proceedings for administration of decedents' estates, to provide that the legislature would prescribe the qualifications and fix the compensation of probate judges and to delete a provision relating to transfer of cases in which the probate judge was disqualified. Prior to amendment this 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 cannot be imprisonment in the penitentiary, or in which the fine cannot 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."

"Otherwise provided by law". — Phrase "until otherwise provided by law" means that the legislature has power to modify or alter the particular exercise of probate jurisdiction; included within this grant is power to confer concurrent probate jurisdiction upon the district courts. In re Will of Hickok, 61 N.M. 204, 297 P.2d 866 (1956).

Probate jurisdiction alterable. — Under this section it was not intended that the probate jurisdiction of these courts should remain frozen, but the legislature may alter, limit or extend jurisdiction of probate courts over all matters which by the English law and general law of this country are from their nature classed generally as within their probate jurisdiction. Dunham v. Stitzberg, 53 N.M. 81, 201 P.2d 1000 (1948), overruled on other grounds, Conley v. Quinn, 58 N.M. 771, 276 P.2d 906 (1954).

And not necessarily exclusive. — In view of this section and the fact that probate proceedings are special in their nature and creatures of statute, word "exclusive" should not be read into provisions of this section relating to probate court jurisdiction. In re Will of Hickok, 61 N.M. 204, 297 P.2d 866 (1956).

Determination of heirship by district courts constitutional. — Former 16-3-20, 1953 Comp., was not constitutionally objectionable hereunder in providing that district courts should have power to determine heirship in probate or administrative proceedings. In re Will of Hickok, 61 N.M. 204, 297 P.2d 866 (1956).

Scope of proviso. — Proviso touching denial of jurisdiction in matters wherein title or boundaries of land are in dispute is a limitation on future legislative action relative to conferring additional civil jurisdiction on probate courts; it does not amount to a present grant of exclusive original jurisdiction in district courts on such matters. Conley v. Quinn, 58 N.M. 771, 276 P.2d 906 (1954).

No jurisdiction in probate courts to try title to property. — Probate courts have no jurisdiction to try or determine title to either real or personal property as between an estate or heirs and devises on the one hand and strangers to the state on the other; this jurisdiction is vested exclusively in the district court. Conley v. Quinn, 58 N.M. 771, 276 P.2d 906 (1954); McCann v. McCann, 46 N.M. 406, 129 P.2d 646 (1942).

Where a widow was incidentally an heir but her claim to one-half of the property involved was not the claim of an heir in administration, but was a claim arising under the community property system, the probate court was without jurisdiction to try her controverted claim of title to one-half the real estate involved as her share of the community. Conley v. Quinn, 58 N.M. 771, 276 P.2d 906 (1954).

Constitutional amendment of 1949 is self-implementing Conley v. Quinn, 58 N.M. 771, 276 P.2d 906 (1954).

Admission of wills to probate is primary function of probate courts, both in territorial days and since statehood, without notice taken of whether the property disposed of be real or personal estate. Humphries v. Le Breton, 55 N.M. 247, 230 P.2d 976 (1951).

Declaration of heirship. — A declaration of heirship is the declaration of a status, that the decedent is who he was and was known to be; and a probate court can, by its determination of heirship, finally settle the ownership of a decedent's estate, both real and personal. Conley v. Quinn, 58 N.M. 771, 276 P.2d 906 (1954).

Attack on decree of heirship. — A decree of the probate court determining heirship, made without personal or constructive service of process upon ascertainable relatives of deceased, is open to direct or collateral attack. Harlan v. Sparks, 125 F.2d 502 (10th Cir. 1942).

Claim against administrator. — District courts had no original jurisdiction to allow a claim against an administrator and surety on his bond, where probate court had jurisdiction and claim had been filed, allowed and paid in part, and no appeal was taken from action of probate court, and where complaint neither alleged grounds for nor prayed for equitable relief, but asked only a money judgment. Michael v. Bush, 26 N.M. 612, 195 P. 904 (1921). But see, 45-1-302, 45-1-302.1 for present jurisdiction of probate courts and district courts in probate matters.

Appointment of administrator is void when will on file names executors. Baca v. Buel, 28 N.M. 225, 210 P. 571 (1922).

Tort claims not covered. — Statutes providing for filing of claims in the probate court, the serving of a copy and a notice of hearing and a presentment thereof to the probate court did not cover tort claims. Frei v. Brownlee, 56 N.M. 677, 248 P.2d 671 (1952).

Compensation. — The salaries of the judges of constitutionally established courts are not subject to the constitutional prohibition against an increase in compensation during the term for which they were elected. 1979 Op. Att'y Gen. No. 79-27.

Law reviews. — For article, "Medical Malpractice Legislation in New Mexico," see 7 N.M. L. Rev. 5 (1976-77).

For survey, "Article VII of the New Probate Code: In Pursuit of Uniform Trust Administration," see 6 N.M. L. Rev. 213 (1976).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 20 Am. Jur. 2d Courts § 69.

Contempt, power to punish for contempt, 8 A.L.R. 1551, 54 A.L.R. 322, 73 A.L.R. 1187.

Mandamus against probate courts, to compel surrogate to require witness to testify or produce documents, 41 A.L.R. 436.

Probate court, corepresentatives in, suits between, 63 A.L.R. 455.

Attorney's fees, allowance for in suit to remove estate from probate court, 79 A.L.R. 532, 142 A.L.R. 1459.

Jurisdiction to grant relief from election as to taking under will, 81 A.L.R. 760, 71 A.L.R.2d 942.

Jurisdiction to determine title when personal representative claims in own right, 90 A.L.R. 134.

Jurisdiction, guardianship court's exclusive, as against execution, attachment, etc., 92 A.L.R. 919.

Mandamus against probate courts, to compel approval of bonds, 92 A.L.R. 1211.

Compromise of liquidated contract claim or money judgment, power of court to authorize or approve, 155 A.L.R. 201.

Removal of child from state pending proceedings for custody as defeating jurisdiction to award custody, 171 A.L.R. 1405.

Jurisdiction of court to award custody of child domiciled in state but physically outside of it, 9 A.L.R.2d 434.

Nonresidence as affecting one's right to custody of child, 15 A.L.R.2d 432.

Jurisdiction of suit involving trust as affected by location of res, residence of parties to trust, service and appearance, 15 A.L.R.2d 610.

Appealability of order, of court possessing probate jurisdiction, allowing or denying tardy presentation of claim to personal representative, 66 A.L.R.2d 659.

21 C.J.S. Courts § 76.

Sec. 24. [District attorneys.]

There shall be a district attorney for each judicial district, who shall be learned in the law, and who shall have been a resident of New Mexico for three years next prior to his election, shall be the law officer of the state and of the counties within his district, shall be elected for a term of four years, and shall perform such duties and receive such salary as may be prescribed by law.

The legislature shall have the power to provide for the election of additional district attorneys in any judicial district and to designate the counties therein for which the district attorneys shall serve; but no district attorney shall be elected for any district of which he is not a resident.

ANNOTATIONS

Cross references. — For statutory provisions relating to district attorneys, see 36-1-1 NMSA 1978 et seq.

"Learned in the law" and being a "licensed attorney" are synonymous. State ex rel. Chavez v. Evans, 79 N.M. 578, 446 P.2d 445, 39 A.L.R.3d 290 (1968).

"Learned in the law" was an expression well known and understood when the constitution was drafted, and as interpreted, the meaning is the same as "licensed attorney," the term used in N.M. Const., art. V, § 3, referring to qualifications for office of

attorney general. State ex rel. Chavez v. Evans, 79 N.M. 578, 446 P.2d 445, 39 A.L.R.3d 290 (1968).

Admission to practice law before the highest courts of a state amounts to a determination, prima facie at least, that an individual is learned in the law, and in the absence of such admission, a person is presumptively not learned in the law. State ex rel. Chavez v. Evans, 79 N.M. 578, 446 P.2d 445, 39 A.L.R.3d 290 (1968).

Admission to practice, or qualification to be admitted, is no less a requirement for district attorneys than is true of supreme court justices; the only difference is that district attorneys need not have had the actual practice required in N.M. Const., art. VI, § 8. State ex rel. Chavez v. Evans, 79 N.M. 578, 446 P.2d 445, 39 A.L.R.3d 290 (1968).

This article makes district attorney law officer of the counties of his district. State ex rel. Board of County Comm'rs v. Board of County Comm'rs, 59 N.M. 9, 277 P.2d 960 (1954).

District attorney is judicial officer in the sense in which those words are used in law relating to bribery of officers. The office is created and its duties are broadly defined by this section of the constitution. It was evidently intended by the constitutional convention to classify the office as judicial, since this article establishes the judicial department. State v. Collins, 28 N.M. 230, 210 P. 569 (1922).

Attorney general and district attorneys may appear as relators on behalf of state. State ex rel. McCulloh v. Polhemus, 51 N.M. 282, 183 P.2d 153 (1947).

Authority to file action. — Suit on behalf of state to recover salary paid to state highway commission [state transportation commission] chairman could be filed by district attorney. State ex rel. Attorney Gen. v. Reese, 78 N.M. 241, 430 P.2d 399 (1967).

Services to county commissioners. — There are no legal services that can be rendered by a district attorney for the board of county commissioners for which he may exact extra compensation; the very act of advising the board with respect to the validity of a contract was an official act, required of his office. Hanagan v. Board of County Comm'rs, 64 N.M. 103, 325 P.2d 282 (1958).

Paternity determinations. — Upon request by the welfare department (now human services department), a district attorney must assist in paternity determinations if the child is likely to be a public charge. 1959-60 Op. Att'y Gen. No. 59-47.

District attorney is required to represent soil conservation district in collecting for work done by the soil conservation district for members of their organization. 1959-60 Op. Att'y Gen. No. 59-47.

District attorney is not obligated to represent county sheriff in a civil suit. 1959-60 Op. Att'y Gen. No. 59-47.

Appearance in justice of peace courts. — In view of the above constitutional provision and the statutes of the state, the district attorney as chief law enforcement officer has the authority to appear in any case filed before any justice of the peace (now magistrate courts) in any county in his district when, in his opinion, the interests of the people in his district require his participation. 1953-54 Op. Att'y Gen. No. 5669.

As a practical matter, district attorney may file a complaint in any justice of the peace court (now magistrate court) which he deems proper (absent an abuse of discretion) in any criminal action which he desires to prosecute, by virtue of the powers granted to him by 36-1-20 NMSA 1978 to appear in such courts. 1965 Op. Att'y Gen. No. 65-127.

District attorney was not vested with power to enforce directive requiring all complaints against offenders booked into McKinley county jail for violation of petty misdemeanor statute to be filed by sheriff or state police in justice of the peace court (now magistrate courts) located in county courthouse in order to eliminate time-consuming and expensive transportation of offenders to one of the other justice of the peace courts of the county. 1965 Op. Att'y Gen. No. 65-127.

Public Records Act. — District attorneys are state officers and office of district attorney falls within broad definition of "agency" as used in 14-3-1 NMSA 1978 of the Public Records Act; therefore, the records of the district attorney's office are subject to provisions of the act for purposes of care, custody, preservation and disposition. 1975 Op. Att'y Gen. No. 75-36.

Appearance on appeal. — District attorney has authority to take an appeal, but it is the prerogative and duty of attorney general to brief the case and to present it in supreme court; district attorney may appear on appeal in a criminal case only by permission of the attorney general and in association with him. State v. Aragon, 55 N.M. 421, 234 P.2d 356 (1950).

Compensation. — The district attorney is a state officer and is precluded from receiving fees, allowances or emoluments other than the salary provided by law. Until such law is enacted, he is not entitled to compensation, but it may date back to his induction into office. State ex rel. Ward v. Romero, 17 N.M. 88, 125 P. 617 (1912).

Under Laws 1917, ch. 18 (since repealed), salary of a district attorney could be garnished in hands of disbursing officer of state, since constitution does not specify his salary. Stockard v. Hamilton, 25 N.M. 240, 180 P. 294 (1919).

District attorneys whose terms of office were to expire on December 31, 1972, were to continue until that time to receive salary prescribed in former 13-8-5, 1953 Comp., which had been repealed by Laws 1972, ch. 97, § 71, a portion of the Children's Code,

as the section enacted in its stead contained no salary provision for a district attorney's service as children's court attorney. 1972 Op. Att'y Gen. No. 72-45.

Election by district electorate. — There is no language used in the constitution evincing any intention on the part of the constitutional convention to permit a district attorney to be elected by any group of voters more than or less than the district electorate of the district in which he is to serve. 1959-60 Op. Att'y Gen. No. 60-3.

Candidate for district attorney must run in all counties of the district. 1959-60 Op. Att'y Gen. No. 60-3.

Probate judge as assistant district attorney. — The duly elected probate judge for Colfax county may be appointed as assistant district attorney with limited authority only. 1957-58 Op. Att'y Gen. No. 58-237.

Removal statute inapplicable. — As the district attorney in 1909, when 10-4-1 NMSA 1978 was passed, was an officer appointed by the governor of the state by and with the consent of the legislature, and not a "county, precinct, district, city, town or village officer elected by the people," district attorney is not amenable to removal under that section. State ex rel. Prince v. Rogers, 57 N.M. 686, 262 P.2d 779 (1953).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 63A Am. Jur. 2d Prosecuting Attorneys §§ 1, 5 to 8.

Disbarment or suspension of attorney because of misconduct of, as prosecuting attorney, 9 A.L.R. 197, 43 A.L.R. 109, 55 A.L.R. 1375.

Contract by attorney to prosecute or assist in prosecution of criminal case on contingent fee, validity of, 11 A.L.R. 1192.

Incompatibility of offices of district attorney and captain of volunteers, 26 A.L.R. 145, 132 A.L.R. 254, 147 A.L.R. 1419, 148 A.L.R. 1399, 150 A.L.R. 1444.

Taxes, power of district attorney to remit, release or compromise, 99 A.L.R. 1068, 28 A.L.R.2d 1425.

Court's power to remove district attorney, 118 A.L.R. 173.

Prosecution for criminal offenses, duty and discretion of district or prosecuting attorney as regards, 155 A.L.R. 10.

Power of assistant or deputy prosecuting or district attorney to file information, or to sign or prosecute it in his own name, 80 A.L.R.2d 1067.

Constitutionality and construction of statute against public attorney representing private person in civil action, 82 A.L.R.2d 774.

Constitutionality and construction of statute prohibiting a prosecuting attorney from engaging in the private practice of law, 6 A.L.R.3d 562.

Disqualification or recusal of prosecuting attorney because of relationship with alleged victim or victim's family, 12 A.L.R.5th 909.

27 C.J.S. District and Prosecuting Attorneys §§ 1 to 10.

Sec. 25. Repealed. (2001)

ANNOTATIONS

Compiler's notes. — Section 1 of S.J.R. No. 21 (Laws 2001) proposed to amend Article 6 of the constitution of New Mexico by repealing Section 25, relating to the designation of judicial districts, as that provision has become outdated (see 34-6-1 NMSA 1978). The amendment was approved by the people at the general election on November 5, 2002, by the vote of 284,600 for and 128,542 against.

Sec. 26. [Magistrate court.]

The legislature shall establish a magistrate court to exercise limited original jurisdiction as may be provided by law. The magistrate court shall be composed of such districts and elective magistrates as may be provided by law. Magistrates shall be qualified electors of, and reside in, their respective districts, and the legislature shall prescribe other qualifications. Magistrates shall receive compensation as may be provided by law, which compensation shall not be diminished during their term of office. Metropolitan court judges shall be chosen as provided in this constitution. (As repealed and reenacted November 8, 1966; as amended November 8, 1988.)

ANNOTATIONS

Cross references. — For statutory provisions relating to magistrates' courts, see 35-1-1 NMSA 1978 et seq.

The 1966 amendment, which was proposed by H.J.R. No. 34, § 4 (Laws 1965) and adopted at the general election held on November 8, 1966, with a vote of 81,055 for and 26,317 against, repealed this section and enacted a new Section 26, providing for establishment of magistrate courts. Prior to repeal and reenactment, this section read: "Justices of the peace, police magistrates and constables shall be elected in and for such districts as are or may be provided by law. The legislature shall prescribe the qualifications for these offices. Such justices and police magistrates shall not have jurisdiction in any matter in which the title to real estate or the boundaries of land may be in dispute or drawn in question or in which the debt or sum claimed shall be in excess of two hundred dollars exclusive of interest."

The 1988 amendment, which was proposed by S.J.R. No. 1, § 1 (Laws 1988) and adopted at the general election held on November 8, 1988, by a vote of 203,509 for and 159,957 against, added the last sentence.

"Limited jurisdiction". — The reference in this section and 35-1-1 NMSA 1978 to "limited" jurisdiction indicates that a magistrate is without authority to take action unless the authority has been affirmatively granted; neither provision authorizes a magistrate to set aside judgment in a criminal case. State v. Vega, 91 N.M. 22, 569 P.2d 948 (Ct. App. 1977).

"Limited" jurisdiction indicates that a magistrate is without authority to take action unless authority is affirmatively granted by the constitution or statutory provision. A magistrate has continuing control over a criminal judgment only until such time as the aggrieved party's opportunity to file an appeal expires. State v. Ramirez, 97 N.M. 125, 637 P.2d 556 (1981).

Statutory prescription of qualifications. — The requirement in 35-2-1 NMSA 1978 that magistrates must have the equivalent of a high school education does not violate N.M. Const., art. VII, § 2, relating to qualifications for office, because this section gives the legislature the power to prescribe qualifications for magistrate court judges. 1969 Op. Att'y Gen. No. 69-8.

Constitution did not define criminal jurisdiction of justices of peace (now magistrate courts), nor make a grant thereof, but merely recognized justices of the peace courts as one of the tribunals upon which the judicial power of the state was vested, made them conservators of the peace, and thereby left the criminal jurisdiction of justices of the peace as fixed by the territorial legislature of 1876 until the enactment of further law. State v. Rue, 72 N.M. 212, 382 P.2d 697 (1963).

No discretionary right to refuse second complaint after no cause found in first. — A magistrate, who has previously heard evidence under an original criminal complaint and has found no probably cause, does not have a discretionary right to refuse the filing of a second complaint. State v. De La O, 102 N.M. 638, 698 P.2d 911 (Ct. App. 1985).

Competency of defendants in courts of limited jurisdiction. — Except for metropolitan courts, courts of limited jurisdiction have no authority to hold competency hearings. 2003 Op. Att’y Gen. No. 03-04.

Courts of limited jurisdiction have no authority to commit defendants to a mental health facility. 2003 Op. Att’y Gen. No. 03-04.

Magistrate court has no jurisdiction to set aside a jury verdict. Jaramillo v. O'Toole, 97 N.M. 345, 639 P.2d 1199 (1982).

Magistrate court may order restitution. — The magistrate court may, as part of its sentencing power, order a Criminal Code or Motor Vehicle Code violator to make restitution. 1979 Op. Att'y Gen. No. 79-18.

No equitable jurisdiction was vested in justice court (now magistrate courts). Durham v. Rasco, 30 N.M. 16, 227 P. 599, 34 A.L.R. 838 (1924).

Creation of police court by city not authorized. — This section, prior to its repeal and reenactment, did not establish offices of justices of the peace, police magistrates and constables, but merely defined the manner of their selection. Hence, a commission-manager city could not create a police court or elect a police judge. Stout v. City of Clovis, 37 N.M. 30, 16 P.2d 936 (1932).

Damages on appeal to district court. — On appeal to district court in a trial de novo in forcible entry and detainer action, the district court was limited in the amount of damages it could award by the maximum award allowable in the justice court (now magistrate courts). Sanchez v. Reilly, 54 N.M. 264, 221 P.2d 560 (1950).

Compensation. — The salaries of the judges of constitutionally established courts are not subject to the constitutional prohibition against an increase in compensation during the term for which they were elected. 1979 Op. Att'y Gen. No. 79-27.

Marriage ceremony outside of district. — A magistrate judge cannot perform a marriage ceremony outside of his district. 1988 Op. Att'y Gen. No. 88-36.

Comparable provisions. — Montana Const., art. VII, § 5.

Utah Const., art. VIII, §§ 11, 14.

Law reviews. — For student symposium, "Constitutional Revision - Judicial Removal and Discipline - The California Commission Plan for New Mexico?" see 9 Nat. Resources J. 446 (1969).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 20 Am. Jur. 2d Courts § 54 et seq.; 46 Am. Jur. 2d Judges § 3.

Compensation per diem, 1 A.L.R. 296.

Summons or notice of commencement of action emanating from justice's court, effect of defects or informalities as to appearance or return day in, 6 A.L.R. 851, 97 A.L.R. 746.

Judgment, prior action in justice's court in which claim might have been asserted by counterclaim, set-off or cross petition as bar to subsequent independent action on such claim, 8 A.L.R. 735.

Arrest, power of justice of the peace to take affidavit as basis for warrant of, 16 A.L.R. 923.

Necessity as justifying action by magistrate otherwise disqualified to act in particular case, 39 A.L.R. 1476.

Search warrant, civil liability for improper issuance of, 45 A.L.R. 609.

License, liability for refusing to grant, 85 A.L.R. 299.

When title to real property deemed involved within contemplation of statute providing that justice of the peace (or similar court) shall not have jurisdiction of matters relating to title of land, 115 A.L.R. 504.

Fault or omission of justice of peace regarding bond, undertaking or recognizance as affecting party seeking appeal, 117 A.L.R. 1386.

Set-off as between judgments, jurisdiction of justice of peace to order, 121 A.L.R. 480.

Pardon as restoring justice to office forfeited by conviction, 143 A.L.R. 172, 70 A.L.R.2d 268, 58 A.L.R.3d 1191.

21 C.J.S. Courts § 12 et seq.; 48A C.J.S. Judges §§ 4, 14, 15, 18, 76 to 79.

Sec. 27. [Appeals from probate courts and other inferior courts.]

Appeals shall be allowed in all cases from the final judgments and decisions of the probate courts and other inferior courts to the district courts, and in all such appeals, trial shall be had de novo unless otherwise provided by law. (As amended November 8, 1966.)

ANNOTATIONS

Cross references. — As to appeals from magistrate courts, see 35-13-1 to 35-13-3 NMSA 1978.

For Probate Code, see Chapter 45 NMSA 1978.

For rules relating to appeals from magistrate courts, see Rules 2-705 and 6-703.

The 1966 amendment, which was proposed by H.J.R. No. 34, § 5 (Laws 1965), and adopted at the general election held on November 8, 1966, by a vote of 81,055 for and 26,317 against, substituted "other inferior courts" for "justices of the peace" after "probate courts and" and inserted a comma after "such appeals."

Compiler's notes. — Under the Probate Code, Chapter 45 NMSA 1978, the probate courts have jurisdiction only over informal proceedings for probate of a will or appointment of a personal representative, which powers are shared concurrently with the district courts. See 45-1-302, 45-1-302.1 NMSA 1978. An interested person may file a petition under 45-3-401 NMSA 1978 to set aside or prevent informal probate of a will and commence a formal testacy proceeding, which proceeding may also involve appointment of a previously appointed, or a different, personal representative.

State's constitutional right to appeal not codified. — The right of the state to appeal orders of suppression from the district court is created by statute as set forth in 39-3-3 NMSA 1978, which has been held not to be a statutory codification of the state's constitutional right to appeal. State v. Heinsen, 2004-NMCA-110, 136 N.M. 295, 97 P.3d 627, cert. granted, 2004-NMCERT-008, 136 N.M. 492, 100 P.3d 198.

Appeals from metropolitan court judgments by aggrieved defendants. — The legislature did not violate this section in authorizing appeals from metropolitan court judgments by aggrieved defendants. State v. Ball, 104 N.M. 176, 718 P.2d 686 (1986).

"Aggrieved" defendants. — A defendant who properly has entered a plea of guilty or nolo contendere in metropolitan court is not an "aggrieved" party entitled to appeal to the district court for a trial de novo. State v. Ball, 104 N.M. 176, 718 P.2d 686 (1986).

Appeal of justice court decision. — District courts had appellate jurisdiction over all cases originating in justice of peace courts (now magistrate courts). Lea County State Bank v. McCaskey Register Co., 39 N.M. 454, 49 P.2d 577 (1935).

Rule restricting bases for state's appeals invalid. — Restrictive nature of Rule 7-703B in providing only two bases for appeal by the state, unconstitutionality of statute and insufficiency of complaint, limits the state's substantive right to appeal provided by the New Mexico constitution and is, therefore, invalid and retracted. Smith v. Love, 101 N.M. 355, 683 P.2d 37 (1984).

State appeal from magistrate court decision. — Pursuant to this section, the state is permitted to appeal to the district court from a final judgment or decision rendered by the magistrate court. State v. Barber, 108 N.M. 709, 778 P.2d 456 (Ct. App. 1989).

Magistrate court orders suppressing evidence were not final orders in either an actual or practical sense. State v. Heinsen, 2004-NMCA-110, 136 N.M. 295, 97 P.3d 627, cert. granted, 2004-NMCERT-008, 136 N.M. 492, 100 P.3d 198.

The state does not have the statutory authority or constitutional right to immediately appeal a magistrate court order suppressing evidence to the district court. State v. Heinsen, 2004-NMCA-110, 136 N.M. 295, 97 P.3d 627, cert. granted, 2004-NMCERT-008, 136 N.M. 492, 100 P.3d 198.

Prosecution has no right to appeal the metropolitan court's suppression of evidence. State v. Giraudo, 99 N.M. 634, 661 P.2d 1333 (Ct. App. 1983).

But may appeal dismissal for failure to timely prosecute. — Since an order of dismissal for failure to timely prosecute is a final judgment, the prosecution may appeal it from the metropolitan court to the district court. State v. Giraudo, 99 N.M. 634, 661 P.2d 1333 (Ct. App. 1983).

Jurisdiction in inferior court. — Where unchallenged notice of appeal showed on its face that magistrate court originally had jurisdiction of case, district court could acquire jurisdiction even though transcript had not been filed. State v. McKee, 86 N.M. 733, 527 P.2d 496 (Ct. App.), cert. denied, 86 N.M. 730, 527 P.2d 493 (1974).

Where justice court (now magistrate court) had no jurisdiction, there was nothing to try de novo on appeal to district court, and the case should be dismissed on proper motion. Geren v. Lawson, 25 N.M. 415, 184 P. 216 (1919).

District court sitting in probate. — Order of district court sitting in probate could not be appealed to district court of general jurisdiction. Bell v. Kase, 87 N.M. 358, 533 P.2d 591 (1975) (case decided under former probate law).

Reasonable procedural requirements for appeals may be enacted by the legislature and a failure to comply with them will defeat the relief sought by the appeal. Levers v. Houston, 49 N.M. 169, 159 P.2d 761 (1945).

Until transcript was filed, district court could not proceed to trial on the merits, but it had jurisdiction of the cause to compel production of transcript so that it could proceed. Lea County State Bank v. McCaskey Register Co., 39 N.M. 454, 49 P.2d 577 (1935).

Court rule valid. — A rule for the district court, providing that if the appellant or plaintiff in error shall not procure the cause to be docketed within time the appellee or defendant in error may, on motion, have the cause docketed, and the appeal or certiorari dismissed, or, at his election, have his judgment affirmed, does not violate this section. Hignett v. Atchison, T. & S.F. Ry., 33 N.M. 620, 274 P. 44 (1928).

Review by certiorari does not provide for trial de novo in the higher court, whereas both the constitution and statutes relate to "appeals" from justice courts and require that the trial be de novo. Lea County State Bank v. McCaskey Register Co., 39 N.M. 454, 49 P.2d 577 (1935).

Appeal from metropolitan court governed by nature of offense. — Appeal from the metropolitan court is governed by the crime of which defendants are convicted rather than the type of trial; thus, defendant convicted of eluding an officer and reckless driving was entitled to a trial de novo, even though the trial was on the record. State v. Krause,

1998-NMCA-013, 124 N.M. 415, 951 P.2d 1076, cert. denied, 125 N.M. 146, 958 P.2d 104 (1998).

Review of metropolitan court's dismissal of criminal complaint. — The district court erred in applying an appellate standard of review to affirm the metropolitan court's dismissal of a criminal complaint because the district court was instead required to make an independent determination of whether the "forthwith" requirement in Rule 7-201D was complied with. State v. Hicks, 105 N.M. 286, 731 P.2d 982 (Ct. App. 1986).

Failure to preserve issue. — Because defendant failed to show the district court that he preserved issue in metropolitan court, the district court was not required to make an independent determination of whether the metropolitan court six-month rule was violated. State v. Hoffman, 114 N.M. 445, 839 P.2d 1333 (Ct. App. 1992).

Comparable provisions. — Utah Const., art. VIII, § 5.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 4 Am. Jur. 2d Appellate Review § 77 et seq.

Plea of guilty in justice of peace court as precluding appeal, 42 A.L.R.2d 995.

Reviewability, on appeal from final judgment, of interlocutory order, as affected by fact that order was separately appealable, 79 A.L.R.2d 1352.

4 C.J.S. Appeal and Error § 14 et seq.; 5 C.J.S. Appeal and Error §§ 723, 724.

Sec. 28. [Court of appeals; number, qualifications, compensation; quorum; majority concurring in judgment; power of chief justice to select acting justices.]

The court of appeals shall consist of not less than seven judges who shall be chosen as provided in this constitution, whose qualifications shall be the same as those of justices of the supreme court and whose compensation shall be as provided by law. The increased qualifications provided by this 1988 amendment shall not apply to court of appeals judges serving at the time this amendment passes or elected at the general election in 1988.

Three judges of the court of appeals shall constitute a quorum for the transaction of business, and a majority of those participating must concur in any judgment of the court.

When necessary, the chief justice of the supreme court may designate any justice of the supreme court, or any district judge of the state, to act as a judge of the court of appeals, and the chief justice may designate any judge of the court of appeals to hold court in any district, or to act as a justice of the supreme court. (As added September 28, 1965; as amended November 8, 1988.)

ANNOTATIONS

Cross references. — For qualifications for supreme court justices, see N.M. Const., art. VI, § 8.

For statutory provisions relating to court of appeals, see 34-5-1 NMSA 1978 et seq.

The 1965 amendment, which was proposed by S.J.R. No. 5, § 3 (Laws 1965), and adopted at a special election held on September 28, 1965, by a vote of 31,582 for and 18,477 against, added this section as new to article VI.

The 1988 amendment, which was proposed by S.J.R. No. 1, § 1 (Laws 1988) and adopted at the general election held on November 8, 1988, by a vote of 203,509 for and 159,957 against, substituted the present first paragraph for the former first paragraph, which reads as set out in the Original Pamphlet, deleted the former second paragraph which read "A vacancy in the office of judge of the court of appeals shall be filled by appointment of the governor for a period provided by law", and substituted "the chief justice may designate" for "he may designate" in the last paragraph.

Compiler's notes. — An amendment to this section, proposed by S.J.R. No. 2 (Laws 1981), which would have substituted "consists" for "shall consist" near the beginning of the first sentence of the first paragraph, deleted "and election for terms of eight years" near the middle of the first paragraph, deleted "except that an initial term may be prescribed by law for less than eight years to provide maximum continuity" at the end of the first paragraph, deleted the second paragraph, deleted "shall" preceding "constitute" near the beginning of the third paragraph and deleted "of the state" following "any district judge" near the middle of the last paragraph, was submitted to the people at the general election held on November 2, 1982. It was defeated by a vote of 117,601 for and 139,643 against.

Qualifications. — The New Mexico Constitution provides that judges of the court of appeals must satisfy the same qualifications as justices of the supreme court. Hannett v. Jones, 104 N.M. 392, 722 P.2d 643 (1986).

Compensation. — The salaries of the judges of constitutionally established courts are not subject to the constitutional prohibition against an increase in compensation during the term for which they were elected. 1979 Op. Att'y Gen. No. 79-27.

Opinion not binding where two judges concurred only in result. — The discussion and rationale underlying an opinion do not constitute binding precedent within the meaning of the state constitution where two judges concurred only in the result. Chadwick v. Public Serv. Co., 105 N.M. 272, 731 P.2d 968 (Ct. App. 1986).

Assignment of cases to advisory committees. — An experimental plan pursuant to which cases would be assigned by the court of appeals to advisory committees of experienced attorneys was not an unconstitutional delegation of judicial power, where

the judges reviewed the records and briefs and decided the cases. Thompson v. Ruidoso-Sunland, Inc., 105 N.M. 487, 734 P.2d 267 (Ct. App. 1987).

Law reviews. — For student symposium, "Constitutional Revision - Judicial Removal and Discipline - The California Commission Plan for New Mexico?" see 9 Nat. Resources J. 446 (1969).

For article, "History of the New Mexico Court of Appeals" see 22 N.M.L. Rev. 595 (1992).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 20 Am. Jur. 2d Courts § 38; 46 Am. Jur. 2d Judges §§ 6 et seq., 14 et seq., 54, 239, 248 et seq.

Governor's calling of special or extra term of court, 16 A.L.R. 1306.

Party's right, in course of litigation, to challenge title or authority of substitute judge, 144 A.L.R. 1214.

Power to appoint public officer for term commencing at or after expiration of term of appointing officer or body, 75 A.L.R.2d 1277.

Power of successor or substituted judge, in civil case, to render decision or enter judgment on testimony heard by predecessor, 84 A.L.R.5th 399.

48A C.J.S. Judges §§ 8, 12, 13, 15 to 18, 69, 70, 75 to 81, 161 to 185.

Sec. 29. [Court of appeals; jurisdiction; issuance of writs.]

The court of appeals shall have no original jurisdiction. It may be authorized by law to review directly decisions of administrative agencies of the state, and it may be authorized by rules of the supreme court to issue all writs necessary or appropriate in aid of its appellate jurisdiction. In all other cases, it shall exercise appellate jurisdiction as may be provided by law. (As added September 28, 1965.)

ANNOTATIONS

Cross references. — As to appellate jurisdiction of court of appeals, see 34-5-8 NMSA 1978.

The 1965 amendment, which was proposed by S.J.R. No. 5, § 4 (Laws 1965) and adopted at a special election held on September 28, 1965, by a vote of 31,582 for and 18,477 against, added this section as new to article VI.

Scope of limited jurisdiction. — Jurisdiction of the court of appeals is limited to appeals from final judgments, interlocutory orders which practically dispose of the merits of an action, and final orders after entry of judgment which affect substantial rights.

Thornton v. Gamble, 101 N.M. 764, 688 P.2d 1268 (Ct. App. 1984); Mitchell v. Mitchell, 104 N.M. 205, 719 P.2d 432 (Ct. App. 1986).

Court of appeals did not have original jurisdiction defendant sought to invoke, to treat his evidentiary claim, asserted as an original motion for post-conviction relief in the appellate court, or in the alternative as an original petition for the writ of habeas corpus. State v. Gonzales, 79 N.M. 414, 444 P.2d 599 (Ct. App. 1968).

Agency "decision" includes regulations. — Word "decision" in this section embraced regulations adopted by a joint municipal-county board created in accordance with the provision of the Air Quality Control Act (74-2-1 NMSA 1978 et seq.), and filed with the supreme court law librarian, and court of appeals could review such regulations under former 12-14-7, 1953 Comp., without violation of this section. Wylie Bros. Contracting Co. v. Albuquerque-Bernalillo County Air Quality Control Bd., 80 N.M. 633, 459 P.2d 159 (Ct. App. 1969).

Pre-enforcement facial challenge of regulations unauthorized. — The court of appeals was without authority to review the constitutionality of the New Mexico Mining Act (69-36-1 to 69-36-20 NMSA 1978) in an appeal challenging regulations on their face. Old Abe Co. v. New Mexico Mining Comm'n, 121 N.M. 83, 908 P.2d 776 (Ct. App. 1995).

Review of tax decision. — Court of appeals was authorized to review decisions of the commissioner of revenue (now director of the revenue division of the taxation and revenue department) directly. Union County Feedlot, Inc. v. Vigil, 79 N.M. 684, 448 P.2d 485 (Ct. App. 1968).

Writ of prohibition not in aid of appellate jurisdiction. — Writ of prohibition against district court judge in workmen's compensation case could not be issued by court of appeals, as the writ would not aid that court's appellate jurisdiction. State ex rel. Townsend v. Court of Appeals, 78 N.M. 71, 428 P.2d 473 (1967).

Appeal of criminal contempt conviction. — Defendant had the right to appeal his conviction for criminal contempt, and court of appeals had jurisdiction over such appeal. State v. Watson, 82 N.M. 769, 487 P.2d 197 (Ct. App. 1971).

Court of appeals has no authority to modify contempt sentence. State v. Sanchez, 89 N.M. 673, 556 P.2d 359 (Ct. App. 1976).

Court of appeals has jurisdiction to entertain a defendant's appeal of probation revocation. State v. Castillo, 94 N.M. 352, 610 P.2d 756 (Ct. App. 1980).

When court has jurisdiction over mandamus proceeding. — Where a mandamus proceeding is consolidated with a district court appeal from a decision of the personnel board, the court of appeals has jurisdiction over the mandamus parties. State ex rel. New Mexico State Hwy. Dep't v. Silva, 98 N.M. 549, 650 P.2d 833 (Ct. App. 1982).

Authority to remand for new sentence. — Appellate courts have the authority to remand a case for entry of judgment on the lesser included offense and resentencing rather than retrial when the evidence does not support the offense for which the defendant was convicted but does support a lesser included offense. The rationale for this holding is that there is no need to retry a defendant for a lesser included offense when the elements of a lesser offense necessarily were proven to a jury beyond a reasonable doubt in the course of convicting the defendant of the greater offense. State v. Haynie, 116 N.M. 746, 867 P.2d 416 (1994).

Court is not bound by trial court interpretations of statutes and rules; rather it reviews them to determine whether they are legally correct. State v. Herrera, 92 N.M. 7, 582 P.2d 384 (Ct. App.), cert. denied, 91 N.M. 751, 580 P.2d 972 (1978).

Court of appeals is to follow precedents of supreme court; it is not free to abolish instructions approved by the supreme court although in appropriate situations it may consider whether the supreme court precedent is applicable. State v. Scott, 90 N.M. 256, 561 P.2d 1349 (Ct. App. 1977), overruled on other grounds State v. Reynolds, 98 N.M. 527, 650 P.2d 811 (1982).

Jury instruction. — The court of appeals has no authority to review a claim that UJI Crim. 2.10 (see now UJI 14-210) is erroneous. State v. King, 90 N.M. 377, 563 P.2d 1170 (Ct. App. 1977), overruled on other grounds State v. Reynolds, 98 N.M. 527, 650 P.2d 811 (1982).

The court of appeals is not precluded from considering error in jury instructions, but is precluded only from overruling those instructions that have been considered by the supreme court in actual cases and controversies that are controlling precedent. State v. Wilson, 116 N.M. 793, 867 P.2d 1175 (1994).

Effect of grand jury report. — Since no parties are involved, and no facts are found nor issues of law decided, the report of a grand jury is not a judgment. Therefore, that report does not constitute a final, appealable order. McKenzie v. Fifth Judicial Dist. Court, 107 N.M. 778, 765 P.2d 194 (Ct. App. 1988).

Law reviews. — For article, "Mandamus in New Mexico," see 4 N.M. L. Rev. 155 (1974).

For annual survey of New Mexico law relating to civil procedure, see 13 N.M.L. Rev. 251 (1983).

For article, "History of the New Mexico Court of Appeals" see 22 N.M.L. Rev. 595 (1992).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 20 Am. Jur. 2d Courts § 54 et seq.

New trial, grant of, by appellate court because of inability to perfect record for appeal, 13 A.L.R. 107, 16 A.L.R. 1158, 107 A.L.R. 603.

21 C.J.S. Courts § 9 et seq.; 72 C.J.S. Process §§ 2 to 10.

Sec. 30. [Fees collected by judiciary paid to state treasury.]

All fees collected by the judicial department shall be paid into the state treasury as may be provided by law and no justice, judge or magistrate of any court shall retain any fees as compensation or otherwise. (As added November 8, 1966.)

ANNOTATIONS

The 1966 amendment, which was proposed by H.J.R. No. 34, § 6 (Laws 1965), and adopted at the general election held on November 8, 1966, by a vote of 81,055 for and 26,317 against, added this section as new to article VI.

Penalty assessments for violations of county traffic ordinances are also public money for the purpose of this section. Board of Comm'rs v. Greacen, 2000-NMSC-016, 129 N.M. 177, 3 P.3d 672.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 48A C.J.S. Judges §§ 82, 83.

Sec. 31. [Justices of the peace abolished.]

Justices of the peace shall be abolished not later than five years from the effective date of this amendment and may, within this period, be abolished by law, and magistrate courts vested with appropriate jurisdiction. Until so abolished, justices of the peace shall be continued under existing laws. (As added November 8, 1966.)

ANNOTATIONS

Cross references. — As to establishment of magistrate courts, see N.M. Const., art. VI, § 26 and 35-1-1 NMSA 1978.

For abolishment of office of justice of the peace, and transfer of powers and duties thereof to the magistrate courts, see 35-1-38 NMSA 1978.

The 1966 amendment, which was proposed by H.J.R. No. 34, § 7 (Laws 1965) and adopted at the general election held on November 8, 1966, by a vote of 81,055 for and 26,317 against, added this section as new to article VI.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 46 Am. Jur. 2d Judges § 5.

48A C.J.S. Judges § 9.

Sec. 32. [Judicial standards commission.] (1997)

There is created the "judicial standards commission", consisting of two justices or judges, one magistrate and two lawyers selected as may be provided by law to serve for terms of four years, and six citizens, none of whom is a justice, judge or magistrate of any court or licensed to practice law in this state, who shall be appointed by the governor for five-year staggered terms as may be provided by law. If a position on the commission becomes vacant for any reason, the successor shall be selected by the original appointing authority in the same manner as the original appointment was made and shall serve for the remainder of the term vacated. No act of the commission is valid unless concurred in by a majority of its members. The commission shall select one of the members appointed by the governor to serve as chairman.

In accordance with this section, any justice, judge or magistrate of any court may be disciplined or removed for willful misconduct in office, persistent failure or inability to perform a judge's duties, or habitual intemperance, or he may be retired for disability seriously interfering with the performance of his duties that is, or is likely to become, of a permanent character. The commission may, after investigation it deems necessary, order a hearing to be held before it concerning the discipline, removal or retirement of a justice, judge or magistrate, or the commission may appoint three masters who are justices or judges of courts of record to hear and take evidence in the matter and to report their findings to the commission. After hearing or after considering the record and the findings and report of the masters, if the commission finds good cause, it shall recommend to the supreme court the discipline, removal or retirement of the justice, judge or magistrate.

The supreme court shall review the record of the proceedings on the law and facts and may permit the introduction of additional evidence, and it shall order the discipline, removal or retirement as it finds just and proper or wholly reject the recommendation. Upon an order for his retirement, any justice, judge or magistrate participating in a statutory retirement program shall be retired with the same rights as if he had retired pursuant to the retirement program. Upon an order for removal, the justice, judge or magistrate shall thereby be removed from office, and his salary shall cease from the date of the order.

All papers filed with the commission or its masters, and proceedings before the commission or its masters, are confidential. The filing of papers and giving of testimony before the commission or its masters is privileged in any action for defamation, except that the record filed by the commission in the supreme court continues privileged but, upon its filing, loses its confidential character, and a writing which was privileged prior to its filing with the commission or its masters does not lose its privilege by the filing. The commission shall promulgate regulations establishing procedures for hearings under this section. No justice or judge who is a member of the commission or supreme court shall participate in any proceeding involving his own discipline, removal or retirement.

This section is alternative to, and cumulative with, the removal of justices, judges and magistrates by impeachment and the original superintending control of the supreme court. (As added November 7, 1967; as amended November 7, 1978 and November 3, 1998.)

ANNOTATIONS

Cross references. — As to power of impeachment, see N.M. Const., art. IV, §§ 35, 36.

As to supreme court's superintending control over inferior courts, see N.M. Const., Art. VI, § 3.

For statutory provisions relating to the judicial standards commission, see 34-10-1 NMSA 1978 et seq.

For the rules of the judicial nominating commission, oath, open meetings resolution, and applicant questionnaire, see the addenda to this article.

The 1967 amendment, which was proposed by H.J.R. No. 2 § 1 (Laws 1967) and adopted at the special election held on November 7, 1967, with a vote of 39,806 for and 11,646 against, added this section as new to article VI.

The 1978 amendment, which was proposed by S.J.R. No. 3 (Laws 1977) and adopted at the general election held on November 7, 1978, by a vote of 142,468 for and 53,660 against, substituted the present first sentence of the second paragraph for "In accordance with this section, any justice, judge or magistrate of any court may be disciplined or removed for willful misconduct in office, or willful and persistent failure to perform his duties or habitual intemperance, or he may be retired for disability seriously interfering with the performance of his duties which is, or is likely to become, of a permanent character."

The 1998 amendment, which was proposed by S.J.R. No. 5, § 2 (Laws 1997) and adopted at the general election held November 3, 1998 by a vote of 213,354 for and 199,143 against, inserted "one magistrate" near the beginning of the first paragraph.

No conflict with Article V, Section 5. — This section addresses the power to fill a vacancy. N.M. Const., art. V, § 5, addresses the power to remove officers. The two powers are not mutually exclusive, and one does not negate the other. State ex rel. New Mexico Judicial Standards Comm'n v. Espinosa, 2003-NMSC-017, 134 N.M. 59, 73 P.3d 197.

Staggered terms. — The use of staggered terms is not sufficient to limit the governor's removal power under N.M. Const., art. V, § 5. While policies underlying staggered terms are important, such policies cannot override the governor's express removal authority. State ex rel. New Mexico Judicial Standards Comm'n v. Espinosa, 2003-NMSC-017, 134 N.M. 59, 73 P.3d 197.

Removal of members. — Neither this section nor its implementing statutes provides a mechanism for the removal of commission members. State ex rel. New Mexico Judicial Standards Comm'n v. Espinosa, 2003-NMSC-017, 134 N.M. 59, 73 P.3d 197.

Municipal judge is not subject to recall election under either state law or the municipal charter; the superintending control of the supreme court over inferior courts affords a present avenue for removal of any municipal judge, should the situation so warrant. 1973 Op. Att'y Gen. No. 73-3.

Since this section creates a judicial standards commission and explicitly provides grounds for and general procedures to be followed in removing judges from office, no legislatively created means of removing judicial officers is contemplated; therefore, 3-14-16 NMSA 1978, providing for recall of elective officers in commission-manager municipalities, is contrary to this section insofar as it pertains to removal of municipal judges. Cooper v. Albuquerque City Comm'n, 85 N.M. 786, 518 P.2d 275 (1974).

Supreme court makes its own independent decision as to the removal of a judge on the merits. In re Martinez, 99 N.M. 198, 656 P.2d 861 (1982).

The Canons of Judicial Ethics do not control the determination of the issue of willful judicial misconduct under the constitution. They only furnish some proof of what constitutes appropriate judicial conduct. In re Martinez, 99 N.M. 198, 656 P.2d 861 (1982).

Standard of proof to be applied in cases of judicial misconduct is clear and convincing evidence. In re Martinez, 99 N.M. 198, 656 P.2d 861 (1982).

Discipline for misconduct during prior, different term of office. — Previous acts of misconduct on the part of a judge or justice, committed in his official capacity as a judge or justice during a prior term of judicial office, follow the judge to any subsequent judicial office. Those acts of misconduct may be the subject of disciplinary proceedings before the judicial standards commission during a present and different term of judicial office held by that judge or justice. In re Romero, 100 N.M. 180, 668 P.2d 296 (1983).

Actions held to constitute willful misconduct. — A judge is without authority to direct the juvenile probation office to refrain from referring juvenile cases to the district attorney without the judge's prior written consent, or to relieve the district attorney as children's court attorney and to appoint private attorneys to act and to be compensated out of the district attorney's budget, and to do so constitutes bad faith, malicious abuse of judicial power and willful misconduct in office. In re Martinez, 99 N.M. 198, 656 P.2d 861 (1982).

It is willful misconduct in office for a judge knowingly to countermand orders of his presiding judge for a prisoner to be immediately transported to the state penitentiary. In re Martinez, 99 N.M. 198, 656 P.2d 861 (1982).

Failure to correct attorneys' mistakes not unjudicial conduct. — Mistakes made by attorneys in making applications for temporary restraining orders which are not noticed or corrected by judges do not automatically constitute unjudicial conduct. In re Martinez, 99 N.M. 198, 656 P.2d 861 (1982).

Attorney may act as temporary presiding officer at hearing. — Proceedings before the judicial standards commission are not illegal because an attorney acts as temporary presiding officer of a hearing on specific charges of misconduct where the chairman of the commission is a lay person. In re Martinez, 99 N.M. 198, 656 P.2d 861 (1982).

Law reviews. — For student symposium, "Constitutional Revision - Judicial Removal and Discipline - The California Commission Plan for New Mexico?" see 9 Nat. Resources J. 446 (1969).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 46 Am. Jur. 2d Judges § 17 et seq.

Confidentiality of proceedings or reports of judicial inquiry board or commission, 5 A.L.R.4th 730.

48A C.J.S. Judges §§ 35-52.

Sec. 33. [Retention or rejection at general election.] (1994)

A. Each justice of the supreme court, judge of the court of appeals, district judge or metropolitan court judge shall have been elected to that position in a partisan election prior to being eligible for a nonpartisan retention election. Thereafter, each such justice or judge shall be subject to retention or rejection on a nonpartisan ballot. Retention of the judicial office shall require at least fifty-seven percent of the vote cast on the question of retention or rejection.

B. Each justice of the supreme court or judge of the court of appeals shall be subject to retention or rejection in like manner at the general election every eighth year.

C. Each district judge shall be subject to retention or rejection in like manner at the general election every sixth year.

D. Each metropolitan court judge shall be subject to retention or rejection in like manner at the general election every fourth year.

E. Every justice of the supreme court, judge of the court of appeals, district judge or metropolitan court judge holding office on January 1 next following the date of the election at which this amendment is adopted shall be deemed to have fulfilled the requirements of Subsection A of this section and the justice or judge shall be eligible for retention or rejection by the electorate at the general election next preceding the end of the term of which the justice or judge was last elected prior to the adoption of this amendment. (As added November 8, 1988, and as amended November 8, 1994.)

ANNOTATIONS

The 1988 amendment to Article VI, which was proposed by S.J.R. No. 1, § 1 (Laws 1988) and adopted at the general election held on November 8, 1988, by a vote of 203,509 for and 159,957 against, added this section.

The 1994 amendment, proposed by S.J.R. No. 1 (Laws 1994) and adopted at the general election held on November 8, 1994 by a vote of 222,910 for and 166,639 against, added the last sentence of Subsection A requiring 57 percent of the vote cast for judicial retention.

Compiler's notes. — An amendment to Article VI, proposed by S.J.R. No. 2 (Laws 1981), which would have added a new Section 33 relating to elections for the retention or rejection of supreme court justices, judges of the court of appeals and district judges, was submitted to the people at the general election held on November 2, 1982. It was defeated by a vote of 117,601 for and 139,643 against.

Judicial officers holding office on January 1, 1995, but appointed to office after adoption of the 1994 amendment to this section, are deemed to have been elected to office in a partisan election, and are eligible for retention or rejection by the voters at the end of the term for which elected. 1990 Op. Att'y Gen. No. 95-03.

Simultaneous declarations of candidacy. — A district judge may not file a declaration of candidacy for retention of office and, at the same time, file a declaration of candidacy in a primary election for a statewide judicial office. 1990 Op. Att'y Gen. No. 90-04.

Law reviews. — For article, "Judicial Selection in New Mexico: A Hybrid of Commission Nomination and Partisan Election," see 30 N.M.L. Rev. 177 (2000).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 46 Am. Jur. 2d Judges § 8 et seq.

48A C.J.S. Judges §§ 12 to 14, 21 to 24.

Sec. 34. [Vacancies in office; date for filing declaration of candidacy.] (1994)

The office of any justice or judge subject to the provisions of Section 33 of Article 6 of this constitution becomes vacant on January 1 immediately following the general election at which the justice or judge is rejected by more than forty-three percent of those voting on the question of his retention or rejection or on January 1 immediately following the date he fails to file a declaration of candidacy for the retention of his office in the general election at which the justice or judge would be subject to retention or rejection by the electorate. Otherwise, the office becomes vacant upon the date of the death, resignation or removal by impeachment of the justice or judge. The date for filing a declaration of candidacy for retention of office shall be the same as that for filing a

declaration of candidacy in a primary election. (As added November 8, 1988, and as amended November 8, 1994.)

ANNOTATIONS

The 1988 amendment to Article VI, which was proposed by S.J.R. No. 1, § 1 (Laws 1988) and adopted at the general election held on November 8, 1988, by a vote of 203,509 for and 159,957 against, added this section.

The 1994 amendment, proposed by S.J.R. No. 1 (Laws 1994) and adopted at the general election held on November 8, 1994 by a vote of 222,910 for and 166,639 against, substituted "more than forty-three percent of those voting" for "a majority of those voting" near the beginning of the section.

Compiler's notes. — An amendment to Article VI, proposed by S.J.R. No. 2 (Laws 1981), which would have added a new Section 34 relating to the duties of the judicial standards commission relative to retention elections, was submitted to the people at the general election held on November 2, 1982. It was defeated by a vote of 117,601 for and 139,643 against.

Applicability to removal under Art. VI, § 32. — This section refers to removal by impeachment or by those methods that under the constitutional scheme are analogous; it does not limit the Supreme Court's authority to act upon the Judicial Standards Commission's petition for removal of a district court judge. In re Castellano, 119 N.M. 140, 889 P.2d 175 (1995).

Simultaneous declarations of candidacy. — A district judge may not file a declaration of candidacy for retention of office and, at the same time, file a declaration of candidacy in a primary election for a statewide judicial office. 1990 Op. Att'y Gen. No. 90-04.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 46 Am. Jur. 2d Judges § 237 et seq.

48A C.J.S. Judges §§ 30 to 34.

Sec. 35. [Appellate judges nominating commission.]

There is created the "appellate judges nominating commission", consisting of: the chief justice of the supreme court or the chief justice's designee from the supreme court; two judges of the court of appeals appointed by the chief judge of the court of appeals; the governor, the speaker of the house of representatives and the president pro tempore of the senate shall each appoint two persons, one of whom shall be an attorney licensed to practice law in this state and the other who shall be a citizen who is not licensed to practice law in any state; the dean of the university of New Mexico school of law, who shall serve as chairman of the commission and shall vote only in the event of a tie vote; four members of the state bar of New Mexico, representing civil and criminal prosecution and defense, appointed by the president of the state bar and the

judges on this committee. The appointments shall be made in such manner that each of the two largest major political parties, as defined by the Election Code, shall be equally represented on the commission. If necessary, the president of the state bar and the judges on this committee shall make the minimum number of additional appointments of members of the state bar as is necessary to make each of the two largest major political parties be equally represented on the commission. These additional members of the state bar shall be appointed such that the diverse interests of the state bar are represented. The dean of the university of New Mexico school of law shall be the final arbiter of whether such diverse interests are represented. Members of the commission shall be appointed for terms as may be provided by law. If a position on the commission becomes vacant for any reason, the successor shall be selected by the original appointing authority in the same manner as the original appointment was made and shall serve for the remainder of the term vacated.

The commission shall actively solicit, accept and evaluate applications from qualified lawyers for the position of justice of the supreme court or judge of the court of appeals and may require an applicant to submit any information it deems relevant to the consideration of his application.

Upon the occurrence of an actual vacancy in the office of justice of the supreme court or judge of the court of appeals, the commission shall meet within thirty days and within that period submit to the governor the names of persons qualified for the judicial office and recommended for appointment to that office by a majority of the commission.

Immediately after receiving the commission nominations, the governor may make one request of the commission for submission of additional names, and the commission shall promptly submit such additional names if a majority of the commission finds that additional persons would be qualified and recommends those persons for appointment to the judicial office. The governor shall fill a vacancy or appoint a successor to fill an impending vacancy in the office of justice of the supreme court or judge of the court of appeals within thirty days after receiving final nominations from the commission by appointing one of the persons nominated by the commission for appointment to that office. If the governor fails to make the appointment within that period or from those nominations, the appointment shall be made from those nominations by the chief justice or the acting chief justice of the supreme court. Any person appointed shall serve until the next general election. That person's successor shall be chosen at such election and shall hold the office until the expiration of the original term. (As added November 8, 1988.)

ANNOTATIONS

Cross references. — For the rules of the judicial nominating commission, oath, open meetings resolution, and applicant questionnaire, see the addenda to this article.

The 1988 amendment to Article VI, which was proposed by S.J.R. No. 1, § 1 (Laws 1988) and adopted at the general election held on November 8, 1988, by a vote of 203,509 for and 159,957 against, added this section.

Compiler's notes. — An amendment to Article VI, proposed by S.J.R. No. 2 (Laws 1981), which would have added a new Section 35 relating to the filling of judicial vacancies, was submitted to the people at the general election held on November 2, 1982. It was defeated by a vote of 117,601 for and 139,643 against.

Law reviews. — For article, "Judicial Selection in New Mexico: A Hybrid of Commission Nomination and Partisan Election," see 30 N.M.L. Rev. 177 (2000).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 46 Am. Jur. 2d Judges § 237 et seq.

48A C.J.S. Judges §§ 32 to 34.

Sec. 36. [District court judges nominating committee.]

There is created the "district court judges nominating committee" for each judicial district. Each and every provision of Section 35 of Article 6 of this constitution shall apply to the "district judges nominating committee" except that: the chief judge of the district court of that judicial district or the chief judge's designee from that district court shall sit on the committee; there shall be only one appointment from the court of appeals; and the citizen members and state bar members shall be persons who reside in that judicial district. (As added November 8, 1988.)

ANNOTATIONS

Cross references. — For the rules of the judicial nominating commission, oath, open meetings resolution, and applicant questionnaire, see the addenda to this article.

The 1988 amendment to Article VI, which was proposed by S.J.R. No. 1, § 1 (Laws 1988) and adopted at the general election held on November 8, 1988, by a vote of 203,509 for and 159,957 against, added this section.

Compiler's notes. — An amendment to Article 6, proposed by S.J.R. No. 2 (Laws 1981), which would have added a new Section 36 relating to the determination of judicial vacancies, was submitted to the people at the general election held on November 2, 1982. It was defeated by a vote of 117,601 for and 139,643 against.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 46 Am. Jur. 2d Judges § 237 et seq.

48A C.J.S. Judges §§ 32 to 34.

Sec. 37. [Metropolitan court judges nominating committee.]

There is created the "metropolitan court judges nominating committee" for each metropolitan court. Each and every provision of Section 35 of Article 6 of this constitution shall apply to the metropolitan court judicial nominating committee except that: no judge of the court of appeals shall sit on the committee; the chief judge of the district court of the judicial district in which the metropolitan court is located or the chief judge's designee from that district court shall sit on the committee; the chief judge of that metropolitan court or the chief judge's designee from that metropolitan court shall sit on the committee only in the case of a vacancy in a metropolitan court; and the citizen members and state bar members shall be persons who reside in the judicial district in which that metropolitan court is located. (As added November 8, 1988.)

ANNOTATIONS

Cross references. — For the rules of the judicial nominating commission, oath, open meetings resolution, and applicant questionnaire, see the addenda to this article.

The 1988 amendment to Article VI, which was proposed by S.J.R. No. 1, § 1 (Laws 1988) and adopted at the general election held on November 8, 1988, by a vote of 203,509 for and 159,957 against, added this section.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 46 Am. Jur. 2d Judges § 237 et seq.

48A C.J.S. Judges §§ 32 to 34.

Sec. 38. [Chief judge of district and metropolitan court districts.] (1996)

Each judicial district and metropolitan court district shall have a chief judge who shall have the administrative responsibility for that judicial district or metropolitan court district. Each chief judge shall be selected by a majority of the district judges or, in the case of the metropolitan court, by a majority of the metropolitan court judges in that judicial district or metropolitan court district. In the event of a tie, the senior judge shall be the chief judge. (As added November 8, 1988.)

ANNOTATIONS

The 1988 amendment Article VI, which was proposed by S.J.R. No. 1, § 1 (Laws 1988) and adopted at the general election held on November 8, 1988, by a vote of 203,509 for and 159,957 against, added this section.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 46 Am. Jur. 2d Judges § 26.

48A C.J.S. Judges § 6.

ADDENDA JUDICIAL NOMINATING COMMISSION

Explanatory Note. (1996)

ADOPTION OF RULES GOVERNING

THE JUDICIAL NOMINATING COMMISSIONS

OF THE STATE OF NEW MEXICO

Leo M. Romero, Dean of the University of New Mexico School of Law and Chair of the judicial nominating commissions established under Article VI, Sections 35 to 37 of the New Mexico Constitution, submits to the New Mexico Compilation Commission for publication the following Rules Governing the Judicial Nominating Commissions. To date, the rules have been adopted by the Appellate Judges Nominating Commission and the District Court Judges Nominating Committees for the Second, Third, Seventh and Eleventh Judicial Districts. The rules will be effective for those commissions on July 1, 1996. The rules will be presented for adoption by the Nominating Committees for the remaining judicial districts and for the metropolitan courts when those committees next convene, and will be effective for those committees as of the date they are adopted.

Leo M. Romero, Chair
Judicial Nominating Commissions

Rules of the Judicial Nominating Commission. (1996)

JUDICIAL NOMINATING COMMISSION RULES

SECTION 1. Rules.

A. These Rules shall be known as the "Rules Governing Judicial Nominating Commissions," and are applicable to the appellate judges nominating commission, the district court judges nominating committees and the metropolitan court judges nominating committee established under Article VI of the New Mexico Constitution.

B. These Rules shall be effective beginning _____ . \

C. By a majority vote of those commissioners present, each judicial nominating commission or committee may adopt additional rules consistent with the Rules Governing Judicial Nominating Commissions, Article VI of the New Mexico Constitution and state law. \

SECTION 2. Role of the Chair.

A. Upon the occurrence of a judicial vacancy or an upcoming judicial vacancy, it is the responsibility of the chair to announce publicly the existence of the vacancy, the application and nomination process and the deadline for applications.

B. The chair shall provide notice of the vacancy to the persons charged by the constitution with the duty of appointing commissioners and shall coordinate the appointment of commissioners in accordance with the constitutional requirements.

C. The chair shall schedule the meetings of the commission and provide the media with notice of the date, time and place of the meetings.

D. The chair shall provide an application packet to applicants and persons nominated by others. For inclusion in the packet, the chair shall prepare a questionnaire requesting information relevant to the evaluation criteria specified in Section 4 of these Rules. Except as specified in the questionnaire, the questionnaire becomes public upon submission.

E. The chair, after the deadline for applications has passed, shall provide the media with the list of applicants who will be considered for the vacancy and date of interviews.

F. The chair shall prepare a proposed agenda and shall send the agenda and the applications to the commission members prior to the meeting.

G. The chair shall determine the order of interviews.

H. The chair shall send a list of the applicants to the Chief Disciplinary Counsel of the Disciplinary Board and request verification that none of the applicants has been the subject of a formal specification of charges.

I. The chair shall send a list of those applicants who are serving as judges in the state to the Executive Director of the Judicial Standards Commission and request verification that none of those applicants has been the subject of formal disciplinary charges.

J. Upon written request by a commissioner, the chair may seek additional information from the applicant or others relevant to the evaluation criteria specified in Section 4 of these Rules.

K. The chair shall preside over meetings of the commission.

L. The chair shall file the oaths of office executed by the commissioners with the Secretary of State.

SECTION 3. Role of the Commissioners.

A. Each commissioner shall take an oath of office prior to the start of a meeting of the commission.

B. Each commissioner shall disclose to the commission all current or past professional, family, business, and other special relationships with any of the applicants. These relationships shall not disqualify a commissioner from participating unless the commissioner feels that he/she cannot be impartial and cannot comply with his/her oath of office as to any applicant.

SECTION 4. Evaluative Criteria.

The commissioners shall evaluate the applicants on the basis of the constitutional requirements and the following evaluative criteria:

* physical and mental ability to perform the tasks required

* impartiality

* industry

* integrity

* professional skills

* community involvement

* social awareness

* collegiality

* writing ability

* decisiveness

* judicial temperament

* speaking ability

SECTION 5. Commission Meetings.

A. A majority of the commission shall constitute a quorum. Should the chair be absent, the commission will choose a chair from among its members.

B. Meetings shall be open to the public.

C. The public shall be notified of the meeting through notice in the media and in accordance with the commission's Open Meetings Act notice resolution.

D. The chair shall report on actions taken before the meeting on behalf of the commission pursuant to Section 2 of these Rules.

E. Members of the public shall be allotted time for comments or questions concerning the policies and procedures of the commission and also time for comments concerning individual applicants. Public comment by any individual shall be limited to 5 minutes.

SECTION 6. Interviews.

A. Interviews shall be conducted in the order determined by the chair, unless the commission determines that a change is warranted by the circumstances.

B. Unless the commission decides that a different time schedule would be appropriate, applicants shall be scheduled for interviews at intervals of at least 20 minutes and may choose to start with an opening statement of no more than 5 minutes.

C. Each commissioner shall be given the opportunity to question each applicant.

D. Each commissioner should ask each applicant about any information which the commissioner has learned or heard regarding the applicant and which the commissioner intends to raise in closed session.

E. The commission may, for good reason, hear any applicant on a confidential subject in closed session.

SECTION 7. Closed Session.

A. Following the interviews, the commission may go into closed session to discuss the applicants' qualifications and to evaluate them according to the evaluative criteria specified in Section 4 of these Rules. The discussion during closed session shall be confidential. The extent of confidentiality shall be determined by the commission, but, in any event, shall extend to prohibit express or implied attribution of comments or opinions to individual commissioners.

B. As part of the discussion of the applicants, straw votes, non-binding and by secret ballot, shall be taken to determine support for particular applicants.

C. Before each round of straw votes, the names of the applicants then under consideration shall be raised for discussion by the Commission.

D. Commissioners shall cast only one vote per applicant but may vote for as many of the applicants as he/she wishes.

E. When the commission, in closed session, after deliberations and at least two rounds of straw votes, believes that it is ready to vote in public session, the commission shall reconvene in open session for a final vote.

SECTION 8. Formal Vote.

A. The commission, using the evaluative criteria set forth in Section 4, shall determine which applicants are both qualified for judicial office and should be recommended to the Governor for appointment.

B. The formal vote shall take place in public session. The chair may vote only in the event of a tie. A vote of the majority of the commissioners present shall be required to recommend a nominee or nominees to the Governor.

C. In recognition of the fact that the New Mexico Constitution vests the Governor with the authority to appoint judges and that the commission does not select the judges, the commission should strive to recommend a list of two or more names for each position to the Governor.

SECTION 9. Recommendation to the Governor.

The chair shall send to the Governor, in alphabetical but unranked order, the names of the applicants recommended by the commission. The chair shall notify the media and all applicants of the commission's recommendation to the Governor.

SECTION 10. Forms.

A. Oath of Office

B. Open Meetings Act Resolution

C. Applicant Questionnaire

ANNOTATIONS

Cross references. — For the judicial standards commission, see N.M. Const., art. VI, § 32.

For the appellate judges nominating commission, see N.M. Const., art. VI, § 35.

For the district court judges nominating committee, see N.M. Const., art. VI, § 36.

For the metropolitan court judges nominating committee, see N.M. Const., art. VI, § 37.

Oath. (1996)

O A T H

I, _____ , do solemnly swear that I will support the Constitution of the United States and the constitution and laws of the State of New Mexico; and that I will faithfully and impartially discharge the duties of the office of Commissioner, _____ Judicial Nominating Commission, on which I am about to enter, to the best of my ability, SO HELP ME GOD.

Commissioner's Signature

Sworn and subscribed before me this _____ day of _____ , _____ .

Notary's Signature

Title

My commission expires

_____

(This oath, when executed, must be forwarded

immediately to the Secretary of State at Santa Fe, New

Mexico, accompanied by the filing fee of $1.00)

Open Meetings Resolution. (1996)

JUDICIAL NOMINATING COMMISSION

OPEN MEETINGS RESOLUTION

WHEREAS, the [Appellate] [_____ Judicial District Court] [Metropolitan Court] Judges Nominating Commission ("Commission") met at _____ on _____ , _____ , at _____ , a.m./p.m. as required per law; and

WHEREAS, Section 10-15-1(B) of the Open Meetings Act (NMSA 1978, Sections 10-15-1 to -4) states that, except as may be otherwise provided in the Constitution or

the provisions of the Open Meetings Act, all meetings of a quorum of members of any board, council, commission, administrative adjudicatory body or other policymaking body of any state or local public agency held for the purpose of formulating public policy, discussing public business or for the purpose of taking any action within the authority of or the delegated authority of such body, are declared to be public meetings open to the public at all times; and

WHEREAS, any meetings subject to the Open Meetings Act at which the discussion or adoption of any proposed resolution, rule, regulation or formal action occurs shall be held only after reasonable notice to the public; and

WHEREAS, Section 10-15-1(D) of the Open Meetings Act requires the Commission to determine annually what constitutes reasonable notice of its public meetings;

NOW, THEREFORE, BE IT RESOLVED by the Commission that:

1. All meetings shall be held on the date and at the time and place indicated on the meeting notice.

2. Notice of meetings at which applicant interviews will be conducted will be given at least ten (10) days in advance of the meeting date. Notice of other, nonemergency meetings shall be given at least three (3) days in advance of the meeting date. The notice for a meeting shall include an agenda or information on how the public may obtain a copy of the agenda. The agenda shall be available to the public at least twenty-four (24) hours before a meeting.

3. Emergency meetings will be called only under circumstances which demand immediate action to protect the health, safety and property of citizens or to protect the Commission from substantial financial loss. The Commission will avoid emergency meetings whenever possible. Emergency meetings may be called upon twenty-four (24) hours' notice, unless the threat of personal injury, property damage or financial loss require less notice. The notice for all emergency meetings shall include an agenda or information on how the public may obtain a copy of the agenda.

4. For purposes of the meetings described in paragraph 2 of this Resolution, notice of the date, time, place and agenda shall be placed in the Bar Bulletin and newspapers of general circulation in the state and posted at the Commission's office at _____ . The Secretary shall also mail copies of the written notice or provide telephone notice to those broadcast stations licensed by the Federal Communications Commission and newspapers of general circulation which have made a written request for notice of public meetings.

5. For purposes of emergency meetings described in paragraph 3 of this Resolution, notice of the date, time, place and agenda shall be posted at the Commission's office at _____ . Telephone notice shall also be provided to those broadcast

stations licensed by the Federal Communications Commission and newspapers of general circulation which have made a written request for notice of public meetings.

6. In addition to the information specified above, all notices shall include the following language:

If you are an individual with a disability who is in need of a reader, amplifier, qualified sign language interpreter, or any other form of auxiliary aid or service to attend or participate in the hearing or meeting, please contact _____ at _____ at least one week prior to the meeting or as soon as possible. Public documents, including the agenda and minutes, can be provided in various accessible formats. Please contact _____ at _____ if a summary or other type of accessible format is needed.

7. The Commission may close a meeting to the public only if the subject matter of such discussion or action is exempted from the open meeting requirement under Section 10-15-1(H) of the Open Meetings Act.

(a) If any meeting is closed during an open meeting, such closure shall be approved by a majority vote of a quorum of the Commission taken during the open meeting. The authority for the closure and the subjects to be discussed shall be stated with reasonable specificity in the motion for closure and the vote on closure of each individual member shall be recorded in the minutes. Only those subjects specified in the motion may be discussed in a closed meeting.

(b) If the decision to hold a closed meeting is made when the Commission is not in an open meeting, the closed meeting shall not be held until public notice, appropriate under the circumstances, stating the specific provision of law authorizing the closed meeting and the subjects to be discussed with reasonable specificity is given to the members and to the general public.

(c) Following completion of any closed meeting, the minutes shall state whether the matters discussed in the closed meeting were limited only to those specified in the motion or notice for closure.

(d) Except as provided in Section 10-15-1(H) of the Open Meetings Act, any action taken as a result of discussions in a closed meeting shall be made by vote of the Commission in an open public meeting.

Passed by the [Appellate] [_____ Judicial District Court] [Metropolitan Court] Judges Nominating Commission this day of _____ , _____ .

Applicant Questionnaire. (1996)

Name:

JUDICIAL SELECTION COMMISSION

FOR JUDICIAL VACANCY ON THE _____

DEADLINE FOR APPLICATIONS

_____ 5:00 p.m.

APPLICANT QUESTIONNAIRE

This questionnaire should be filed with the Chair of the Judicial Selection Commission no later than 5:00 p.m. _____ . Upon submission, it will be considered as a public document and will be open for inspection by anyone who requests to see it. If you wish to disclose any information that you think should be confidential, you may, in a separate letter, so indicate. Your application will then be treated as conditional pending the Commission's decision regarding your request for confidentiality. If the Commission denies your request, you will not be considered as a candidate and your application will be returned to you unless you elect to be considered a candidate with the information available on a non-confidential basis. Please type or use a word processor.

1. Full name:
2. Social Security Number:
3. County of residence:
4. (a) Office address:
   (b) Phone number:
5. (a) Home address:
   (b) Phone number:
6. (a) Birthplace:
   (b) If outside the United States, give the basis for your citizenship:
7. Birthdate:
8. (a) Marital status:
   (b) If divorced, list the name(s) of former spouses:
9. If married, give your spouse's full name, including maiden name where appropriate:
10. Spouse's occupation:
11. All places of residence, city and state, and approximate dates for last 10 years:
12. Schools attended, including preparatory, college and law, with dates and degrees:
13. Bar admissions and dates:
14. (a) Present employment:

(b) List your professional partner(s), associates or employer:

15. (a) Previous employment and dates:

(b) Past professional partners, associates or employers:

16. Public offices held and dates:

17. Activities in professional organizations, including offices held, for last 10 years:

18. Activities in civic organizations, including offices held, for last 10 years:

19. Avocational interests and hobbies:

20. Have you been addicted to the use of any substance within the last three years that would affect your ability to perform the essential duties of a judge? If so, please state the substance and what treatment received, if any:

21. Have you any mental or physical impairment that would affect your ability to perform the essential duties of a judge? If so, please specify:

22. If you have undergone treatment for an emotional or mental condition or illness that would affect your ability to perform the essential duties of a judge, please so indicate by a separate confidential letter and state the reason:

23. To your knowledge, has any formal charge of violation of any rules of professional conduct ever been filed against you in any jurisdiction? If so, when? How was it resolved?

24. Have you ever been convicted of any misdemeanor or felony other than a minor traffic offense?

25. Have you ever had a DWI or any criminal charge, other than a minor traffic offense, filed against you? If so, when? What was the outcome?

26. To your knowledge, is there any circumstance in your professional or personal life that creates a substantial question as to your qualifications to serve in the judicial position involved or which might interfere with your ability to so serve?

27. (a) List the names and addresses of five persons who are in a position to comment on your qualifications for a judicial position. Include one or more professional adversaries in your list of references, identifying them as such. (List only 5 - separate attachment entitled: References).

(b) Please have at least two, but not more than five, letters of recommendation from your references listed above submitted directly to The Chair of the Judicial Selection Commission.

28. If you have served as a judge, has any formal charge of a violation of the Code of Judicial Conduct been filed against you, and if so, how was it resolved?

29. Have you filed all federal, state and city tax returns that are now due or overdue, and are all tax payments up to date? If no, please explain.

30. Have you or any entity in which you have or had an interest ever filed a petition in bankruptcy, or has a petition in bankruptcy been filed against you? If so, please explain.

31. Are you presently an officer, director, partner, majority shareholder or holder of a substantial interest in any corporation, partnership or other business entity? If so, please list the entity and your relationship:

32. Have you ever been a party to a lawsuit other than a dissolution of marriage either as a plaintiff or as a defendant? If so, please supply details and give caption and cause number and date it was filed:

33. Please enclose one legal writing sample, such as a legal memorandum, opinion, or brief. If you had assistance from an associate, clerk or partner, indicate the extent of such assistance.

34. Attach a copy of a publication which you feel would be pertinent to the Commission's consideration of your qualifications:

35. Describe the nature of your law practice for at least the last six years, including the type of legal work, whether in trial or appellate courts, etc. Do you hold yourself out as a specialist in any areas? Do you limit your practice in any way?

36. (a) How extensive is your experience in the following areas:

Personal injury:

Commercial:

Domestic Relations:

Juvenile:

Criminal:

Appellate:

(b) How many cases have you tried to a jury? Of those trials, how many occurred within the last two years? Please indicate whether these jury trials involved criminal or civil cases.

(c) How many cases have you tried without a jury? How many of these trials occurred within the last two years? Please indicate whether these non-jury trials involved criminal or civil cases.

(d) How many appeals have you handled? Please indicate how many of these appeals occurred within the last two years.

37. Please explain your reasons for applying for a judicial position and what factors you believe indicate that you are well-suited for it.

38. Please submit a current resume.

Submission of this questionnaire expresses my willingness to accept judicial appointment to the _____ if tendered by the Governor.

_____ _____

Date Signature

Please transmit the completed and signed questionnaire along with attachments to the Judicial Selection Office, at the following address:

Chair, Judicial Selection Commission
The University of New Mexico
School of Law
1117 Stanford NE
Albuquerque, NM 87131-1431

Type Name: _____

Waiver of confidentiality - Professional Disciplinary Bodies and Judicial Disciplinary Bodies

The undersigned applicant hereby waives, until the judicial position applied for is filled, the benefits of any statute, rule or regulation prescribing confidentiality of records of any administrative or disciplinary committee of the State of New Mexico, including but not limited to the Disciplinary Board of the Supreme Court, the Board of Bar Examiners and the Judicial Standards Commission; and does authorize any of the above to furnish to the Judicial Nominating Commission, any such information, including documents, records, bar association files regarding charges or complaints filed against the undersigned, formal or informal, pending or closed, or any other pertinent data, and to permit the Judicial Nominating Commission or any of its members, agents or representatives to inspect and make copies of such documents, records, and other information. The undersigned does hereby release and discharge the Judicial Nominating Commission, its individual representatives, and any other person so furnishing information from any and all liability of every nature and kind arising out of the furnishing of information so provided concerning the applicant. The undersigned also expressly consents to the release of his/her name and this form to the public in the sole discretion of the Judicial Nominating Commission.

/s/
Date:

STATE OF NEW MEXICO)
) SS.:
COUNTY OF_____)

The undersigned, upon oath, deposes and states as follows: that he/she is the person whose signature appears hereinabove on the instrument entitled, "Waiver of Confidentiality - Professional Disciplinary Bodies and Judicial Disciplinary Bodies"; that he/she has read the same and is aware of the content thereof; that the same is true and correct according to the best knowledge and belief of the undersigned; and that he/she executed the same freely and voluntarily.

/s/
Date:

SWORN TO AND SUBSCRIBED before me on this _____ day of _____ , _____ .

_____
Notary Public

_____
My commission expires

ARTICLE VII
Elective Franchise

Section 1. [Qualifications of voters; absentee voting; school elections; registration.]

Every citizen of the United States, who is over the age of twenty-one years, and has resided in New Mexico twelve months, in the county ninety days, and in the precinct in which he offers to vote thirty days, next preceding the election, except idiots, insane persons and persons convicted of a felonious or infamous crime unless restored to political rights, shall be qualified to vote at all elections for public officers. The legislature may enact laws providing for absentee voting by qualified electors. All school elections shall be held at different times from other elections.

The legislature shall have the power to require the registration of the qualified electors as a requisite for voting, and shall regulate the manner, time and places of voting. The legislature shall enact such laws as will secure the secrecy of the ballot, the purity of elections and guard against the abuse of elective franchise. Not more than two members of the board of registration, and not more than two judges of election shall belong to the same political party at the time of their appointment. (As amended November 7, 1967.)

ANNOTATIONS

I. GENERAL CONSIDERATION.

Cross references. — For special restrictions on amendment of this section, see N.M. Const., art. VI, § 3 and art. XIX, § 1, as qualified by notes thereunder.

For Election Code, see Chapter 1 NMSA 1978.

For governor's power to restore political rights of persons convicted of a felony, see N.M. Const. Art. V, §6.

The 1967 amendment, which was proposed by H.J.R. No. 7, § 1 (Laws 1967) and adopted at the special election held on November 7, 1967, with a vote of 42,101 for and

9,757 against, in the first paragraph, deleted "male" before "citizen" and "Indians not taxed" before "shall be qualified to vote" in the first sentence; added the second sentence relating to absentee voting; and deleted a provision at the end of the paragraph relating to women's suffrage in school elections.

The supreme court issued a writ of mandamus requiring the canvassing board to certify the passage of the amendment. See State ex rel. Witt v. State Canvassing Bd., 78 N.M. 682, 437 P.2d 143 (1968).

Compiler's notes. — An amendment to this section proposed by H.J.R. No. 3, § 1 (Laws 1955), which was substantially the same as the 1967 amendment, was submitted to the people at a special election held on September 20, 1955. It failed to pass because it did not receive the necessary majority of each county.

An amendment to this section proposed by S.J.R. No. 2 (Laws 1957), which was substantially the same as the 1967 amendment, was submitted to the people at the general election held on November 4, 1958. It failed to pass because it did not receive the necessary majority of each county.

An amendment to this section proposed by S.J.R. No. 9, § 1 (Laws 1961), which was substantially the same as the 1967 amendment, was submitted to the people at the special election held on September 19, 1961. It was defeated because it did not receive the necessary majority of each county.

An amendment to this section proposed by H.J.R. No. 13, § 1 (Laws 1963), which was substantially the same as the 1967 amendment, was submitted to the people at the general election held on November 3, 1964. It failed to pass because it did not receive the necessary majority of each county.

Senate Joint Memorial 6 (Laws 1969) referred to the constitutional convention an amendment to this section to allow 18 year olds to vote. The constitution submitted by the convention was rejected by the voters on December 9, 1969.

House Joint Memorial 19 (Laws 1969) referred to the constitutional convention an amendment "to permit new residents of this state to vote in presidential elections even though their length of residency does not qualify them as electors of the state." The constitution submitted by the convention was rejected by the voters on December 9, 1969.

An amendment to the constitution proposed by H.J.R. No. 15, § 1 (Laws 1970), which would have repealed Article VII and adopted a new Article VII, was submitted to the people at the general election held on November 3, 1970. It was defeated by a vote of 67,299 for and 63,279 against, failing to meet the voting requirements of N.M. Const., art. XIX, § 1. The amendment would have read as follows:

"Section 1. Every citizen of the United States who has attained the age of twenty-one years, who has resided in New Mexico at least twelve months and in the county ninety days next preceding the election and who meets the requirements of local residence provided by law is a qualified elector and may vote in all elections except as may be otherwise provided in this constitution. Residence requirements for United States presidential elections may be provided by law.

"Section 2. The legislature shall provide for the registration of qualified electors as a requisite for voting. No person shall register or vote who has been convicted of a felony within the United States unless his civil rights have been legally restored. No person shall register or vote who has been judicially determined to be incompetent because of mental illness unless the incompetency has been legally removed.

"Section 3. The legislature shall provide for absentee voting. The place and method of voting and the administration of all elections shall be provided by law. The legislature shall enact laws to secure the secrecy of the ballot and purity and fairness of elections, and to guard against abuse of the elective franchise.

"Section 4. The candidate receiving the highest number of votes for any office shall be declared elected to that office. The joint candidates receiving the highest number of votes for the offices of governor and lieutenant governor shall be declared elected to those offices.

"Section 5. Election results shall be canvassed and certified, and election contests determined as provided by law.

"Section 6. General elections shall be held on the Tuesday after the first Monday in November of each even-numbered year.

"Section 7. Elections held in the political subdivisions of this state, excluding elections for county officers, shall be held at times other than general or other statewide elections.

"Section 8. Boards of registration and boards judging elections of county officers and general or other statewide elections shall include members of more than one political party and shall be constituted as provided by law.

"Section 9.

"A. Every citizen of the United States who is a legal resident of the state and is a registered qualified elector of the state, is qualified to hold any public office except as otherwise provided in this constitution.

"B. The legislature may provide by law for such qualifications and standards as may be necessary for holding an appointive position by any public officer or employee.

"C. The right to hold public office in New Mexico shall not be denied or abridged on account of sex, and whenever masculine gender is used in this constitution, in defining the qualifications for specific offices, it shall be construed to include the feminine gender.

"Section 10. The right of any citizen of the state to vote, hold office or sit upon juries shall never be restricted, abridged or impaired on account or religion, race, language or color, or inability to speak, read or write the English or Spanish languages except as may be otherwise provided in this constitution.

"Section 11. No person shall be deemed to have acquired or lost residence by reason of his presence or absence while employed in the service of the United States or of the state, nor while a student at any school."

Eight amendments to the constitution were proposed by the 1970 session of the legislature although the attorney general has stated that constitutional amendments may not be considered in even-numbered years. See 1965 Op. Att'y Gen. No. 65-212 and 1969 Op. Att'y Gen. No. 69-151.

An amendment to this section proposed by H.J.R. No. 1, § 1 (Laws 1971), which would have lowered the voting age to 18, was submitted to the people at a special election held on November 2, 1971. It was defeated by a vote of 47,767 for and 26,690 against.

Laws 1971, ch. 308, §§ 1 and 2 provided that all constitutional amendments proposed by the thirtieth legislature be voted upon at a special election on the first Tuesday of November, 1971, unless otherwise specified, and appropriated $171,000 for election expenses.

An amendment to this section proposed by H.J.R. No. 31, § 1 (Laws 1973), which would have lowered the voting age to 18, reduced the residency requirement to 30 days in the state, county and precinct and added a provision relating to absentee voting, was submitted to the people at the special election held on November 6, 1973. It was defeated by a vote of 25,198 for and 16,455 against.

An amendment proposed by S.J.R. No. 3 (Laws 1994), which would have substituted "the age of eighteen years and who meets residency requirements established by law, except persons found by a court to be incapacitated for this purpose" for the language beginning "the age of twenty-one" and ending "insane persons", was submitted to the people in the general election held on November 8, 1994. It was defeated by a vote of 172,111 for and 210,576 against.

An amendment proposed by S.J.R. No. 10 (Laws 2001), which would have set 18, rather than 21, as the age of eligibility to vote and would have removed language excluding idiots and insane persons from those qualified to vote, was submitted to the people at the general election held on November 5, 2002. It was defeated by a vote of 184,077 for and 242,921 against.

Amendment XXVI of U.S. constitution. — The twenty-sixth amendment to the United States constitution provides that the right of United States citizens, who are 18 years of age or older, to vote, shall not be denied or abridged by the United States or any state on account of age, and gives congress enforcement power.

Indian suffrage. — A three-judge federal district court sitting in Trujillo v. Garley, No. 1353 (D.N.M. Aug. 11, 1948) entered a declaratory judgment that Indians in New Mexico are entitled to vote, the provisions of the New Mexico constitution to the contrary notwithstanding. The case was not appealed.

Section was inapplicable to organization of junior college districts by petition and to elections held subsequent to such organization under 21-13-2, 21-13-4 and 21-13-6 NMSA 1978 (repealed); and provisions relating thereto were not invalid under this section. Daniels v. Watson, 75 N.M. 661, 410 P.2d 193 (1966).

The residence requirement for junior college board members under 21-13-8 NMSA 1978 does not violate either N.M. Const., art. VII, § 2 or this section. Daniels v. Watson, 75 N.M. 661, 410 P.2d 193 (1966).

Municipal indebtedness. — The 1964 amendment of N.M. Const., art. IX, § 12, relating to municipal indebtedness, neither amends, applies to nor affects the provisions of this section. 1964 Op. Att'y Gen. No. 64-142.

Local option elections. — Qualifications of electors at local option election would be the same as in other elections and as prescribed by this section. 1915-16 Op. Att'y Gen. 99.

Authority of legislature. — Delegation of authority to legislature in second paragraph of this section covers regulation of method and mechanics of voting by those persons who are otherwise qualified electors and appear in person; legislature cannot enlarge the right beyond that delineated in first paragraph. Chase v. Lujan, 48 N.M. 261, 149 P.2d 1003 (1944).

Ballots. — Under this section, it is competent for legislature to provide that ballots other than those printed by the respective county clerks shall not be cast, counted or canvassed in any election. State ex rel. Read v. Crist, 25 N.M. 175, 179 P. 629 (1919).

Secrecy of the ballot. — Laws 1915, § 1999 (now repealed) providing for an examination of ballots by the board of county commissioners did not violate the provision of this section relating to enactment of laws securing the secrecy of the ballot. Hyde v. Bryan, 24 N.M. 457, 174 P. 419 (1918).

Maintaining secrecy of ballot is privilege personal to voter. Kiehne v. Atwood, 93 N.M. 657, 604 P.2d 123 (1979).

Compromising secrecy of ballot is not to be tolerated except in cases of paramount public importance; the purity of elections is the public interest which sometimes outweighs the individual's right to have his ballot kept secret. Kiehne v. Atwood, 93 N.M. 657, 604 P.2d 123 (1979).

Illegal voter has no privilege against testifying as to the persons for whom he voted. Kiehne v. Atwood, 93 N.M. 657, 604 P.2d 123 (1979).

Signature list requirements. — The legislature is charged with the duty of enacting laws to accomplish the purity of elections and protect against abuses, and signature list requirements provided by 1-8-2, 1-8-3 NMSA 1978 are consistent with its authority and duty to do so; the state has a legitimate interest in trying to determine some degree of good faith on the part of the electors who sign nominating petitions, and in assuring at least a modicum of support for a political party and its nominees whose names are placed on the general election ballot. People's Constitutional Party v. Evans, 83 N.M. 303, 491 P.2d 520 (1971).

Officers of irrigation districts are not "public officers" within meaning of this section, and hence requirement of certain qualifications for electors in irrigation districts does not violate this section in its meaning. Davy v. McNeill, 31 N.M. 7, 240 P. 482 (1925).

Amendment accomplished. — The requirement of a two-thirds vote in each county being unconstitutional, and the demand of ratification by "at least three-fourths of the electors voting in the whole state" having been met when that percentage voting on the particular proposition favored it; the adoption of the constitutional amendment submitted as Amendment No. 7 at the election held on November 7, 1967 was accomplished; it should be certified as having been ratified. State ex rel. Witt v. State Canvassing Bd., 78 N.M. 682, 437 P.2d 143 (1968).

Amendment void. — Proposed 1919 constitutional amendment to permit absent voting (J.R. No. 12, Laws 1919) was void because it was never constitutionally adopted. Baca v. Ortiz, 40 N.M. 435, 61 P.2d 320 (1936).

Comparable provisions. — Idaho Const., art. VI, §§ 1 to 3.

Iowa Const., art. II, § 5; amendment 30.

Montana Const., art. IV, §§ 1, 2.

Utah Const., art. IV, §§ 2, 6, 8.

Wyoming Const., art. VI, §§ 1, 2, 5, 6.

Law reviews. — For article, "The Legislature," see 8 Nat. Resources J. 148 (1968).

For student symposium, "Constitutional Revision - Constitutional Amendment Process," see 9 Nat. Resources J. 422 (1969).

For student symposium, "Constitutional Revision - Indians in the New Mexico Constitution," see 9 Nat. Resources J. 466 (1969).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 25 Am. Jur. 2d Elections §§ 103 et seq., 150 et seq.

Nonregistration as affecting legality of votes cast by persons otherwise qualified, 101 A.L.R. 657.

Constitutionality, construction and application of constitutional or statutory provisions which make payment of poll tax condition of right to vote, 139 A.L.R. 561.

Right of persons living in area acquired by federal government to provide housing facilities to persons engaged in national defense activities, to register and vote at elections in state, 142 A.L.R. 430.

Governing law as to existence or character of offense for which one has been convicted in a federal court, or court of another state, as bearing upon disqualification to vote, hold office, practice profession, sit on jury or the like, 175 A.L.R. 784.

Validity of governmental requirement of oath of allegiance or loyalty, 18 A.L.R.2d 268.

Military establishments, state voting rights of residents of, 34 A.L.R.2d 1193.

What constitutes conviction within constitutional or statutory provision disfranchising one convicted of crime, 36 A.L.R.2d 1238.

Absentee voters' laws, validity of, 97 A.L.R.2d 218.

Absentee voters' laws, construction and effect of, 97 A.L.R.2d 257.

Residence or domicile of student or teacher for purpose of voting, 98 A.L.R.2d 488, 44 A.L.R.3d 797.

Conviction in federal court, or in court of another state or country, as disqualification to vote at election, 39 A.L.R.3d 303.

Right of married woman to use maiden surname, 67 A.L.R.3d 1266.

Voting rights of persons mentally incapacitated, 80 A.L.R.3d 1116.

29 C.J.S. Elections §§ 15 to 35.

II. QUALIFICATIONS.

Preemption of age requirement by federal constitution. — Adoption of the twenty-sixth amendment to the United States constitution has preempted state control of the field of voting age requirements; 18 to 20 year olds are eligible to vote in New Mexico elections notwithstanding this section. 1971 Op. Att'y Gen. No. 71-119.

The twenty-sixth amendment to the United States constitution has superseded the age provision of this section. 1971 Op. Att'y Gen. No. 71-117.

And federal law. — This section is in direct conflict with the federal Voting Rights Act insofar as it prescribes age of 21 as a voting qualification. 1970 Op. Att'y Gen. No. 70-69.

Federal Voting Rights Act amendments of 1970, extending the 18-year-old suffrage to primary elections at which "federal" office-candidates are chosen, apply to all primary or other elections for president, vice-president, United States congressmen and United States senators, 1971 Op. Att'y Gen. No. 71-4.

For discussion of meaning of "idiots" and "insane persons," see 1973 Op. Att'y Gen. No. 73-44.

Mental retardation. — Mentally retarded individuals who can understand the nature of their actions should be allowed to register and vote. 1974 Op. Att'y Gen. No. 74-35.

Care must be exercised not to disenfranchise persons who are merely enfeebled by old age or physical infirmities. 1973 Op. Att'y Gen. No. 73-44.

Bar of felons from voting constitutional. — It appears that there is no federal constitutional impediment to constitutional or statutory provisions barring convicted felons from voting. 1973 Op. Att'y Gen. No. 73-44.

"Conviction" occurs at trial level; it is the finding of guilt and has nothing to do with the sentence, and is not held in abeyance pending review. 1973 Op. Att'y Gen. No. 73-44.

Conviction in trial court was determinative, under this section, while said conviction was being appealed. State ex rel. Chavez v. Evans, 79 N.M. 578, 446 P.2d 445 (1968).

And not serving of sentence. — Person receiving a suspended sentence or placed on probation loses the same rights he would lose if he were committed to the penitentiary. 1959-60 Op. Att'y Gen. No. 59-176.

Conviction in federal court. — The conviction of a felony in a foreign jurisdiction, such as the federal court in this instance, should be considered by the courts of another state

as being the conviction of a felony within the constitutional prohibition. State ex rel. Chavez v. Evans, 79 N.M. 578, 446 P.2d 445, 39 A.L.R.3d 290 (1968).

Since under federal law offenses which may be punished by death or imprisonment for a term exceeding one year are felonies, and other offenses are misdemeanors, no felony under federal law occurred where the penalty is one-year imprisonment. 1957-58 Op. Att'y Gen. No. 58-55.

"Infamous crime". — A conviction in federal court of a violation of 18 U.S.C. § 242, relating to the deprivation of another individual's rights, privileges or immunities under color of law, probably does not constitute conviction of an "infamous crime" within the meaning of this section and N.M. Const., art. VII, § 2. 1957-58 Op. Att'y Gen. No. 58-55.

Restoration of "political rights" refers to powers of executive clemency granted to governor by N.M. Const., art. V, § 6. 1973 Op. Att'y Gen. No. 73-44.

A person seeking restoration of a franchise after a suspended sentence must go to the governor for relief, and likewise the procedure for restoration of the elective franchise to persons who have served all or part of their sentences in the penitentiary, by executive clemency, is set forth in 31-13-1 NMSA 1978. 1973 Op. Att'y Gen. No. 73-44.

Person convicted of infamous crime is not qualified to vote until restored to political rights, which requires action by the governor. 1915-16 Op. Att'y Gen. 50.

Restoration of rights by convicting state. — A person's conviction in a foreign state would constitute no block to his being legally qualified to vote in this state if his political rights had been restored in the foreign state. 1953-54 Op. Att'y Gen. No. 6013.

Effect of dismissal order. — Dismissal order under 31-20-9 NMSA 1978 is intended to restore the right to vote automatically. 1973 Op. Att'y Gen. No. 73-44.

Indians in New Mexico are entitled to register and vote, the provisions of the New Mexico statutes and constitution notwithstanding. 1961-62 Op. Att'y Gen. No. 62-47.

There is nothing in the constitution or the statutes which prohibits an Indian from voting in a proper election, provided he fulfills the statutory requirements required of any other voter. Montoya v. Bolack, 70 N.M. 196, 372 P.2d 387 (1962).

Right to vote is not natural right, but a franchise conferred by organized government. State ex rel. Apodaca v. New Mexico State Bd. of Educ., 82 N.M. 558, 484 P.2d 1268 (1971).

Naturalization. — Naturalization does not have the effect of automatically conferring the right to vote and the right to hold office in New Mexico. Lopez v. Kase, 1999-NMSC-011, 126 N.M. 733, 975 P.2d 346.

Constitutional right to vote cannot be denied by official failure or defect, but the judges of election should satisfy themselves that the person who offers to vote is the same person whose name appears upon the registration list, although the name may be misspelled, or the wrong initials appear thereon. 1915-16 Op. Att'y Gen. 293.

The voter shall not be deprived of his rights as an elector either by fraud or mistake of election officers if it is possible to prevent it. Valdez v. Herrera, 48 N.M. 45, 145 P.2d 864 (1944).

Rejection of voter. — Judges of election may, if a voter is challenged, examine the voter, and if satisfied, from the evidence presented or from their own knowledge, that the voter lacks the qualifications, reject the vote. 1914 Op. Att'y Gen. 237.

Registration. — Framers of the constitution did not intend that registration be required to be a qualified elector. 1965 Op. Att'y Gen. No. 65-10.

Since the legislature did not require qualified voters to be registered, registration was not necessary for a qualified elector to vote in a county income surtax election. 1968 Op. Att'y Gen. No. 68-75.

Property tax. — In order to be able to vote in any municipal bond election, voter must have paid his property tax during the preceding year; this requirement does not exist for voters in elections for public officers. 1953-54 Op. Att'y Gen. No. 5643.

Qualification to serve as grand juror. — Grand juror did not have to be a properly registered voter to be a qualified elector, for purposes of sitting on the grand jury. State v. Chama Land & Cattle Co., 111 N.M. 317, 805 P.2d 86 (Ct. App. 1990).

A juror has only to meet the requirements of this section to be a qualified elector under 38-5-1 NMSA 1978, and therefore to be qualified to serve as a grand juror. State v. Chama Land & Cattle Co., 111 N.M. 317, 805 P.2d 86 (Ct. App. 1990).

III. RESIDENCY.

Residency requirements for certain elections superseded by federal law. — Portion of Voting Rights Act amendments of 1970 (42 U.S.C. §§ 1973aa to 1973bb-4) establishing a nationwide uniform residency period of 30 days in election for president and vice-president substantially changed the law in this regard. 1971 Op. Att'y Gen. No. 71-4.

Requirements of 42 U.S.C.A. 1973aa-1 eliminating durational residency requirements as a precondition for voting for presidential electors and prescribing standards for absentee registration and absentee voting in such presidential elections, apply to presidential primary elections. 1971 Op. Att'y Gen. No. 71-86.

Durational residency requirement is not applicable to elections held pursuant to Federal Voting Rights Compliance Act (1-21-1 NMSA 1978 et seq.). 1971 Op. Att'y Gen. No. 71-119.

Residency for federal senate nominees. — New Mexico scheme added an impermissible requirement of at least two years residency to qualifications for United States senator, and was therefore void, due to combination of one-year residency requirement of this section, along with provision of 1-4-2 NMSA 1978, permitting registration by one who will be a qualified elector at the next election (which, in effect, prevents one from registering to vote until he has resided in the state for one year), and the one-year party membership requirement found in 1-8-18 NMSA 1978, prior to amendment, for nomination by a political party. Dillon v. Fiorina, 340 F. Supp. 729 (D.N.M. 1972).

"Residence" is synonymous with home or domicil, denoting a permanent dwelling place to which a party when absent intends to return. Frequent sojourns on business will not qualify an elector. 1929-30 Op. Att'y Gen. 57.

Residence is a matter of intention. 1970 Op. Att'y Gen. No. 70-72.

For the purpose of casting a ballot in any election in New Mexico, residence is to be determined on the basis of the intention of the party desiring to vote. 1959-60 Op. Att'y Gen. No. 60-94.

Residence is determined by intention of voter to establish domicil. 1912-13 Op. Att'y Gen. 239.

But residence must be taken up in time. — One who merely intends to become a resident of the state at a given time, but does not actually begin such residence, until less than a year before a general election, is not a qualified elector. 1917-18 Op. Att'y Gen. 191.

Residence in place of employment. — One who is dependent on his earnings for support, and who accepts employment in a place with intention of remaining there so long as the employment is available, is entitled to vote there if other requirements are met. Klutts v. Jones, 21 N.M. 720, 158 P. 490, 1917A L.R.A. 291 (1916).

Student's residence. — Evidentiary facts supporting the intention of a student to establish residence in New Mexico should be construed with a liberal view. The fact that he is paying one type of tuition as opposed to another, or residing in a dormitory as opposed to a private residence, should not affect his status as a resident of this state for the purpose of exercising his constitutionally granted elective franchise. 1959-60 Op. Att'y Gen. No. 60-94. But see, N.M. Const., art. VII, § 4, as to acquisition or loss of residence by reason of presence or absence while employed in the service of the federal or state government, or while a student.

Twenty-sixth amendment to the United States Constitution had the effect of emancipating the 18- to 20-year-old voter for purposes of establishing his residence for voting purposes. 1971 Op. Att'y Gen. No. 71-119.

Soldiers' residence. — Soldiers who have actually maintained their residence as here prescribed are entitled to vote. 1919-20 Op. Att'y Gen. 122. But see, N.M. Const., art. VII, § 4, as to acquisition or loss of residence by reason of presence or absence while employed in the service of the state or federal government, or while a student.

For discussion of rights of persons residing on federal enclaves to register and vote in New Mexico, see 1970 Op. Att'y Gen. No. 70-72.

Los Alamos residents. — Those residing on the condemned area of the Los Alamos project do not meet the constitutional requirement of "residence" for voting, while bona fide residents on portions of land in Los Alamos project occupied by United States in proprietary capacity only remain subject to state jurisdiction in matters not inconsistent with effective and free use of the land and meet constitutional requirements for voting. Arledge v. Mabry, 52 N.M. 303, 197 P.2d 884 (1948). But see, 1970 Op. Att'y Gen. No. 70-72, analyzing more recent court cases relating to voting rights of persons residing on federal enclaves.

Residence on reservation. — Indian reservation lying within geographic boundaries of the state is a part of the state, and residence for voting purposes, within the meaning of the constitution. Montoya v. Bolack, 70 N.M. 196, 372 P.2d 387 (1962).

Voter qualifications at first state election. — Residential qualification of voter required by Laws 1897, § 1703, and not that required by this section, was applicable to first state election. 1909-12 Op. Att'y Gen. 209.

IV. VOTING PLACE.

Personal presence is contemplated by words "offers to vote" as used in this section. Chase v. Lujan, 48 N.M. 261, 149 P.2d 1003 (1944) (case decided prior to 1967 amendment authorizing absentee voting).

Prior to amendment, section required manual delivery of ballot by the voter in person at the polls in the precinct of his residence, and Laws 1955, ch. 256, providing for voting by absentee ballot, was unconstitutional. State ex rel. West v. Thomas, 62 N.M. 103, 305 P.2d 376 (1956).

This section requires the manual delivery of the ballot at the polls by the elector in person. Baca v. Ortiz, 40 N.M. 435, 61 P.2d 320 (1936) (case decided prior to 1967 amendment).

Voting to be in precinct of residence. — This section requires a voter to cast his ballot in the precinct in which he resides. Thompson v. Scheier, 40 N.M. 199, 57 P.2d 293 (1936) (case decided prior to 1967 amendment).

If a precinct, or any portion thereof, is involved in any election whatsoever in this state, at least one polling place must be provided therein and all of the voters in that precinct involved in the election must be permitted and required to vote in that polling place. 1953-54 Op. Att'y Gen. No. 6067 (opinion rendered prior to 1967 amendment of this section).

This section means that a person must be afforded an opportunity to vote in his precinct, and thus any statute that permits consolidation of precincts is unconstitutional, unless the old precincts are abolished and a new precinct, including the area desired to be consolidated, is legally created. 1953-54 Op. Att'y Gen. No. 6067 (opinion rendered prior to 1967 amendment of this section).

1709, 1897 C.L. violated this provision in purporting to grant citizens the right to vote in any precinct of the state upon certificate of registration from their own precinct. 1912-13 Op. Att'y Gen. 108 (opinion rendered prior to 1967 amendment of this section).

Voting place may be outside precinct. — The constitution does not require the machine or ballot box to be within the boundaries of a precinct as long as those casting their votes at the designated polling place are registered to vote in their precinct. Martinez v. Harris, 102 N.M. 2, 690 P.2d 445 (1984).

Polling places on reservation. — Inasmuch as there is residence on the reservation for voting purposes, there is no prohibition to the location of polling places thereon. Montoya v. Bolack, 70 N.M. 196, 372 P.2d 387 (1962).

Municipal precincts. — This section does not provide that a person otherwise qualified to vote can have but one place to vote in all elections, or that he can be a resident of but one precinct with fixed territorial boundaries; hence, establishment by Municipal Code (3-30-1 NMSA 1978 et seq.) of "municipal precincts" and requirement that in municipal elections voters vote in different precinct or polling place than that in which they reside for purposes of county elections was not invalid. City of Raton v. Sproule, 78 N.M. 138, 429 P.2d 336 (1967).

V. SCHOOL ELECTIONS.

School bond election is school election. 1915-16 Op. Att'y Gen. 133.

School district bond election was a school election, within meaning of this section (and was one at which women were entitled to vote under former provision of this section providing for women's suffrage in school elections.) Klutts v. Jones, 20 N.M. 230, 148 P. 494 (1915).

"School elections" include elections on bond issue for school building. 1912-13 Op. Att'y Gen. 245.

Special school bond election for immediate and future construction of buildings and for purchase of school sites was a school election within this section. Johnston v. Board of Educ., 65 N.M. 147, 333 P.2d 1051 (1958).

Election of members of board of education is school election, and by the terms of this section such election cannot be held at the time of a city election, as provided by 1567, 1897 C.L. Until the legislature has acted and provided for a separate election, elected officers will hold over until their successors are qualified, by the terms of N.M. Const., art. XX, § 2. 1912-13 Op. Att'y Gen. 13.

"Other elections". — Fact that women had been granted right of suffrage since this section was adopted did not alter requirement that "all school elections shall be held at different times from other elections"; municipal elections were included in "other elections." Roswell Mun. School Dist. No. 1 v. Patton, 40 N.M. 280, 58 P.2d 1192 (1936).

School consolidation not invalid. — Fact that some electors would cast vote for member of state board of education in judicial district other than that in which their children attended school did not render school consolidation invalid. State ex rel. Apodaca v. New Mexico State Bd. of Educ., 82 N.M. 558, 484 P.2d 1268 (1971).

Qualifications for voting in school election. — The provisions of this section and N.M. Const., art. IX, § 11, when read together, require that any person undertaking to vote in a school bond election must reside in such school district, and must own real estate therein and be otherwise qualified to vote. 1963-64 Op. Att'y Gen. No. 64-27.

Any person meeting the requirements of this section and N.M. Const., art. IX, § 11 is entitled to vote in a school bond election. 1963-64 Op. Att'y Gen. No. 64-27.

Registration not required to vote in school election. — There is no express constitutional or statutory requirement of registration as a condition to voting in special school bond election, but voter must be otherwise qualified elector. Johnston v. Board of Educ., 65 N.M. 147, 333 P.2d 1051 (1958).

Registration for voting was not a necessary prerequisite to vote in a school bond election if the voter was otherwise qualified to vote in such election under former law. 1963-64 Op. Att'y Gen. No. 64-27.

Husband and wife may both vote in school bond election if they are owners of realty in the school district which realty is held as community property. 1963-64 Op. Att'y Gen. No. 64-27.

Simultaneous school elections in multi-district county. — Two or more school districts situate in the same county may properly hold school bond elections on the same day. 1965 Op. Att'y Gen. No. 65-55.

Provision on school elections not self-executing. — This section is not self-executing, and pending legislative action, the county superintendent of schools will be elected with other county officers under existing law. 1912-13 Op. Att'y Gen. 112.

Sec. 2. [Qualifications for holding office.]

A. Every citizen of the United States who is a legal resident of the state and is a qualified elector therein, shall be qualified to hold any elective public office except as otherwise provided in this constitution.

B. The legislature may provide by law for such qualifications and standards as may be necessary for holding an appointive position by any public officer or employee.

C. The right to hold public office in New Mexico shall not be denied or abridged on account of sex, and wherever the masculine gender is used in this constitution, in defining the qualifications for specific offices, it shall be construed to include the feminine gender. The payment of public road poll tax, school poll tax or service on juries shall not be made a prerequisite to the right of a person to vote or hold office. (As amended September 20, 1921, September 19, 1961, and November 6, 1973.)

ANNOTATIONS

I. GENERAL CONSIDERATION.

Cross references. — For qualifications of state senators and representatives, see N.M. Const., art. IV, § 3.

As to qualifications of executive officers, see N.M. Const., art. V, § 3.

For residence requirement for local public officers, see N.M. Const., art. V, § 13.

For qualifications of supreme court justices, district judges and judges of court of appeals, see N.M. Const., art. VI, §§ 8, 14 and 28, respectively.

As to qualifications of district attorney, see N.M. Const., art. VI, § 24.

For qualifications of voters, see N.M. Const., art. VII, § 1.

As to residence of members of governing body of home-rule municipality, see N.M. Const., art. X, § 6.

As to qualifications of public officers and employees, see 10-1-1 NMSA 1978 et seq.

For Personnel Act, see 10-9-1 NMSA 1978 et seq.

The 1921 amendment, which was proposed by H.J.R. No. 18 (Laws 1921) and adopted at a special election held on September 20, 1921, by a vote of 26,744 for and 19,751 against, amended this section to read: "Every citizen of the United States who is a legal resident of the state and is a qualified elector therein, shall be qualified to hold any public office in the state except as otherwise provided in this Constitution. The right to hold public office in the state of New Mexico shall not be denied or abridged on account of sex, and wherever the masculine gender is used in this Constitution, in defining the qualifications for specific offices, it shall be construed to include the feminine gender. Provided, however, that the payment of public road poll tax, school poll tax or service on juries shall not be made a prerequisite to the right of a female to vote or hold office." Prior to amendment the section read: "Every male citizen of the United States who is a legal resident of the state and is a qualified elector therein, shall be qualified to hold any public office in the state, except as otherwise provided in this constitution; provided, however, that women possessing the qualifications of male electors prescribed in Paragraph one of this article shall be qualified to hold the office of county school superintendent, and shall also be eligible for election to the office of school director or members of a board of education."

The 1961 amendment, which was proposed by S.J.R. No. 1, § 1 (Laws 1961), and adopted at the special election held on September 19, 1961, with a vote of 25,915 for and 23,417 against, divided the section into three subsections, in Subsection A inserted "elective" before "public office" and deleted "in the state" thereafter, inserted new matter as Subsection B, in Subsection C deleted "in the state of" before "New Mexico" and set off with a semicolon the proviso which had been a separate sentence.

The 1973 amendment, which was proposed by H.J.R. No. 7, § 1 (Laws 1973), and adopted at the special election held on November 6, 1973, with a vote of 33,215 for and 9,783 against, recast a proviso at the end of Subsection C as a separate sentence and substituted "person" for "female" near the end of that sentence.

"Qualified" is equivalent to "eligible." Gibbany v. Ford, 29 N.M. 621, 225 P. 577 (1924).

"Public office" defined. — To be a public office: (1) the office must be created by the constitution or by the legislature or created by a municipality or other body through authority conferred by the legislature; (2) it must possess a delegation of a portion of the sovereign power of government, to be exercised for the benefit of the public; (3) the powers conferred, and the duties to be discharged, must be defined, directly or impliedly, by the legislature or through legislative authority; (4) the duties must be performed independently and without control of a superior power, other than the law, unless they be those of an inferior or subordinate office, created or authorized by the legislature, and by it placed under the general control of a superior officer or body; (5) it must have some permanency and continuity, and not be only temporary or occasional. 1957-58 Op. Att'y Gen. No. 58-10.

The officers of "a public corporation for a municipal purpose" are not "public officers" within the contemplation of this section. Daniels v. Watson, 75 N.M. 661, 410 P.2d 193 (1966).

Unconstitutional limitation on candidacy for Albuquerque mayor. — An Albuquerque city charter provision that no full-time elective official other than the mayor or the mayor pro tem can be a candidate for the office of mayor is unconstitutional, because it violates this section. 1985 Op. Att'y Gen. No. 85-4.

Comparable provisions. — Montana Const., art. IV, § 4.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 63A Am. Jur. 2d Public Officers and Employees §§ 37, 46, 51, 60 to 63.

Mental or physical disability as disqualification, 28 A.L.R. 777.

Women's suffrage amendment as affecting eligibility of women to office, 71 A.L.R. 1333.

Time as of which eligibility to office is to be determined, 88 A.L.R. 812, 143 A.L.R. 1026.

Residence or inhabitancy within district or other political unit for which he is elected or appointed as a necessary qualification of officer or candidate, in absence of express provision to that effect, 120 A.L.R. 672.

Nonregistration as affecting one's qualification to hold public office, 128 A.L.R. 1117.

Discrimination because of race, color or creed in respect of appointment, duties, etc., of public officers, 130 A.L.R. 1512.

Interest as stockholder or officer of corporation with which contract is made as affecting disqualification for serving in office, 140 A.L.R. 356.

Defeated candidate for nomination: constitutionality, construction and application of statute declaring him ineligible as a candidate at general election, 143 A.L.R. 603.

Legislative power to prescribe qualifications for or conditions of eligibility to constitutional office, 34 A.L.R.2d 155.

Infamous crime or one involving moral turpitude constituting disqualification to hold public office, 52 A.L.R.2d 1314.

Previous tenure of office, construction and effect of constitutional or statutory provisions disqualifying one for public office because of, 59 A.L.R.2d 716.

Effect of conviction under federal law or law of another state or county, on right to vote or hold public office, 39 A.L.R.3d 303.

Pardon as restoring eligibility to public office, 58 A.L.R.3d 1191.

Validity of requirement that candidate for public office has been resident of governmental unit for a specified period, 65 A.L.R.3d 1048.

What constitutes conviction within statutory or constitutional provision making conviction of crime ground of disqualification for, removal from, or vacancy in, public office, 10 A.L.R.5th 139.

67 C.J.S. Officers and Public Employees §§ 16, 20, 21, 26.

II. QUALIFICATIONS.

Any citizen who is qualified voter, can hold county office, subject to term limitations. 1915-16 Op. Att'y Gen. 171.

Naturalization. — Naturalization does not have the effect of automatically conferring the right to vote and the right to hold office in New Mexico. Lopez v. Kase, 1999-NMSC-011, 126 N.M. 733, 975 P.2d 346.

Municipal board of trustees. — Any citizen who is a resident and qualified elector of the state and a resident of a town may hold office on its board of trustees. 1933-34 Op. Att'y Gen. 119.

Women are eligible to hold any office in state. 1921-22 Op. Att'y Gen. 114.

A woman is qualified to hold the appointive office of state librarian. 1912-13 Op. Att'y Gen. 81.

Registration is not requirement for qualified elector. 1965 Op. Att'y Gen. No. 65-10.

Registration does not affect the qualifications of a candidate for public office, and the fact that a particular candidate is registered under her former name can have no bearing on the fact that she now appears as a candidate under her present real name. 1965 Op. Att'y Gen. No. 65-10.

Conviction of felony or infamous crime as disqualification. — To be qualified to hold any public office in this state a citizen must be a qualified elector in New Mexico; since one convicted of a felony or infamous crime cannot vote for the election of public officers, he is also ineligible to hold public office. 1970 Op. Att'y Gen. No. 70-85.

Since only "qualified electors" may be candidates for municipal office, and since the constitution denies the status of "qualified elector" to a convicted felon, one who has been convicted of a federal felony and confined in federal prison may not be a candidate for municipal office. 1970 Op. Att'y Gen. No. 70-16.

Regardless of pending appeal. — Person who committed felony by assaulting a federal officer was ineligible to run for governor even though he was appealing; a judgment on a verdict of guilty is a conviction, regardless of the fact that an appeal is pending. 1968 Op. Att'y Gen. No. 68-98.

Conviction after election. — Unless and until the house of representatives refuses to seat a member who, since his election, has been convicted of a felony, the member will continue to occupy his office and no vacancy exists. 1961-62 Op. Att'y Gen. No. 61-131.

"Infamous crime". — A conviction in federal court of a violation of 18 U.S.C. § 242, relating to violation of citizen's rights, privileges and immunities under color of law, does not constitute a conviction of an "infamous crime" within the meaning of N.M. Const., art. VII, § 1 and this section. 1957-58 Op. Att'y Gen. No. 58-55.

Restoration of political rights. — Both the right to vote and the right to hold public office are restored if the governor exercises his constitutional power to restore a convicted felon to his political rights. 1970 Op. Att'y Gen. No. 70-85.

A convicted felon who was elected to the position of county commissioner became eligible to hold that office when, prior to taking the oath of office, she applied for and received a certificate of restoration of full rights of citizenship from the Governor of New Mexico. Lopez v. Kase, 1999-NMSC-011, 126 N.M. 733, 975 P.2d 346.

Sections construed together to determine governor's qualifications. — The constitution must be construed as a whole so that N.M. Const., art. V, § 3 and this section should be read together, thereby requiring that a person in order to hold the office of governor must be a citizen of the United States, at least 30 years of age, who has been a resident continuously for five years preceding his election and who is a qualified elector in New Mexico. State ex rel. Chavez v. Evans, 79 N.M. 578, 446 P.2d 445 (1968).

Minor could be appointed deputy county clerk and clerk of the district court, since the constitutional provision does not apply to the deputies of the officers. 1925-26 Op. Att'y Gen. 62.

This article prohibits legislature from adding restrictions upon right to hold office beyond those provided in the constitution itself. 1961-62 Op. Att'y Gen. No. 62-106.

This section relates generally to the elective franchise and right to hold office, and is concerned entirely with the definition of the personal qualifications and characteristics of persons who may vote, hold office and sit as jurors. The legislature has no power to make added restrictions to such right to hold public office. 1939-40 Op. Att'y Gen. 134.

Legislature has no power to make added restrictions to the right to hold public office; consequently, Laws 1919, ch. 111, § 3, which required aldermen to live within the ward

for which they were elected, was void. Gibbany v. Ford, 29 N.M. 621, 225 P. 577 (1924).

But additional conditions not precluded. — The constitution does not provide that all qualified voters may hold public office without additional burdens or conditions. Board of Comm'rs v. District Court, 29 N.M. 244, 223 P. 516 (1924).

Qualifications inconsistent with section. — Qualifications of county school superintendents fixed by Laws 1907, ch. 97, § 18 (since repealed) were inconsistent with, and abrogated by, original provision of this section that every male citizen who was a legal resident of the state and a qualified elector therein, was qualified to hold any public office except as otherwise provided in the constitution, and therefore, school superintendents were not required to submit themselves to the territorial board of education as to their qualifications. 1909-12 Op. Att'y Gen. 220.

Legislature authorized to impose restrictions on right to appointive office. — This constitutional provision empowers the legislature with the authority to impose statutory restrictions and qualifications upon the right of individuals to hold any appointive state office or employment. 1963-64 Op. Att'y Gen. No. 64-15.

Restrictions on office-holding by public employee. — Section 10-9-21 NMSA 1978, which prohibits certain state employees from simultaneously holding public office, does not violate this section, since it imposes no restriction on the employee's public office, but rather upon his job with the state. State ex rel. Gonzales v. Manzagol, 87 N.M. 230, 531 P.2d 1203 (1975).

Qualifications for magistrates. — Requirement in 35-2-1 NMSA 1978 that magistrates must have the equivalent of a high school education does not violate this section because N.M. Const., art. VI, § 26 gives the legislature the power to prescribe qualifications for magistrate court judges. 1969 Op. Att'y Gen. No. 69-8.

Prohibition of private law practice constitutional. — In prohibiting a small claims court judge from practicing law while in office under 34-8-3 NMSA 1978 (since repealed; see 34-8A-4 NMSA 1978), the legislature is attaching a lawful condition to the holding of the office which in no way interferes with the class of persons eligible to hold public office under this section. 1963-64 Op. Att'y Gen. No. 63-58.

Surveyors. — Section 4-42-1 NMSA 1978 does not violate this section by requiring county surveyors to be practical land surveyors. 1968 Op. Att'y Gen. No. 68-114.

Junior college district board members. — A junior college district is a quasi-municipal corporation, the officers of which, like those of irrigation districts, are not those contemplated by the constitution. Accordingly, this section does not restrict the legislature in fixing the qualifications of such board members. Daniels v. Watson, 75 N.M. 661, 410 P.2d 193 (1966).

Board of medical examiners. — Section 61-6-1 NMSA 1978, whereby the governor was obligated to appoint to the board of medical examiners nominees submitted by the New Mexico medical society, did not unconstitutionally usurp governor's power, since the legislature, and not the constitution, delegated this power, and the legislature could establish board member qualifications. Seidenberg v. New Mexico Bd. of Medical Exmrs., 80 N.M. 135, 452 P.2d 469 (1969).

Former Sales Tax Act. — Sales Tax Act (Laws 1934 (S.S.), ch. 7, temporary in nature) did not violate constitution on theory that it made the "seller" a collector of taxes who must be appointed by the governor, and must have the qualifications of a public officer under this section; in fact the tax was levied against the seller and was collected by the state tax commission. State ex rel. Attorney Gen. v. Tittmann, 42 N.M. 76, 75 P.2d 701 (1938).

Bond requirement. — A statutory requirement, authorized by N.M. Const., art. XXII, § 19, that first state officers should furnish bond before being inducted into office and exercising the functions thereof, did not violate this section. Board of Comm'rs v. District Court, 29 N.M. 244, 223 P. 516 (1924).

Offices not incompatible. — The offices of probate judge and deputy county treasurer were not incompatible under this section. 1917-18 Op. Att'y Gen. 79.

Term limits not authorized in home rule municipalities. — The Home Rule Amendment to the constitution does not allow home rule municipalities to impose eligibility requirements for municipal elected office beyond those set forth in the Qualification Clause and elsewhere in the constitution; thus, the provision of the city charter adopting term limits was not authorized. Cottrell v. Santillanes, 120 N.M. 367, 901 P.2d 785 (Ct. App. 1995).

III. RESIDENCY.

Office holders to be citizens and residents. — This provision specifically requires all persons seeking to hold elective state office to be both a citizen and a resident of the state of New Mexico. 1963-64 Op. Att'y Gen. No. 64-15.

Residence in subdivision for which elected or appointed. — The only general restriction against the right of every citizen of the United States who is a resident of, or a qualified voter within, this state to hold any public office is that all reside within the political subdivision for which they were elected or appointed. Gibbany v. Ford, 29 N.M. 621, 225 P. 577 (1924).

Based on N.M. Const., art. VII, § 1 and this section, and on House Bill No. 2, § 6, Laws 1963 (S.S.) (now repealed), candidates for the New Mexico house of representatives were to actually reside in the legislative district where they were seeking election and to be qualified electors in such legislative district. 1963-64 Op. Att'y Gen. No. 64-18.

Acquiring municipal residence. — New Mexico Const., art. V, § 13 and this section fix no time that one must occupy a place or home in order to become a resident of a certain city, town or village when not coming from without the state. State ex rel. Magee v. Williams, 57 N.M. 588, 261 P.2d 131 (1953).

Dual abodes. — There is no reason why, within the meaning of N.M. Const., art. V, § 13 and this section, a person may not have more than one place to reside in. State ex rel. Magee v. Williams, 57 N.M. 588, 261 P.2d 131 (1953).

Failure to fill residence requirements. — One who has not fulfilled the residence requirements for a qualified elector is not eligible to the office of probate judge. 1917-18 Op. Att'y Gen. 191.

Person who established a business and home in Grant county about December 5, 1965 and since that time has lived there, and changed his voter registration to Grant county on March 2, 1966, but served as state representative from Catron county in the 1966 legislative session, was not eligible to run for nomination for state senator from Grant county in the 1966 primary election. 1966 Op. Att'y Gen. No. 66-47.

Illegal registration does not "qualify" elector for office. — A candidate is not a "qualified elector" eligible for a state senate candidacy where, although he registered and voted in a precinct in that senate district, he was ineligible to so register and vote because he actually resides outside the precinct and senate district. Thompson v. Robinson, 101 N.M. 703, 688 P.2d 21 (1984).

Out-of-state residence of employee. — The superintendent of the reform school was an employee and not an officer, and was not disqualified by being a resident of another state. 1912-13 Op. Att'y Gen. 285.

Employment of alien. — An individual who is a resident or who is exempted from residence requisites, and who is otherwise qualified for state employment, is legally eligible to be employed by the state of New Mexico, although not a citizen of the United States, and such employment is subject only to the administrative discretion and policy approval of the hiring public agency. 1963-64 Op. Att'y Gen. No. 64-15.

Sec. 3. [Religious and racial equality protected; restrictions on amendments.]

The right of any citizen of the state to vote, hold office or sit upon juries, shall never be restricted, abridged or impaired on account of religion, race, language or color, or inability to speak, read or write the English or Spanish languages except as may be otherwise provided in this constitution; and the provisions of this section and of Section One of this article shall never be amended except upon a vote of the people of this state in an election at which at least three-fourths of the electors voting in the whole state, and at least two-thirds of those voting in each county of the state, shall vote for such amendment.

ANNOTATIONS

Cross references. — As to freedom of elections, see N.M. Const., art. II, § 8.

For equal protection guarantee, see N.M. Const., art. II, § 18.

For qualifications to vote for public officers, see N.M. Const., art. VII, § 1.

For restrictions on amendment of this section and N.M. Const., art. VII, § 1, see also, N.M. Const., art. XIX, § 1.

Right to sit upon juries. — Where a potential juror's inability to perform his or her duty is based upon religious objection and belief, his or her removal does not violate the religious protections of this section, because exclusion from the jury is not based upon religious affiliation. State v. Clark, 1999-NMSC-035, 128 N.M. 119, 990 P.2d 793.

The trial court did not abuse its discretion in excluding prospective jurors who indicated that they would automatically vote against the death penalty. The basis for excluding these individuals was their inability to apply the law, rather than their religious views. State v. Allen, 2000-NMSC-002, 128 N.M. 482, 994 P.2d 728, cert. denied, 530 U.S. 1218, 120 S. Ct. 2225, 147 L. Ed. 2d 256 (2000); State v. Jacobs, 2000-NMSC-026, 129 N.M. 448, 10 P.3d 127.

A defendant has standing to protect the rights of an excluded juror under this section. State v. Rico, 2002-NMSC-022, 132 N.M. 570, 52 P.3d 942.

This section requires that a trial court make every reasonable effort to accommodate a potential juror for whom language difficulties present a barrier to participation in court proceedings. State v. Rico, 2002-NMSC-022, 132 N.M. 570, 52 P.3d 942.

What constitutes sufficiently reasonable efforts to accommodate a potential juror with language difficulties will depend on the circumstances in which the problem arises. Whether a reviewing court will find a trial court's efforts in this regard reasonable will depend on several factors, including, but not limited to, the steps actually taken to protect the juror's rights, the rarity of the juror's native language and the difficulty that rarity has created in finding an interpreter, the stage of the jury selection process at which it was discovered that an interpreter will be required, and the burden a continuance would have imposed on the court, the remainder of the jury panel, and the parties. State v. Rico, 2002-NMSC-022, 132 N.M. 570, 52 P.3d 942.

Two-thirds vote per county requirement violates federal constitution. — A requirement of a two-thirds favorable vote in every county, when there is a wide disparity in population among counties, must result in greatly disproportionate values to votes in the different counties, and violates the "one person, one vote" concept announced by the United States supreme court. State ex rel. Witt v. State Canvassing Bd., 78 N.M. 682, 437 P.2d 143 (1968).

Construction of three-fourths vote provision. — Three-fourths vote requirement should be construed to mean three-fourths of those voting on the proposition in question, not three-fourths of those voting in the election. State ex rel. Witt v. State Canvassing Bd., 78 N.M. 682, 437 P.2d 143 (1968).

Amendment accomplished. — The requirement of a two-thirds vote in each county being unconstitutional, in view of disparity of population among counties, and the demand of ratification by "at least three-fourths of the electors voting in the whole state" having been met by favorable vote of three-fourths of those voting on the proposition in question, the adoption of constitutional amendment to N.M. Const., art. VII, § 1 submitted as Amendment No. 7 at the election held on November 7, 1967 was accomplished, and it should be certified as having been ratified. State ex rel. Witt v. State Canvassing Bd., 78 N.M. 682, 437 P.2d 143 (1968).

Amendment void. — The constitutional amendment permitting absentee voting, proposed by J.R. No. 12 (Laws 1919) to be added to this article, violated N.M. Const., art. VII, § 1, which at that time required voting in person, and was void because only a bare majority of the electors voted for its adoption. Baca v. Ortiz, 40 N.M. 435, 61 P.2d 320 (1936).

Extraordinary vote requirements inapplicable. — Provisions of N.M. Const., art. XIX, § 1 and this section, requiring an extraordinary majority of votes for certain constitutional amendments, did not apply to the November 3, 1964 amendment to N.M. Const., art. IX, § 12. 1964 Op. Att'y Gen. No. 64-142.

Fact that under amendment to N.M. Const., art. IX, § 12, additional electors may now vote, in municipal bond elections, did not apply to or affect the general voter qualifications set forth in N.M. Const., art. VII, § 1, which qualifications remain exactly the same; art. VII, § 1, makes no provision for or mention of municipal bond elections, or the qualifications of electors at such elections. City of Raton v. Sproule, 78 N.M. 138, 429 P.2d 336 (1967).

Ratification of an amendment to N.M. Const., art. IX, § 12, required only a simple majority of the votes which are cast on the question, and this majority was attained. City of Raton v. Sproule, 78 N.M. 138, 429 P.2d 336 (1967).

School consolidation not invalid. — There is nothing in either N.M. Const., art. VII, § 1 or this section which suggests the right of an elector to cast his vote for candidate for office of state board of education from the judicial district in which the elector's child attends public school; his right is to vote for the candidate of his choice for this position, to be elected from the judicial district in which he has voting residence. And school consolidation was not rendered invalid merely because certain parents would cast vote for member of state board of education in judicial district other than one where children attended school. State ex rel. Apodaca v. New Mexico State Bd. of Educ., 82 N.M. 558, 484 P.2d 1268 (1971).

Law reviews. — For note, "Bilingual Education: Serna v. Portales Municipal Schools," see 5 N.M. L. Rev. 321 (1975).

For comment, "Education and the Spanish-Speaking - An Attorney General's Opinion on Article XII, Section 8 of the New Mexico Constitution," see 3 N.M. L. Rev. 364 (1973).

For comment, "An Equal Protection Challenge to First Degree Depraved Mind Murder Under the New Mexico Constitution," see 19 N.M.L. Rev. 511 (1989).

For student symposium, "Constitutional Revision - Constitutional Amendment Process," see 9 Nat. Resources J. 422 (1969).

For note, "Peremptory Exclusion of Spanish-Speaking Jurors: Could *Hernandez v. New York* Happen Here?," see 23 N.M.L. Rev. 467 (1993).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 16 Am. Jur. 2d Constitutional Law §§ 31, 44, 50; 25 Am. Jur. 2d Elections §§ 103 et seq., 112 et seq., 146 et seq., 157, 158, 160; 47 Am. Jur. 2d Jury § 159 et seq.; 63A Am. Jur. 2d Public Officers and Employees §§ 36, 44, 46, 48.

Age, sex, religion, etc., validity of statute requiring information as to, as condition to right to vote, 14 A.L.R. 260.

Primary election, exclusion of Negroes from participation in, 70 A.L.R. 1502, 88 A.L.R. 473, 97 A.L.R. 685, 151 A.L.R. 1121.

Discrimination because of race, color or creed in respect of appointment, duties, compensation, etc., of public officers, 130 A.L.R. 1512.

Proof as to exclusion of or discrimination against eligible class or race in respect to jury in criminal case, 1 A.L.R.2d 1291.

Actionability, under 42 U.S.C.S. § 1983, of claim arising out of maladministration of election, 66 A.L.R. Fed. 750.

16 C.J.S. Constitutional Law §§ 12, 14; 29 C.J.S. Elections §§ 15, 27, 31; 50 C.J.S. Juries §§ 134, 135, 140, 143; 67 C.J.S. Officers and Public Employees §§ 15 to 18, 21, 25.

Sec. 4. [Residence.]

No person shall be deemed to have acquired or lost residence by reason of his presence or absence while employed in the service of the United States or of the state, nor while a student at any school.

ANNOTATIONS

Compiler's notes. — Senate J.R. No. 3 (Laws 1953) proposed an amendment to this section to provide for absentee voting by adding the following sentence at the end of the section: "The legislature may enact laws providing for the voting of qualified electors who cannot be physically present at their polling places on the day of any election." The amendment received better than a 50% favorable vote at the special election held in September, 1953, but failed to become a part of the constitution under a ruling of the attorney general of Sept. 25, 1953 (1953-54 Op. Att'y Gen. No. 5819), in that it failed to receive the majority requisite under N.M. Const., art. XIX, § 1.

Section deals only with residence for voting or holding office; hence, legislature may confer resident status upon persons stationed within the state by military assignment for purposes of divorce jurisdiction. Wilson v. Wilson, 58 N.M. 411, 272 P.2d 319 (1954). See also, Crownover v. Crownover, 58 N.M. 597, 274 P.2d 127 (1954).

Residence is largely matter of intention, but a mere declaration of intention is insufficient if inconsistent with the facts and actions. A candidate for office is not ineligible because while away at school he voted in a local election. 1914 Op. Att'y Gen. 182, 196, 263.

Effect of tax payment. — Payment of state taxes may be considered as indicia of mental intent to maintain and keep New Mexico residency. 1963-64 Op. Att'y Gen. No. 64-26.

Temporary absence. — Once a bona fide residence is established in New Mexico, mere temporary absence from the state would not in and of itself alter residency. 1963-64 Op. Att'y Gen. No. 64-26.

New domicile may be acquired by soldier just as by any civilian provided both the fact and the intent concur. Allen v. Allen, 52 N.M. 174, 194 P.2d 270 (1948).

But not by mere fact of stationing. — This section of constitution does not mean that a soldier stationed in this state may not acquire residence in New Mexico, but it does mean that he may not acquire a residence from the mere fact that he was stationed therein for whatever period of time he may be so stationed. Allen v. Allen, 52 N.M. 174, 194 P.2d 270 (1948).

Soldiers' right to vote. — Soldiers who have actually maintained their residence as herein prescribed are entitled to vote. 1919-20 Op. Att'y Gen. 122.

Resident hunting license. — Army service alone is not sufficient to enable a person to acquire bona fide residence in this state for the purpose of obtaining a resident hunting license, but a resident of this state stationed outside its boundaries would still be entitled to such a license. 1931-32 Op. Att'y Gen. 108.

Holding office after out-of-state service. — A person who has left the physical limits of the state to serve with the armed forces of the United States after having once established residence here is eligible to hold an executive office. 1959-60 Op. Att'y Gen. No. 60-27.

Acquisition of residence in county where stationed. — This provision does not prevent persons who remove to a county while in service of the United States or this state from acquiring a residence in that county if they actually intend to do so. 1935-36 Op. Att'y Gen. 113.

Resident student defined. — A resident student is one who shall have resided in the state of New Mexico for at least one year before registering as a student in any college or university in the state or whose parent or guardian shall have resided in the state for at least one year before such registration. 1951-52 Op. Att'y Gen. No. 5410.

Acquisition of resident status by student. — Under existing law one's status as a resident or nonresident student is not conditioned by any stated period of residing in New Mexico prior to matriculating in any state-supported college or university. Determination, in the final analysis, must be made by reference to the students' acts manifesting a desire to give up an earlier existing residence and to establish a new one in New Mexico, or a similar manifestation of parents in the case of unemancipated minor children. 1957-58 Op. Att'y Gen. No. 58-68.

Temporary attendance, without more, insufficient. — Students at the school of mines (New Mexico institute of mining and technology) are not qualified to vote in local city election by reason of temporary attendance at school there. 1937-38 Op. Att'y Gen. 223.

Intent determinative. — Set of "uniform definitions" promulgated by the board of educational finance and purporting to define resident and nonresident students for administering tuition fees, were not in keeping with constitution and statutes of the state; any revision of the definitions must be made so as to give effect to one's manifest intent to become a resident of the state. 1957-58 Op. Att'y Gen. No. 58-68. See also, 1963-64 Op. Att'y Gen. No. 64-26.

A person cannot ordinarily acquire or lose residence while a student at any school, but it depends principally upon intention coupled with some overt act. 1935-36 Op. Att'y Gen. 145.

Dependency is strong evidence of residence with parents, but a person cannot ordinarily acquire or lose residence while a student for it is principally a matter of intention. 1935-36 Op. Att'y Gen. 97.

Effect of twenty-sixth amendment. — Twenty-sixth amendment to the federal constitution had effect of emancipating the 18 to 20-year-old voter for purposes of establishing his residence for voting purposes. 1971 Op. Att'y Gen. No. 71-119.

Evidence to be viewed liberally. — Evidentiary facts supporting the intention of a student to establish residence in New Mexico should be construed with a liberal view; the fact that he is paying one type of tuition as opposed to another, or residing in a dormitory as opposed to a private residence, should not affect his status as a resident of this state for the purpose of exercising his constitutionally granted elective franchise. 1959-60 Op. Att'y Gen. No. 60-94.

Attendance at out-of-state school. — The fact that a resident of this state is attending school outside its boundaries does not deprive him of his residence within the state. 1933-34 Op. Att'y Gen. 94.

Comparable provisions. — Idaho Const., art. VI, § 5.

Law reviews. — For student symposium, "Constitutional Revision - Constitutional Amendment Process," see 9 Nat. Resources J. 422 (1969).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 25 Am. Jur. 2d Elections § 163 et seq.

Age, sex, residence, etc., validity of statute requiring information as to, as condition of right to vote, 14 A.L.R. 160, 62 A.L.R. 1167, 74 A.L.R. 163.

Military establishment, state voting rights of residents of, 34 A.L.R.2d 1193.

Residence or domicile of student or teacher for purpose of voting, 98 A.L.R.2d 488, 44 A.L.R.3d 797.

29 C.J.S. Elections §§ 19, 21, 22, 24, 25.

Sec. 5. [Election by ballot; plurality elects candidate.] (2003)

A. All elections shall be by ballot.

B. The legislature may provide by law for runoff elections for all elections other than municipal, primary or statewide elections. If the legislature does not provide for runoff elections, the person who receives the highest number of votes for any office, except as provided in this section, and except in the cases of the offices of governor and lieutenant governor, shall be declared elected to that office. The joint candidates receiving the highest number of votes for the offices of governor and lieutenant governor shall be declared elected to those offices.

C. In a municipal election, the candidate that receives the most votes for an office shall be declared elected to that office, unless the municipality has provided for runoff elections. A municipality may provide for runoff elections as follows:

(1) a municipality that has not adopted a charter pursuant to Article 10, Section 6 of the constitution of New Mexico may provide by ordinance for runoff elections;

(2) a municipality that has adopted a charter pursuant to Article 10, Section 6 of the constitution of New Mexico, and prior to the adoption of this amendment the charter provided for runoff elections, shall hold runoff elections pursuant to the charter; or

(3) a municipality that adopts or has adopted a charter pursuant to Article 10, Section 6 of the constitution of New Mexico may, subsequent to the adoption of this amendment, provide for runoff elections as provided in its charter. (As amended, November 6, 1962; November 2, 2004.)

ANNOTATIONS

Cross references. — For complementary provision relating to joint election of governor and lieutenant governor, see N.M. Const., art. V, § 1.

For Election Code, see Chapter 1 NMSA 1978.

The 1962 amendment, which was proposed by S.J.R. No. 3, § 3 (Laws 1961) and adopted at the general election held on November 6, 1962, with a vote of 41,435 for and 22,383 against, inserted "except in the cases of the offices of governor and lieutenant governor" following "office" in the first sentence and added the second sentence.

The 2003 amendment, which was proposed by H.J.R. 1 (Laws 2003) and adopted at a general election held November 2, 2004, by a vote of 401,026 for and 203,414 against, permits municipalities to provide for runoff elections to resolve those elections that do not produce a candidate who has received a statistically significant portion of the vote.

Constitutional mandate controlling. — Provision that election returns shall be filed with county clerk within 24 hours, though probably mandatory, must yield to constitutional mandate that the person receiving the highest number of votes shall be elected as well as to principle that voters should not be denied their rightful voice in government, in absence of showing that public interest could not be served by preserving validity of election. Valdez v. Herrera, 48 N.M. 45, 145 P.2d 864 (1944).

Voting machines. — Voting for justices of the peace (now magistrate courts) and constables may be properly conducted by voting machines where all other provisions of the law applicable to the installation and operations of voting machines are observed. 1953-54 Op. Att'y Gen. No. 5737.

Requirements for placement on ballot. — Requirements of 1-8-2 and 1-8-3 NMSA 1978 calling for lists of signatures of qualified electors, declaring party affiliation or endorsement of party's principles, to be submitted by minority parties which make

nominations other than with a political convention, in order to place their nominees on the ballot, were consistent with legislature's authority and duty to secure the purity of elections and guard against abuse of the elective franchise. People's Constitutional Party v. Evans, 83 N.M. 303, 491 P.2d 520 (1971).

Election contest. — A contestant's claimed majority, adversely affected by conduct of election officials, affords grounds for an election contest. Seele v. Smith, 51 N.M. 484, 188 P.2d 337 (1947).

A complaint alleging that a candidate received a majority of the votes cast, and that the improper conduct of the election officials in refusing to count certain votes deprived him of victory, is sufficient to support an election contest. Weldon v. Sanders, 99 N.M. 160, 655 P.2d 1004 (1982).

Protection of voter's rights. — The voter shall not be deprived of his rights as an elector either by fraud or by mistake of election officers if it is possible to prevent it. Valdez v. Herrera, 48 N.M. 45, 145 P.2d 864 (1944).

Comparable provisions. — Iowa Const., art. II, § 6.

Montana Const., art. IV, § 5.

Utah Const., art. IV, § 8.

Wyoming Const., art. VI, § 11.

Law reviews. — For note, "Bilingual Education: Serna v. Portales Municipal Schools," see 5 N.M. L. Rev. 321 (1975).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 26 Am. Jur. 2d Elections §§ 298, 405; 38 Am. Jur. 2d Governor § 2.

Constitutionality of statute providing for use of voting machines, 66 A.L.R. 855.

Constitutionality of statute providing that candidates for certain offices shall be placed on nonpartisan ballots, 125 A.L.R. 1044.

Constitutional or other special proposition submitted to voters, basis for computing majority essential to adoption of, 131 A.L.R. 1382.

Excess of illegal ballots, treatment of, when it is not known for which candidate or upon which side of a proposition they were cast, 155 A.L.R. 677.

Official ballots or ballots conforming to requirements, failure to make available as affecting validity of election of public officer, 165 A.L.R. 1263.

Power of election officer to withdraw or change returns, 168 A.L.R. 855.

Governing law as to existence or character of offense for which one has been convicted in a federal court, or court of another state, as bearing upon disqualification to vote, hold office, practice profession, sit on jury, or the like, 175 A.L.R. 784.

Validity of write-in vote where candidate's surname only is written in on ballot, 86 A.L.R.2d 1025.

29 C.J.S. Elections §§ 149, 241.

ARTICLE VIII
Taxation and Revenue

Section 1. [Levy to be proportionate to value; uniform and equal taxes; percentage of value taxed; limitation on annual valuation increases.] (1997)

A. Except as provided in Subsection B of this section, taxes levied upon tangible property shall be in proportion to the value thereof, and taxes shall be equal and uniform upon subjects of taxation of the same class. Different methods may be provided by law to determine value of different kinds of property, but the percentage of value against which tax rates are assessed shall not exceed thirty-three and one-third percent.

B. The legislature shall provide by law for the valuation of residential property for property taxation purposes in a manner that limits annual increases in valuation of residential property. The limitation may be applied to classes of residential property taxpayers based on owner-occupancy, age or income. The limitations may be authorized statewide or at the option of a local jurisdiction and may include conditions under which the limitation is applied. Any valuation limitations authorized as a local jurisdiction option shall provide for applying statewide or multi-jurisdictional property tax rates to the value of the property as if the valuation increase limitation did not apply. (As amended November 3, 1914, November 2, 1971 and November 3, 1998.)

ANNOTATIONS

I. GENERAL CONSIDERATION.

Cross references. — For statutory provisions relating to taxation generally, see Chapter 7 NMSA 1978.

As to valuation of property, see 7-36-1 NMSA 1978 et seq.

The 1914 amendment, which was proposed by J.R. 10 (Laws 1913) and adopted at the general election held on November 3, 1914, with a vote of 18,468 for and 13,593

against, rewrote this section which formerly read: "The rates of taxation shall be equal and uniform upon all subjects of taxation." See also compiler's note to N.M. Const., art. VIII, § 8.

The 1971 amendment, which was proposed by H.J.R. No. 18 (Laws 1971) and was adopted at the special election held on November 2, 1971, with a vote of 43,262 for and 30,256 against, added the second sentence.

Laws 1971, ch. 308, §§ 1 and 2, provided that all constitutional amendments proposed by the Thirtieth Legislature be voted upon at a special election on the first Tuesday of November, 1971, unless otherwise specified, and appropriated $171,000 for election expenses.

The 1998 amendment, which was proposed by H.J.R. No. 19, § 2 (Laws 1997), and adopted at the general election held November 3, 1998, by a vote of 261,507 for and 169,513 against, designated the existing language as Subsection A, added "Except as provided in Subsection B of this section", and added Subsection B.

Compiler's notes. — An amendment to this section proposed by H.J.R. No. 1 (Laws 1969), which would have allowed classification of property for purpose of valuation, was, according to 1969-70 Op. Att'y Gen. No. 69-151, nullified by submission of proposed constitution to voters in 1969.

An amendment was proposed by H.J.R. No. 16 (Laws 1970), which would have repealed this article and adopted a new Article VIII, was submitted to the people at the general election held on November 3, 1970. It was defeated by a vote of 65,552 for and 71,537 against.

Legislature's inherent power to tax. — The enumeration of subjects of taxation contained in this article was merely confirmatory of the legislature's inherent power to tax, and not a limitation thereon. State ex rel. Capitol Addition Bldg. Comm'n v. Connelly, 39 N.M. 312, 46 P.2d 1097, 100 A.L.R. 878 (1935).

Court cannot substitute its view in selecting and classifying for that of legislature. Anaconda Co. v. Property Tax Dep't, 94 N.M. 202, 608 P.2d 514 (Ct. App. 1979), cert. denied, 94 N.M. 628, 614 P.2d 545 (1980).

Article covers whole subject of tax exemption and has repealed existing territorial provisions on the subject. Albuquerque Alumnae Ass'n of Kappa Kappa Gamma Fraternity v. Tierney, 37 N.M. 156, 20 P.2d 267 (1933). As to tax exemptions, see N.M. Const., art. VIII, §§ 3 and 5.

"Taxes," as used in this section, applies only to taxes, in the proper sense of the word, levied to raise revenue for general purposes. State v. Ingalls, 18 N.M. 211, 135 P. 1177 (1913).

The 1914 amendment took effect as soon as election was closed. 1914 Op. Att'y Gen. 265.

Provisions deemed separable. — It is the obvious conclusion of the United States supreme court that the second and third phrases of the first sentence are separable, the second being applicable solely to property taxes and the third applying to all other taxes, or at least to all excise taxes. 1961-62 Op. Att'y Gen. No. 61-68.

Comparable provisions. — Idaho Const., art. VII, §§ 2, 3, 5.

Montana Const., art. VIII, §§ 3, 4.

Utah Const., art. XIII, §§ 2, 3.

Wyoming Const., art. XV, § 11.

Law reviews. — For note, "Forest Fire Protection on Public and Private Lands in New Mexico," see 4 Nat. Resources J. 374 (1964).

For comment, "Land Use Planning - New Mexico's Green Belt Law," see 8 Nat. Resources J. 190 (1968).

For note, "Serrano v. Priest and Its Impact on New Mexico," see 2 N.M. L. Rev. 266 (1972).

For article, "Ad Valorem Tax Status of a Private Lessee's Interest in Publicly Owned Property: Taxability of Possessory Interests in Industrial Projects under the New Mexico Industrial Revenue Bond Act," see 3 N.M. L. Rev. 136 (1973).

For comment, "Coal Taxation in the Western States: The Need for a Regional Tax Policy," see 16 Nat. Resources J. 415 (1976).

For comment, "Taxation of the Uranium Industry: An Economic Proposal," 7 N.M. L. Rev. 69 (1976-77).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 71 Am. Jur. 2d State and Local Taxation § 159.

Automobile license tax as affected by constitutional provisions as to uniformity and discrimination in taxation, 5 A.L.R. 761, 126 A.L.R. 761.

Business or profession as "property" as used in provision as to uniformity and equality of taxes, 34 A.L.R. 719.

Newspapers and magazines, equality and uniformity in taxation of, 35 A.L.R. 11, 110 A.L.R. 327.

Gasoline, equality and uniformity requirements as applicable to license tax on, 47 A.L.R. 985, 84 A.L.R. 839, 111 A.L.R. 185.

Dog taxes, discrimination in, 49 A.L.R. 850.

Additional tax levy necessitated by failure of some property owners to pay their proportions of original levy as violating requirement of uniformity, 79 A.L.R. 1157.

Tax anticipation warrants, relation of uniformity clause to, 99 A.L.R. 1039.

Installments, constitutionality of statute permitting payment of taxes in, 101 A.L.R. 1335.

Relieving property subject to assessment from all or part of such assessment, 105 A.L.R. 1169.

Quo warranto to test constitutionality of statutory provisions in respect to taxation, 109 A.L.R. 326.

Domicile of decedent as regards taxation, diverse adjudications by courts of different states as to, 121 A.L.R. 1200.

Taxation in same state of real property and debt secured by mortgage or other lien thereon as double taxation, 122 A.L.R. 742.

Notes or obligations secured by real estate mortgage and those unsecured, discrimination between, as regards property taxation or exemption therefrom, 129 A.L.R. 682.

Tolls as taxes within constitutional provisions respecting taxes, 167 A.L.R. 1356.

Who may complain of underassessment or nonassessment of property for taxation, 5 A.L.R.2d 576, 9 A.L.R.4th 428.

Military personnel, provisions of Soldiers' and Sailors' Civil Relief Act relating to taxation of property of, 32 A.L.R.2d 618.

"Blockage rule" or "blockage discount theory" in determining stock valuation for purposes of taxation of intangibles, 33 A.L.R.2d 607.

Eminent domain, rights in respect to real estate taxes where property is taken in, 45 A.L.R.2d 522.

Solid mineral royalty as real or personal property, 68 A.L.R.2d 728.

Oil and gas royalty: expenses and taxes deductible by lessee in computing lessor's oil and gas royalty or other return, 73 A.L.R.2d 1056.

Equal and uniform taxation, real estate tax equalization, reassessment, or revaluation program commenced, but not completed within the year, as violative of constitutional provisions requiring, 76 A.L.R.2d 1077.

Civil liability of tax assessor to taxpayer for excessive or improper assessment of real property, 82 A.L.R.2d 1148.

Laundries, taxation of self-service, 87 A.L.R.2d 1007.

Income or rental value as a factor in evaluation of real property for purposes of taxation, 96 A.L.R.2d 666.

Landlord and tenant: construction of provision of lease providing for escalation of rental in event of tax increases, 48 A.L.R.3d 287.

Property tax: exemption of property leased by and used for purposes of otherwise tax-exempt body, 55 A.L.R.3d 430.

Property tax: Business situs of intangibles held in trust in state other than beneficiary's domicil, 59 A.L.R.3d 837.

Validity, construction, and effect of state statutes affording preferential property tax treatment to land used for agricultural purposes, 98 A.L.R.3d 916.

Validity of statutory classifications based on population - tax statutes, 98 A.L.R.3d 1083.

Classification, as real estate or personal property, of mobile homes or trailers for purposes of state or local taxation, 7 A.L.R.4th 1016.

84 C.J.S. Taxation §§ 21 to 38.

II. TANGIBLE PROPERTY.

Provisions deemed separable. — See same catchline in notes under analysis line I, "General Consideration," of this section.

Taxpayer must show that taxing statute patently arbitrary and capricious or void for uncertainty in order to defeat the statute on constitutional grounds. C & D Trailer Sales v. Taxation & Revenue Dep't, 93 N.M. 697, 604 P.2d 835 (Ct. App. 1979).

All tangible property in New Mexico is subject to taxation in proportion to value, and should be taxed, unless specifically exempted by the constitution or by its authority. Sims v. Vosburg, 43 N.M. 255, 91 P.2d 434 (1939).

Phrase "taxes levied upon tangible property" as used in this section has same meaning as "taxes levied upon real or personal property" used in Section 2 of this article. Hamilton v. Arch Hurley Conservancy Dist., 42 N.M. 86, 75 P.2d 707 (1938).

Classification of property generally. — The constitution in this section and sections 3 and 5 of this article, in effect, classes tangible property into that exempt from taxation, that which may be exempted and that which must be taxed. State ex rel. Attorney Gen. v. State Tax Comm'n, 40 N.M. 299, 58 P.2d 1204 (1936). See also catchline "Power of legislature to classify for purposes of taxation" and catchline "Exemption of industrial revenue bonds from taxation no violation of provisions" in notes under analysis line III, "Equal and Uniform," of this section.

Liability of lessee of university-owned land. — The lessee of university-owned land is not liable for ad valorem taxes based on the assessed value of the land itself, as distinct from the value of the improvements erected upon the land. 1970 Op. Att'y Gen. No. 70-24.

Exemption of veterans from ad valorem taxes. — The veterans exemption laws do not exempt a veteran from the payment of ad valorem taxes for the taxable year during which property was purchased by the veteran from a nonveteran owning the property on January 1st of such year. 1959-60 Op. Att'y Gen. No. 59-133. See also, N.M. Const., art. VIII, § 5, and notes thereto.

Nonprofit water corporation subject to ad valorem taxation. — A nonprofit corporation organized to provide a community water system pursuant to 3-29-1 NMSA 1978 is not "another municipal corporation" and is subject to ad valorem taxation. 1968 Op. Att'y Gen. No. 68-38. But see catchline "Such as town pollution control project to be used by private corporations" in notes under analysis line III, "Equal and Uniform," of this section.

Shares of bank stock are intangibles in respect to taxation. First State Bank v. State Tax Comm'n, 40 N.M. 319, 59 P.2d 667 (1936).

Section does not apply to license or privilege taxes. Veterans' Foreign Wars, Ledbetter-McReynolds Post No. 3015 v. Hull, 51 N.M. 478, 188 P.2d 334 (1947); State ex rel. Taylor v. Mirabal, 33 N.M. 553, 273 P. 928 (1928).

Privilege tax deemed nonproperty in nature. — Where the tax involved is a privilege tax, it is in the nature of a nonproperty tax to which this section is not applicable, and reasonable classifications allowing the imposition of such taxes by the legislature do not deny equal protection or due process. Sunset Package Store, Inc. v. City of Carlsbad, 79 N.M. 260, 442 P.2d 572 (1968).

Annual auto license fee not unconstitutional property tax. — Laws 1912, ch. 28 (now repealed), fixing an annual license fee for operating an automobile was not unconstitutional as a property tax imposed without regard to value of property on which

it was made, but was a license tax, since character of tax is not determined by the mode adopted in fixing its amount. State v. Ingalls, 18 N.M. 211, 135 P. 1177 (1913). See also catchline "Provisions relating to auto licenses not in contravention" in notes under analysis line III, "Equal and Uniform," of this section.

Gross receipts tax on sale of mobile homes constitutional. C & D Trailer Sales v. Taxation & Revenue Dep't, 93 N.M. 697, 604 P.2d 835 (Ct. App. 1979).

Assessment for conservancy district not "tax". — An assessment for conservancy district purposes made under Laws 1927, ch. 45 (73-14-1 NMSA 1978 et seq.) is not a tax within meaning of this section. Gutierrez v. Middle Rio Grande Conservancy Dist., 34 N.M. 346, 282 P. 1, 70 A.L.R. 1261 (1929), cert. denied, 280 U.S. 610, 50 S. Ct. 158, 74 L. Ed. 653 (1930).

Laws 1923, ch. 140, § 502 (now repealed), relating to conservancy districts and authorizing preliminary assessments to defray preliminary costs of surveys, engineers' fees, etc., did not violate this section. In re Proposed Middle Rio Grande Conservancy Dist., 31 N.M. 188, 242 P. 683 (1925).

Succession tax not violative of section. — Laws 1919, ch. 122 (now repealed), the Succession Tax Law, did not violate this section, since it did not tax tangible property. State v. Gomez, 34 N.M. 250, 280 P. 251 (1929).

Tax on gasoline not property taxation. — The first part of this section clearly refers to property taxation. The tax imposed upon the "sale or use of all gasoline sold or used in this state" is not property taxation, but, in effect, as in name, an excise tax. The state has the power to select this commodity, as distinguished from others, in order to impose an excise tax upon its sale or use; and since the tax operated impartially upon all, and with territorial uniformity throughout the state, it is "equal and uniform upon subjects of taxation of the same class." Bowman v. Continental Oil Co., 256 U.S. 642, 41 S. Ct. 606, 65 L. Ed. 1139 (1921).

And tax on extracted oil and gas held not property tax. — Tax imposed by Laws 1933, ch. 72 (now repealed), upon oil and gas secured from the soil was an excise tax, and not a property tax on tangible property not in proportion to value thereof, and was not unconstitutional. Flynn, Welch & Yates, Inc. v. State Tax Comm'n, 38 N.M. 131, 28 P.2d 889 (1934).

Separate taxation of oil and gas well equipment not precluded. — A tax on production of oil and gas wells, based on one-half of market value after deducting certain items, does not preclude separate taxation of equipment used in connection with such wells. State ex rel. Attorney Gen. v. State Tax Comm'n, 40 N.M. 299, 58 P.2d 1204 (1936).

There is a substantial difference between underground and open-pit mines sufficient to support a distinction between them for tax purposes. Anaconda Co. v.

Property Tax Dep't, 94 N.M. 202, 608 P.2d 514 (Ct. App. 1979), cert. denied, 94 N.M. 628, 614 P.2d 545 (1980).

Dams and reservoirs are assessed and taxed separately at their situs, separately from the lands they irrigate. Storrie Project Water Users Ass'n v. Gonzales, 53 N.M. 421, 209 P.2d 530 (1949).

Timber may be separately assessed where it is owned by persons other than those owning the land upon which it stands. 1919-20 Op. Att'y Gen. 77.

Evaluation and assessment generally. — In view of the fact that the adoption of the amendment in 1914 dissolved the board of equalization, and the county commissioners had not the power to evaluate the property of certain corporations and other property excluded by Laws 1913, ch. 81, § 4 (now repealed), the evaluation and original assessment fell to county assessors under § 5 of that act. 1914 Op. Att'y Gen. 259. For provisions relating to the county valuation protests boards, see 7-38-25 NMSA 1978 et seq.

Continuing partial annual reappraisal not violative of section. — Where only 20% of a county was reappraised during the year and the equalization program was a continuing one, the reappraisal program did not violate this section of the constitution of New Mexico. Skinner v. New Mexico State Tax Comm'n, 66 N.M. 221, 345 P.2d 750 (1959).

Valuation of property for tax assessment purposes. — In arriving at the value of property for tax assessment purposes, mathematical formulae may lawfully be employed as a factor for determining the ultimate amount of tax due, but the validity of such formulae is dependent upon the proper consideration of all relevant factors. 1961-62 Op. Att'y Gen. No. 61-93. See also notes under analysis line IV, "Methods," of this section.

Determination of value by "reasonable cash market value". — Generally, the "reasonable cash market value" reflected by sales of comparable property is to be used to determine value if there have been such sales. Hardin v. State Tax Comm'n, 78 N.M. 477, 432 P.2d 833 (1967).

And determination where no "market value" for property. — In situations where property has no "market value" based on comparable sales earning capacity, cost of reproduction and original cost, less depreciation, furnish proper criteria for consideration in determining value. Hardin v. State Tax Comm'n, 78 N.M. 477, 432 P.2d 833 (1967).

Hypothetical or speculative values not to be used in determination. — Classification or assessment of property for tax purposes, premised upon hypothetical or speculative values believed, ultimately or at some later time, to be or become the true market value of such land, cannot legitimately be the basis of determining its value. Gerner v. State Tax Comm'n, 71 N.M. 385, 378 P.2d 619 (1963).

Assessment of farm machinery and equipment. — Farm machinery and equipment for ad valorem tax purposes must be assessed in proportion to the full actual value of the property subject to the tax. 1961-62 Op. Att'y Gen. No. 61-93.

Assessment on net product violative of section. — Laws 1915, ch. 55 (now repealed), providing that mines should be assessed for taxation on their net product violated this section. 1917-18 Op. Att'y Gen. 115.

Invidious assessment. — Failing to tax all alike as result of wrong intentionally done by taxing officer was an "invidious assessment" and violated this section prior to its amendment. First Nat'l Bank v. McBride, 20 N.M. 381, 149 P. 353 (1915). See also catchline "Classification and valuation found excessive and discriminatory" in notes under analysis line III, "Equal and Uniform," of this section.

Affording relief to taxpayer. — The court will not ordinarily afford relief to a taxpayer whose property is not assessed more than the law provides. In re Taxes Assessed Against Property of Scholle, 42 N.M. 371, 78 P.2d 1116 (1938).

Remedy of taxpayer not assessed more than law allows. — A taxpayer who is not assessed more than the law provides has no cause for complaint in the courts in the absence of some well-defined and established scheme of discrimination or some fraudulent action, and the taxpayer's remedy is to have the assessing authority raise the value on the property claimed to be valued too low to a level with his own. Skinner v. New Mexico State Tax Comm'n, 66 N.M. 221, 345 P.2d 750 (1959).

Relief granted by state, not federal, courts. — If there is illegal discrimination as to the assessment against one or more taxpayers, New Mexico courts will grant relief and not require the taxpayer to proceed in the federal courts. Skinner v. New Mexico State Tax Comm'n, 66 N.M. 221, 345 P.2d 750 (1959).

Courts may not reclassify, revalue or reassess property. — Neither supreme court nor the district court may reclassify, revalue or reassess property, improperly classified by taxing officials, and consequently, assess at an excessive valuation. Gerner v. State Tax Comm'n, 71 N.M. 385, 378 P.2d 619 (1963).

Authority to settle tax suits not affected. — The authority of district attorneys to compromise and settle tax suits is not affected by this section. State v. State Inv. Co., 30 N.M. 491, 239 P. 741 (1925).

Sovereign immunity doctrine not applicable in mandamus proceeding. — In a mandamus proceeding to require the performance of a duty plainly required under the constitution, i.e., to prescribe an assessment ratio so that property shall be uniformly assessed in proportion to its value, the sovereign immunity doctrine is not applicable. State ex rel. Castillo Corp. v. New Mexico State Tax Comm'n, 79 N.M. 357, 443 P.2d 850 (1968).

Discriminatory method for reappraising land entitles taxpayer to relief. — A well-defined and established scheme of discrimination in the method used for reappraising land within a county violates this section and entitles the taxpayer to relief. Ernest W. Hahn, Inc. v. County Assessor, 92 N.M. 609, 592 P.2d 965 (1978).

Reassessment violating law may be enjoined. — Laws 1933, ch. 86 (now repealed), providing for an assessment every four years and prohibiting increased assessments in intervening years and Laws 1933, ch. 104 (now repealed), conferring power on county equalization board (now county valuation protests boards) to revise and revalue property except where such valuation is fixed by law or by state tax commission (now property tax division of the taxation and revenue department), conformed with this section, and a reassessment in violation of those laws could be enjoined. Vermejo Club v. French, 43 N.M. 45, 85 P.2d 90 (1938).

Burden on plaintiff to prove unreasonable assessment. — The burden is on the plaintiff to prove that an unreasonable number of typical or representative properties were assessed at a level considerably under the figure at which his property was assessed. Skinner v. New Mexico State Tax Comm'n, 66 N.M. 221, 345 P.2d 750 (1959). See also catchline "Evidence to arrive at uniformity in assessment" in notes under analysis line III, "Equal and Uniform," of this section.

Description of items by taxpayer. — The taxpayer is not required to describe each specific item, but certainly a large enough number so that the court can obtain a true account of the situation without engaging in conjecture. Skinner v. New Mexico State Tax Comm'n, 66 N.M. 221, 345 P.2d 750 (1959).

No appellate review of assessment when question moot or abstract. — When cause of action under this section is destroyed where neighboring county raises its tax assessment to figure higher than one in plaintiff's county and the issues involved in the trial court no longer exist, then an appellate court will not review a case merely to decide moot or abstract questions. Hamman v. Clayton Mun. School Dist. No. 1, 74 N.M. 428, 394 P.2d 273 (1964).

III. EQUAL AND UNIFORM.

Provisions deemed separable. — See same catchline in notes under analysis line I, "General Consideration," of this section.

General requirements for validity of taxation. — The state may select its subjects of taxation, and, so long as the tax is equal and uniform on all subjects of a class and the classifications for taxation are reasonable, such legislation does not offend this section of the state constitution. Gruschus v. Bureau of Revenue, 74 N.M. 775, 399 P.2d 105 (1965); Anaconda Co. v. Property Tax Dep't, 94 N.M. 202, 608 P.2d 514 (Ct. App. 1979), cert. denied, 94 N.M. 628, 614 P.2d 545 (1980).

Uniformity clause of New Mexico constitution requires uniformity of property taxation within a county as well as statewide uniformity of assessments. Ernest W. Hahn, Inc. v. County Assessor, 92 N.M. 609, 592 P.2d 965 (1978).

Rationale for section. — The rationale for the provision that "taxes shall be equal and uniform upon subjects of taxation of the same class" is that all property should bear its share of the cost of government. NRA Special Contribution Fund v. Board of County Comm'rs, 92 N.M. 541, 591 P.2d 672 (Ct. App. 1978), cert. quashed, 92 N.M. 464, 589 P.2d 1055 (1979).

Uniformity and equality do not mean mathematical exactitude in appraisals for tax purposes. Ernest W. Hahn, Inc. v. County Assessor, 92 N.M. 609, 592 P.2d 965 (1978).

No violation of Uniformity Clause shown. — Although taxpayers were able to present evidence that a disparity existed between their lot and those of other lots in their subdivision, their failure to present any evidence that the disparity was substantial, intentional, or related to the overall assessment of the property, or that their lot was overassessed militated against a finding that there was a constitutional violation of the Uniformity Clause. Hannahs v. Anderson, 1998-NMCA-152, 126 N.M. 1, 966 P.2d 168, cert. denied, 126 N.M. 532, 972 P.2d 351 (1998).

Duty of tax assessor. — A tax assessor has a constitutional duty to take the necessary action to require, so far as possible, equality and uniformity in taxation on a continuing basis. Ernest W. Hahn, Inc. v. County Assessor, 92 N.M. 609, 592 P.2d 965 (1978).

Legislature is authorized to exempt certain property from taxation and none other. Dillard v. New Mexico State Tax Comm'n, 53 N.M. 12, 201 P.2d 345 (1948). See also catchline "Classification of property generally" in notes under analysis line II, "Tangible Property," of this section.

State may constitutionally tax one class and exempt other classes if the classification reasonably tends, in some lawful way, to facilitate the raising of revenue. Texas Co. v. Cohn, 8 Wash. 2d, 112 P.2d 522 (1941); Beatty v. City of Santa Fe, 57 N.M. 759, 263 P.2d 697 (1953).

There need be no relation between class of taxpayers and purpose of appropriation according to the supreme court of the United States in New York Rapid Transit Corp. v. City of New York, 303 U.S. 573, 58 S. Ct. 728, 82 L. Ed. 1024 (1938). Beatty v. City of Santa Fe, 57 N.M. 759, 263 P.2d 697 (1953). See also catchline "Excise tax need bear no relation to object" in notes under this analysis (III. Equal and Uniform).

Valuations and taxes to be based on standard. — To have uniformity and equality in a form of tax, the valuations must be established by some standard, and after valuations are fixed, the taxes based upon such valuations must be levied by a standard. It is only

thus that each taxpayer may bear his fair share of the burden of government. Gerner v. State Tax Comm'n, 71 N.M. 385, 378 P.2d 619 (1963). For annotations relating to determining the value of property, see notes under analysis line II, "Tangible Property," of this section. See also notes under analysis line IV, "Methods," of this section.

Uniform method of taxation requires that each reappraisal be part of a systematic and definite plan which provides that all similar properties be valued in a like manner. Ernest W. Hahn, Inc. v. County Assessor, 92 N.M. 609, 592 P.2d 965 (1978).

Violations of constitutional uniform taxation requirements frequently result in violations of equal protection clauses. Ernest W. Hahn, Inc. v. County Assessor, 92 N.M. 609, 592 P.2d 965 (1978).

Taxpayer must not be subjected to discrimination in the imposition of a property tax burden which results from systematic, arbitrary, or intentional revaluation of some property at a figure greatly in excess of the undervaluation of other like properties. Ernest W. Hahn, Inc. v. County Assessor, 92 N.M. 609, 592 P.2d 965 (1978).

To support claim under uniformity clause of New Mexico constitution, the taxpayer must show that the inequality is substantial and amounts to an intentional violation of the essential principle of practical uniformity. Ernest W. Hahn, Inc. v. County Assessor, 92 N.M. 609, 592 P.2d 965 (1978).

Evidence to arrive at uniformity in assessment. — To arrive at uniformity in the assessment of property for taxation, as provided in this section and N.M. Const., art. VIII, § 2, the taxing authority and the taxpayer can introduce evidence regarding the ratios of assessed values to market values as the latter are reflected in actual sales of any other real estate in the taxing district for a reasonable period prior to the assessment date. Peterson Properties v. Valencia County Valuation Protests Bd., 89 N.M. 239, 549 P.2d 1074 (Ct. App. 1976).

Classification and valuation found excessive and discriminatory. — Classification and valuation of property suitable for grazing purposes at 10 times the valuation of other property of the same character and quality and similarly situated because of its classification as lots held for speculation for oil or other purposes, absent any evidence of such speculative purposes, was so excessive and discriminatory as to entitle taxpayer to relief, despite fact that some other owners of like tracts were similarly assessed or that these lands, while similar to grazing lands, were not actually used for grazing purposes. Gerner v. State Tax Comm'n, 71 N.M. 385, 378 P.2d 619 (1963). See also catchline "Hypothetical or speculative values not to be used in determination" in notes under analysis line II, "Tangible Property," of this section and N.M. Const., art. VIII, § 6, and notes thereto.

Factors in determining discrimination in property revaluation plan. — In determining whether a property revaluation plan constitutes intentional and arbitrary discrimination in violation of this section and N.M. Const., art. II, § 18, all relevant

circumstances should be taken into consideration. Such factors should include, but not be limited to, the resources realistically available to the assessing authority, the time limitations involved in the plan, the availability of other alternatives and the amount of temporary inequalities in valuations which result from the cyclical implementation of the plan. Ernest W. Hahn, Inc. v. County Assessor, 92 N.M. 609, 592 P.2d 965 (1978).

Mere errors of judgment not unconstitutional discrimination. — Mere errors of judgment in estimating market value of property will not be sufficient to show unconstitutional discrimination in the assessment of unequal taxes, however, good faith alone will not justify an assessment which is discriminatory in fact. Ernest W. Hahn, Inc. v. County Assessor, 92 N.M. 609, 592 P.2d 965 (1978).

Reasonable time limitation on completion of revaluation program. — Where a cyclical program of revaluation is undertaken, such plan need not necessarily be completed within a single year; however, it must be completed within a reasonably limited time. Ernest W. Hahn, Inc. v. County Assessor, 92 N.M. 609, 592 P.2d 965 (1978).

And lack of adequate resources no excuse for unequal assessments. — Lack of adequate resources with which to undertake and complete a cyclical reappraisal within a reasonable time cannot be relied upon as an excuse for unequal tax assessments where the assessor has a mandatory duty to achieve equal and uniform property taxation. Ernest W. Hahn, Inc. v. County Assessor, 92 N.M. 609, 592 P.2d 965 (1978).

Assessment based on invalid carry-over assessment unconstitutional. — Where taxpayer's 1975 assessment is not based on any new reappraisal, but is a result of an automatic carry-over of a 1974 assessment which was constitutionally invalid, the 1975 assessment is unconstitutional. Dale Bellamah Land Co. v. County of Bernalillo, 92 N.M. 615, 592 P.2d 971 (1978).

Inequality in yearly reappraisals of some property unconstitutional. — Singling out one or a few taxpayers for reappraisals for several years in succession while virtually all other owners of comparable properties do not undergo a single reappraisal in the same period is an inequality that is neither temporary nor constitutional. Ernest W. Hahn, Inc. v. County Assessor, 92 N.M. 609, 592 P.2d 965 (1978).

But temporary inequalities constitutional. — Since there is no requirement under this section for reappraisals of all comparable properties within a county to be completed within a single year, temporary inequalities which result from the practicalities of carrying out a county-wide systematic and definite property appraisal program are inevitable and constitutional. Ernest W. Hahn, Inc. v. County Assessor, 92 N.M. 609, 592 P.2d 965 (1978); Dale Bellamah Land Co. v. County of Bernalillo, 92 N.M. 615, 592 P.2d 971 (1978).

Income tax subject to section. — The income tax, being an excise tax, is subject to the limitations imposed by this section. A provision relating to such would violate the

equality clause if it were given retroactive construction. 1961-62 Op. Att'y Gen. No. 61-68.

Arbitrary classification based on incomes invalid. — A statute making an arbitrary classification between incomes to be taxed and those in part or in whole exempt from or not subject to taxation is invalid. 1961-62 Op. Att'y Gen. No. 61-68.

Equalization of valuation of property for taxation purposes. — State board of equalization under Laws 1913, ch. 84, § 13 (now repealed), had power to equalize its valuation of property for taxation purposes by classes, both as between classes in the same county and as between counties throughout the state, and fact that action taken resulted in increase or decrease of total valuations in the state was immaterial. South Spring Ranch & Cattle Co. v. State Bd. of Equalization, 18 N.M. 531, 139 P. 159 (1914).

Under Laws 1915, ch. 54, § 6 (now repealed), state tax commission (now property tax division of the taxation and revenue department) could only increase or decrease the entire property within a given county, except such as it had previously valued, and such as has been assessed at its actual value, by a uniform percentage. Taxes based on values set by the commission on varying percentages of increase or decrease could be enjoined. Maxwell Land Grant Co. v. Jones, 28 N.M. 427, 213 P. 1034 (1923).

See also catchline "Duty of county valuation protests boards to hear taxpayer's valuation protest on any grounds" in notes under analysis line IV, "Methods," of this section.

There exists no constitutional inhibition against double taxation. New Mexico State Bd. of Pub. Accountancy v. Grant, 61 N.M. 287, 299 P.2d 464 (1956).

Rather, taxes must be equal and uniform upon subjects of same class. — There is no state constitutional inhibition against double taxation in the sense frequently used. The requirement that must be met to escape the stricture of its being illegal is that taxes must be equal and uniform upon subjects of the same class. Amarillo-Pecos Valley Truck Lines v. Gallegos, 44 N.M. 120, 99 P.2d 447 (1940).

"Double taxation" held not suffered. — An attorney who paid a $5.00 license fee for board of commissioners of state bar, a $1.00 license fee under Sales Tax Law and the gross income tax was held not to have suffered "double taxation" prohibited by this section. State ex rel. Attorney Gen. v. Tittmann, 42 N.M. 76, 75 P.2d 701 (1938).

Special tax districts no violation of section. — Where legislature by special law created a state road through two counties, it could require levy of special tax on all the property within one of the counties for purpose of providing a fund for improvement of the highway therein, since it thereby created a special taxing district, which it had the power to do, without violating this section. Borrowdale v. Board of County Comm'rs, 23 N.M. 1, 163 P. 721 (1916).

Taxes levied under district school bonds not in violation of section. — Taxes levied under a bond issued in accord with portions of Laws 1937, ch. 36 (now repealed), providing that a school district within which is located a state school conducting a high school may vote, issue and sell district school bonds, for purpose of joining with the state school in erecting and furnishing a high school building, or purchasing ground therefor, were not in violation of this section, since the taxes were equal and uniform throughout the district. White v. Board of Educ., 42 N.M. 94, 75 P.2d 712 (1938).

Equality provision of section does not extend to local assessments for improvements levied upon property specially benefited thereby; it did not apply to conservancy district's preliminary fund assessment. State ex rel. Capitol Addition Bldg. Comm'n v. Connelly, 39 N.M. 312, 46 P.2d 1097 (1935). See also catchline "Assessment for conservancy district not 'tax' " in notes under analysis line II, "Tangible Property," of this section.

Exemption of industrial revenue bonds from taxation no violation of provisions. — Statute authorizing issuance of revenue bonds by municipality for industrial development and providing that bonds so authorized, the income therefrom, etc., shall be exempt from all taxation by state on any subdivision, was not violation of constitutional provision requiring that taxes be equal and uniform insofar as the exemption was confined to municipal property. Village of Deming v. Hosdreg Co., 62 N.M. 18, 303 P.2d 920 (1956).

Such as town pollution control project to be used by private corporations. — The fact that pollution control project to be used by private corporations and financed by funds from industrial revenue bonds was to be owned by the town, and therefore be exempt from ad valorem taxes, did not violate this section. Kennecott Copper Corp. v. Town of Hurley, 84 N.M. 743, 507 P.2d 1074 (1973). But see catchline "Nonprofit water corporation subject to ad valorem taxation" in notes under analysis line II, "Tangible Property," of this section.

Power of legislature to classify for purposes of taxation. — Former 2% privilege tax (1937 amendment to 59-26-31 NMSA 1978) from which qualified benefit societies were exempt did not violate this section. Power of legislature to classify for purposes of taxation and to impose tax in question must be conceded if any reasonable or sound basis can be found to sustain it. Sovereign Camp, W.O.W. v. Casados, 21 F. Supp. 989 (D.N.M.), aff'd, 305 U.S. 558, 59 S. Ct. 79, 83 L. Ed. 352 (1938). See also catchline "Classification of property generally" in notes under analysis line II, "Tangible Property," of this section.

And power to levy excise tax. — Given a reasonable classification of subjects, the power of the legislature to levy an excise tax is almost unlimited, at least so long as it does not go to the extent of extortion or confiscation. George E. Breece Lumber Co. v. Mirabal, 34 N.M. 643, 287 P. 699, 84 A.L.R. 827 (1930), aff'd, 283 U.S. 788, 51 S. Ct. 352, 75 L. Ed. 1415 (1931).

Excise tax need bear no relation to object. — That excise tax need bear no relation to the object for which the proceeds are to be expended is well settled. See New York Rapid Transit Corp. v. City of New York, 303 U.S. 573, 58 S. Ct. 721, 82 L. Ed. 1024 (1938), and George E. Breece Lumber Co. v. Mirabal, 34 N.M. 643, 287 P. 699, 84 A.L.R. 827 (1930), aff'd, 283 U.S. 788, 51 S. Ct. 352, 75 L. Ed. 1415 (1931); Beatty v. City of Santa Fe, 57 N.M. 759, 263 P.2d 697 (1953). See also catchline "There need be no relation between class of taxpayers and purpose of appropriation" in notes under this analysis (III. Equal and Uniform).

Classification of commodities, businesses or occupations for excise tax purposes, under which the classes are taxed at unequal rates or one class is taxed and another is exempted, will be upheld as constitutional if it is not arbitrary nor capricious and rests upon some reasonable basis of difference or policy. Beatty v. City of Santa Fe, 57 N.M. 759, 263 P.2d 697 (1953).

Excise tax upon use of gasoline for any purpose. — An excise tax laid upon the use of gasoline for any purpose in the state preserves equality and uniformity of taxation within constitutional requirements. George E. Breece Lumber Co. v. Mirabal, 34 N.M. 643, 287 P. 699, 84 A.L.R. 827 (1930), aff'd, 283 U.S. 788, 51 S. Ct. 352, 75 L. Ed. 1415 (1931). See also catchline "Tax on gasoline not property taxation" in notes under analysis line II, "Tangible Property," of this section.

Validity of tax on tobacco sustained. — In almost every case in which the question has arisen, the courts have sustained the validity of statutes or ordinances imposing a tax on cigars, cigarettes and other forms of tobacco, as against objections based on violation of the rule requiring uniformity of taxation or constitutional provisions guaranteeing equal protection of the law. Beatty v. City of Santa Fe, 57 N.M. 759, 263 P.2d 697 (1953).

Provisions relating to auto licenses not in contravention. — Provision in Laws 1925, ch. 82 (now repealed), relating to automobile licenses, that county assessor should prepare an assessment roll of motor vehicles, fix the assessed valuation thereof, in accordance with a schedule prepared by state tax commission (now property tax division of the taxation and revenue department), specifying valuations of vehicles of the several makes, types and models, making proper allowances for depreciation, and extend the taxes thereon, did not contravene the uniformity clause of the constitution. State ex rel. Taylor v. Mirabal, 33 N.M. 553, 273 P. 928, 62 A.L.R. 296 (1928).

Laws 1912, ch. 28 (now repealed), providing for automobile licenses, did not conflict with constitutional provision with respect to equality and uniformity under authorities holding that constitutional provision is restricted to property tax. State v. Ingalls, 18 N.M. 211, 135 P. 1177 (1913). See also catchline "Annual auto license fee not unconstitutional property tax" in notes under analysis line II, "Tangible Property," of this section.

Uniformity requirement as to taxes levied for county purposes. — This section does not require uniformity throughout the state as to taxes levied and assessed for purely county purposes, the requirement of uniformity being met in such case if operation of tax is equal and uniform throughout the county. Love v. Dunaway, 28 N.M. 557, 215 P. 822 (1923).

Making uniform state's share of ad valorem taxes. — There must be a uniform percentage ratio, or some other means of equalization, so as to make uniform the state's share of ad valorem taxes, and the manner by which it is done, the court leaves to the state tax commission (now property tax division of the taxation and revenue department). State ex rel. Castillo Corp. v. New Mexico State Tax Comm'n, 79 N.M. 357, 443 P.2d 850 (1968).

IV. METHODS.

Distinction between subdivided and unsubdivided agricultural land did not offend section. — Distinction drawn by former statute (72-2-14.1, 1953 Comp.) between subdivided and unsubdivided agricultural land, for tax purposes, did not offend this section and did not violate due process. Property Appraisal Dep't v. Ransom, 84 N.M. 637, 506 P.2d 794 (Ct. App. 1973). For annotations relating to taxes to be equal and uniform upon subjects of taxation of the same class, see notes under analysis line III, "Equal and Uniform," of this section.

Section 7-36-20 NMSA 1978 establishes special method of valuation for land used primarily for agricultural purposes, determined on the basis of the land's capacity to produce agricultural products. This "green belt" law is clearly an exception to the general mode of property valuation for tax purposes established by the property tax code and the New Mexico constitution, i.e., market value. County of Bernalillo v. Ambell, 94 N.M. 395, 611 P.2d 218 (1980).

Duty of county valuation protests boards to hear taxpayer's valuation protest on any grounds. — When the language of a statute is clear and unambiguous, the statute must be given its literal meaning; the language of 7-38-24 and 7-38-25 NMSA 1978 (formerly 72-2-37 and 72-2-38, 1953 Comp.) clearly and unambiguously gives to the county valuation protests boards the duty to hear a protest of the valuation of a taxpayer's property on any grounds whatsoever, including the grounds of allegedly unconstitutional discrimination in comparison with assessments of other properties. In re Miller, 88 N.M. 492, 542 P.2d 1182 (Ct. App.), cert. denied, 89 N.M. 5, 546 P.2d 70 (1975). For annotations relating to determining the value of property, see notes under analysis line II, "Tangible Property," of this section.

Sec. 2. [Property tax limits; exception.]

Taxes levied upon real or personal property for state revenue shall not exceed four mills annually on each dollar of the assessed valuation thereof except for the support of the educational, penal and charitable institutions of the state, payment of the state debt

and interest thereon; and the total annual tax levy upon such property for all state purposes exclusive of necessary levies for the state debt shall not exceed ten mills; provided, however, that taxes levied upon real or personal tangible property for all purposes, except special levies on specific classes of property and except necessary levies for public debt, shall not exceed twenty mills annually on each dollar of the assessed valuation thereof, but laws may be passed authorizing additional taxes to be levied outside of such limitation when approved by at least a majority of the qualified electors of the taxing district who paid a property tax therein during the preceding year voting on such proposition. (As amended November 3, 1914, September 19, 1933, and November 7, 1967.)

ANNOTATIONS

I. GENERAL CONSIDERATION.

Cross references. — For statutory provisions relating to property taxes generally, see Articles 35 to 38 of Chapter 7 NMSA 1978.

The 1914 amendment, which was proposed by J.R. No. 10 (Laws 1913) and adopted at the general election held November 3, 1914, with a vote of 18,468 for and 13,593 against, substituted that part of the present section preceding the proviso for the original section which read: "The legislature shall have power to provide for the levy and collection of license, franchise, excise, income, collateral and direct inheritance, legacy and succession taxes; also graduated income taxes, graduated collateral and direct inheritance taxes, graduated legacy and succession taxes, and other specific taxes, including taxes upon the production and output of mines, oil lands and forests; but no double taxation shall be permitted." See also compiler's note to N.M. Const., art. VIII, § 8.

The 1933 amendment, which was proposed by S.J.R. No. 21 (Laws 1933) and adopted at a special election held on September 19, 1933, with a vote of 41,393 for and 27,541 against, added the proviso.

The 1967 amendment, which was proposed by H.J.R. No. 23, § 1 (Laws 1967) and adopted at a special election held on November 7, 1967, with a vote of 38,231 for and 13,682 against, inserted "qualified" preceding "electors" and "who paid a property tax therein during the preceding year" preceding "voting on" in the proviso.

Phrase "taxes levied upon real or personal property" as used in this section has same meaning as "taxes levied upon tangible property" used in Section 1 of this article. Hamilton v. Arch Hurley Conservancy Dist., 42 N.M. 86, 75 P.2d 707 (1938).

Legislature has power to levy excise tax on gasoline. Lujan v. Triangle Oil Co., 38 N.M. 543, 37 P.2d 797 (1934). See also notes to N.M. Const., art. VIII, § 1.

Provisions authorizing levies for public highways and roads held valid. — Laws 1921, ch. 153 (temporary), authorizing levy of taxes and issuance and sale of state debentures in anticipation of taxes, for construction and improvement of public highways, and to meet, dollar for dollar, allotments to the state of federal funds under Federal Aid Road Act, was validated by adoption of amendment to state constitution, adding Section 16 to Article IX. Lopez v. State Hwy. Comm'n, 27 N.M. 300, 201 P. 1050 (1921).

Laws 1919, ch. 168 (temporary), authorizing and directing the counties of the state to levy a tax of three mills on the dollar for construction and maintenance of public roads in the several counties, and to meet allotments of federal funds, was not an act for raising of state revenue and did not violate this section. State v. Red River Valley Co., 28 N.M. 94, 206 P. 695 (1922).

Evidence regarding uniformity in assessment of property for taxation. — To arrive at uniformity in the assessment of property for taxation, as provided in N.M. Const., art. VIII, § 1 and this section, the taxing authority and the taxpayer can introduce evidence regarding the ratios of assessed values to market values as the latter are reflected in actual sales of any other real estate in the taxing district for a reasonable period prior to the assessment date. Peterson Properties v. Valencia County Valuation Protests Bd., 89 N.M. 239, 549 P.2d 1074 (Ct. App. 1976). See also notes to N.M. Const., art. VIII, § 1.

Comparable provisions. — Idaho Const., art. VII, § 9.

Wyoming Const., art. XV, § 4.

Law reviews. — For comment, "Approaches to State Taxation of the Mining Industry," see 10 Nat. Resources J. 156 (1970).

For article, "Indians - Civil Jurisdiction in New Mexico - State, Federal and Tribal Courts," see 1 N.M. L. Rev. 196 (1971).

For note, "Serrano v. Priest and Its Impact on New Mexico," see 2 N.M. L. Rev. 266 (1972).

For article, "An Intergovernmental Approach to Tax Reform," see 4 N.M. L. Rev. 189 (1974).

For comment, "Coal Taxation in the Western States: The Need for a Regional Tax Policy," see 16 Nat. Resources J. 415 (1976).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 71 Am. Jur. 2d State and Local Taxation §§ 122, 126.

Corporate property, assessment at full value when valuations generally are illegally fixed lower, 3 A.L.R. 1370, 28 A.L.R. 983, 55 A.L.R. 503.

Limitation of power to tax as limitation on power to incur indebtedness, 97 A.L.R. 1103.

Presumptions and burden of proof as to violation of or compliance with public debt limitation, 16 A.L.R.2d 515.

Inclusion of tax-exempt property in determining value of taxable property for debt limit purposes, 30 A.L.R.2d 903.

84 C.J.S. Taxation § 56.

II. TWENTY-MILLS LIMITATION.

"Public debt" means judgments arising out of involuntary debt of a political subdivision. This includes tort judgments and possibly condemnation awards. It does not include debts for ordinary current obligation of the county. A judgment arising out of a contractual obligation may not be placed on the tax rolls if the levy would exceed the 20-mill limitation of this section. 1970 Op. Att'y Gen. No. 70-1.

Conservancy district assessments not subject to limitation. — Conservancy district's preliminary fund assessment was not subject to the limitation provision of this section. Hamilton v. Arch Hurley Conservancy Dist., 42 N.M. 86, 75 P.2d 707 (1938).

The assessments levied through the provisions of 73-18-8 NMSA 1978, relating to conservancy district reclamation, are not within the purview of the limitations imposed by this section, and thus are not subject to the 20-mill limitation. 1959-60 Op. Att'y Gen. No. 60-209.

Nor those of flood control authority. — The "1/2 of one mill" property tax which the Albuquerque flood control authority may levy pursuant to Subsection J of 72-16-22 NMSA 1978 is not a general tax, but a benefit assessment, and hence is not subject to the 20-mill limitation of this section. 1963-64 Op. Att'y Gen. No. 64-90.

Nor paving assessments against school district property. — Taxes levied for payment of paving assessments against school district property are levies for public debt and do not come within 20-mill limitation appearing in the proviso clause. 1933-34 Op. Att'y Gen. 134.

Levy for tort judgment against county commissioners compelled. — Mandamus lay to compel state tax commission to approve a levy of tax to pay tort judgment against county commissioners; statutory debt limitation could not be interposed, especially where evidence failed to show that combined rate would exceed constitutional 20-mill limitation and five-mill limitation on expenditures of county for neither would shield

county from a forced levy to satisfy such a judgment. State ex rel. Martin v. Harris, 45 N.M. 335, 115 P.2d 80 (1941).

But not for caring for indigent patients. — Constitutional provision permitting levies for public debts in excess of 20-mill limitation does not contemplate judgment for hospital against board of county commissioners for cost of care of indigent persons. Board of Dirs. of Mem. Gen. Hosp. v. County Indigent Hosp. Claims Bd., 77 N.M. 475, 423 P.2d 994 (1967).

Words "but laws may be passed authorizing additional taxes" should not be construed to provide that only laws which are passed authorizing additional taxes after the enactment of the constitutional amendment are effective. 1968 Op. Att'y Gen. No. 68-105.

Qualified electors those who paid property tax during preceding year. — This section would preclude the legislature from limiting persons entitled to vote on a special levy to those who own or pay property taxes. 1955-56 Op. Att'y Gen. No. 6492.

The effect of the 1967 amendment to this section was to amend former 21-16-12 and 21-16-17 NMSA 1978 by adding the additional qualification that those voting in district elections be those qualified electors who paid a property tax therein during the preceding year. 1968 Op. Att'y Gen. No. 68-105.

Sec. 3. [Tax-exempt property.]

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

Provided, however, that any property acquired by public libraries, community ditches and all laterals thereof, property acquired by churches, property acquired and used for educational or charitable purposes, and property acquired by cemeteries not used or held for private, or corporate profit, and property acquired by the Indian service and property acquired by the United States government or by the state of New Mexico by outright purchase or trade, where such property was, prior to such transfer, subject to the lien of any tax or assessment for the principal or interest of any bonded indebtedness shall not be exempt from such lien, nor from the payment of such taxes or assessments.

Exemptions of personal property from ad valorem taxation may be provided by law if approved by a three-fourths majority vote of all the members elected to each house of the legislature. (As amended November 3, 1914, November 5, 1946, and November 7, 1972.)

ANNOTATIONS

I. GENERAL CONSIDERATION.

Cross references. — As to exemption from property tax generally, see 7-36-14 to 7-36-33 NMSA 1978.

The 1914 amendment, which was proposed by J.R. No. 10 (Laws 1913) and adopted at the general election held on November 3, 1914, with a vote of 18,468 for and 13,593 against, substituted the first paragraph, which was formerly Section 7 of this article, for language which read: "The enumeration of subjects of taxation in section two of this article shall not deprive the legislature of the power to require other subjects to be taxed in such manner as may be consistent with the principles of taxation fixed in this Constitution." See also compiler's note to N.M. Const., art. VIII, § 8.

The 1946 amendment, which was proposed by S.J.R. No. 3 (Laws 1945) and adopted at the general election held on November 5, 1946, with a vote of 15,645 for and 6,925 against, added the proviso.

The 1972 amendment, which was proposed by S.J.R. No. 1, § 1 (Laws 1972) and adopted at the general election held on November 7, 1972, with a vote of 141,622 for and 73,386 against, inserted "not used for commercial purposes" following "church property" in the first paragraph and added the last paragraph.

Compiler's notes. — An amendment to this section proposed by H.J.R. No. 20, § 1 (Laws 1971), was submitted to the people at a special election held November 2, 1971. It was defeated by a vote of 26,059 for and 46,110 against.

An amendment to this section proposed by S.J.R. No. 19 (Laws 1975), which would have allowed the legislature to exempt from property taxation fractional interests in real property that is exempt from taxation under the constitution by reason of ownership if approved by three-fourths of the members of each house of the legislature, was submitted to the people at the general election held on November 2, 1976. It was defeated by a vote of 110,232 for and 155,761 against.

Laws 1983, ch. 110, § 1, which amends Laws 1903, ch. 51, provides that all property of the woman's board of trade and library association of Santa Fe and all other associations or corporations not conducted for financial gain, but rather for the education or social advancement of their members, is exempt from taxation.

Laws 1983, ch. 110, contains no effective date provision, but was enacted at the session which adjourned on March 19, 1983. See N.M. Const., art. IV, § 23.

Comparable provisions. — Idaho Const., art. VII, § 4.

Montana Const., art. VIII, § 5.

Utah Const., art. XIII, §§ 2, 14.

Wyoming Const., art. XV, § 12.

Law reviews. — For article, "Ad Valorem Tax Status of a Private Lessee's Interest in Publicly Owned Property: Taxability of Possessory Interests in Industrial Projects under the New Mexico Industrial Revenue Bond Act," see 3 N.M. L. Rev. 136 (1973).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 71 Am. Jur. 2d State and Local Taxation §§ 307 to 318, 332 to 349, 362 to 391.

Construction and application of statutory and constitutional provisions exempting property of persons in military service, or formerly in such service, from taxation, 149 A.L.R. 1485.

Scope and application of exemption of cemeteries from taxation, 168 A.L.R. 283.

Construction of exemption of religious body or society from taxation or special assessment, 168 A.L.R. 1222.

Conditions: constitutional exemption from taxation as subject to legislative regulation respecting conditions of its assertion, 4 A.L.R.2d 744.

Property used by personnel as living quarters or for recreation purposes as within contemplation of tax exemptions extended to property of religious, educational, charitable, or hospital organizations, 15 A.L.R.2d 1064, 55 A.L.R.3d 356, 55 A.L.R.3d 485, 61 A.L.R.4th 1105.

Stadium: exemption from taxation of municipally owned or operated stadium, auditorium and similar property, 16 A.L.R.2d 1376.

"Scientific institution" within property tax exemption provisions, 34 A.L.R.2d 1221.

Validity, construction, and effect of statutes providing for urban redevelopment by private enterprise, 44 A.L.R.2d 1414.

Time: tax exemption of real property as affected by time of acquisition of title by private owner entitled to exemption, 54 A.L.R.2d 996.

Additional property, etc.: legislative power to exempt from taxation property, purposes or uses additional to those specified in constitution, 61 A.L.R.2d 1031.

College fraternity or sorority house, 66 A.L.R.2d 904.

Dining rooms or restaurants as within tax exemptions extended to property of religious, educational, charitable or hospital organizations, 72 A.L.R.2d 521.

Church parking lots as entitled to tax exemptions, 75 A.L.R.2d 1106.

Blue Cross, Blue Shield, or other hospital or medical service corporation, 88 A.L.R.2d 1414.

Agricultural fair society or association engaged in education activities, property of, 89 A.L.R.2d 1104.

Charitable, educational or religious tax exemption of property held in trust for tax-exempt organization, 94 A.L.R.2d 626.

Schools: exemption of public school property from assessments for local improvements, 15 A.L.R.3d 847.

Receipt of pay from beneficiaries as affecting tax exemption of charitable institutions, 37 A.L.R.3d 1191.

Clubhouse: tax exemption of property used by fraternal or benevolent association for clubhouse or similar purposes, 39 A.L.R.3d 640.

What constitutes church, religious society or institution exempt from property tax under state constitutional or statutory provisions, 28 A.L.R.4th 344.

Exemption of nonprofit theater or concert hall from local property taxation, 42 A.L.R.4th 614.

Exemption from real-property taxation of residential facilities maintained by hospital for patients, staff, or others, 61 A.L.R.4th 1105.

Nursing homes as exempt from property taxation, 34 A.L.R.5th 529.

84 C.J.S. Taxation §§ 215 to 226, 251 to 254, 281 to 303.

II. EXEMPT PROPERTY.

A. IN GENERAL.

Purpose of tax exemption is to encourage religious, charitable, scientific, literary and educational associations not operating for the profit of any private shareholder or individual. NRA Special Contribution Fund v. Board of County Comm'rs, 92 N.M. 541, 591 P.2d 672 (Ct. App. 1978), cert. quashed, 92 N.M. 464, 589 P.2d 1055 (1979).

Purposes served by exempt institution. — For most types of exemptions from taxation an exempt institution must serve some worthy purpose, religious, charitable, educational or governmental or must further the public welfare in some special way.

NRA Special Contribution Fund v. Board of County Comm'rs, 92 N.M. 541, 591 P.2d 672 (Ct. App. 1978), cert. quashed, 92 N.M. 464, 589 P.2d 1055 (1979).

Purpose of charitable exemption is to encourage charitable activities by providing them with tax relief, and to thereby promote the general welfare of society. The countervailing consideration is to limit the exemption within reasonable bounds so as to minimize the shift of the tax burden to nonexempt property owners. Another consideration in limiting exemptions is to avoid inequitable competition in the name of charity with nonexempt entities. Sisters of Charity v. County of Bernalillo, 93 N.M. 42, 596 P.2d 255 (1979).

Case-by-case determination of exemptions. — The constitution has provided a charitable exemption for which our cases recognize the propriety of a case-by-case analysis, and the statutory scheme provided by the legislature permits an orderly, expert, and consistent resolution of requests for an exemption on a case-by-case basis. Grand Lodge of Ancient & Accepted Masons v. Taxation & Revenue Dep't, 106 N.M. 179, 740 P.2d 1163 (Ct. App. 1987).

Classification of property. — The constitution, in effect, classes tangible property into that exempt from taxation, that which may be exempted and that which must be taxed. State ex rel. Attorney Gen. v. State Tax Comm'n, 40 N.M. 299, 58 P.2d 1204 (1936). See also N.M. Const., art. VIII, §§ 1, 5, and notes thereto.

Section determinative of exempt status. — No matter how praiseworthy the purposes of a nonprofit organization may be and no matter the quantity of public benefit derived, this section of the constitution, in establishing its standard for tax exempt status, is determinative. 1957-58 Op. Att'y Gen. No. 58-2.

It is applicable only to property, not excise, taxes. — There is a difference between a property tax and an excise or privilege tax. The constitutional exemption does not extend to more than that to which it plainly refers - property and property taxes. It falls short of exempting from the imposition of an excise tax such as the sales tax. 1955-56 Op. Att'y Gen. No. 6146.

Municipalities may legally assess and collect one cent gasoline tax from penitentiary, although it is a state agency, for it is an excise tax, where laws make no provision for exemption of state-owned vehicles, and by implication state consented to such tax. 1933-34 Op. Att'y Gen. 94.

Authority of legislature. — The legislature is authorized to exempt certain property from taxation and none other. Dillard v. New Mexico State Tax Comm'n, 53 N.M. 12, 201 P.2d 345 (1948). See also notes under analysis line IV, "Ad Valorem Tax Exemptions," of this section.

It may neither enlarge nor diminish exemptions granted in and by this section. 1955-56 Op. Att'y Gen. No. 6267.

The enumeration of certain exemptions in this section precludes other statutory exemptions. 1917-18 Op. Att'y Gen. 153.

Theory of exemptions. — The exemption granted to church property, public libraries, educational and charitable institutions and cemeteries not used or held for private or corporate profit proceeds upon the theory of the public good accomplished by them, and of the peculiar benefits derived by the public in general from their conduct. The exemption granted to property of the United States is perhaps compulsory; that to the state, all counties, towns, cities and school districts arises from public policy, which repudiates, as being utterly futile, the theory of the state taxing its own property in order to produce funds with which to operate its own affairs. State v. Locke, 29 N.M. 148, 219 P. 790, 30 A.L.R. 407 (1923).

Length thereof. — Tax exemption on property continues as long as the use is for the exempted purpose. Berger v. University of N.M., 28 N.M. 666, 217 P. 245 (1923).

Liability of federal contractor not taxation of government. — Where general contractor was required by contracts with federal government to furnish materials to be used on federal reservation in New Mexico, the contractor purchased the materials, became the owner thereof and was liable for the use or compensating tax under former statutory provisions (72-17-1, 1953 Comp. et seq.); and this was not taxation of government land or other government property. Robert E. McKee, Gen. Contractor v. Bureau of Revenue, 63 N.M. 185, 315 P.2d 832 (1957).

Irrigation districts are not "municipal corporations." Davy v. McNeill, 31 N.M. 7, 240 P. 482 (1925).

Nor is nonprofit water corporation. — A nonprofit corporation organized to provide a community water system pursuant to 3-29-1 NMSA 1978 is not "another municipal corporation," and is subject to ad valorem taxation. 1968 Op. Att'y Gen. No. 68-38.

Nor is town of Tome. — The organized town of Tome is not included in the term "other municipal corporations." Board of Trustees v. Sedillo, 28 N.M. 53, 210 P. 102 (1922).

Not all irrigation works exempt. — While community ditches and their laterals are exempt from taxation, other irrigation works are not. State ex rel. State Tax Comm'n v. San Luis Power & Water Co., 51 N.M. 294, 183 P.2d 605 (1947).

Relief when single irrigation work taxed. — In case a single irrigation works is singled out for taxation while other similar works go untaxed, the district court may grant such relief as may be proper. State ex rel. State Tax Comm'n v. San Luis Power & Water Co., 51 N.M. 294, 183 P.2d 605 (1947).

Exemption of church property. — If property is owned by a church, it is exempt from taxation, regardless of the use made of the property. 1925-26 Op. Att'y Gen. 58 (opinion rendered prior to 1972 amendment).

Church property to have active use for tax-exempt status. — The constitutional language "all church property not used for commercial purposes" contemplates a concurrent affirmative, active, nontaxable use to qualify church-owned property for tax-exempt status. Grace, Inc. v. Board of County Comm'rs, 97 N.M. 260, 639 P.2d 69 (Ct. App. 1981).

Houses and lots not deemed "church property". — A dwelling house and lot owned by a church, the rent for which is collected by the church and used for religious or charitable purposes, is not "church property." Church of Holy Faith, Inc. v. State Tax Comm'n, 39 N.M. 403, 48 P.2d 777 (1935).

A house and lot owned by a church and rented was not exempt from taxation as "church property," although church had acquired the property for the purpose of establishing a girls' school, but was not yet in financial condition to do so. Trustees of Property of Protestant Episcopal Church v. State Tax Comm'n, 39 N.M. 419, 48 P.2d 786 (1935).

Vacant lot which a church corporation had acquired for the purpose of building a church thereon sometime in the future is not church property pursuant to this provision. Grace, Inc. v. Board of County Comm'rs, 97 N.M. 260, 639 P.2d 69 (Ct. App. 1981).

Use of church property for religious or charitable purposes is necessary before the property is exempt. 1955-56 Op. Att'y Gen. No. 6088.

Where church establishes nonprofit corporation to run nursing home facility, the facility is church-affiliated but is not "church property" for purposes of a tax exemption; however, where the substantial and primary use of such a facility is for charitable purposes, it is tax exempt. Retirement Ranch, Inc. v. Curry County Valuation Protest Bd., 89 N.M. 42, 546 P.2d 1199 (Ct. App.), cert. denied, 89 N.M. 206, 549 P.2d 284 (1976).

Phrase "used for educational purposes" means the direct, immediate, primary and substantial use of property that embraces systematic instruction in any and all branches of learning from which a substantial public benefit is derived. NRA Special Contribution Fund v. Board of County Comm'rs, 92 N.M. 541, 591 P.2d 672 (Ct. App. 1978), cert. quashed, 92 N.M. 464, 589 P.2d 1055 (1979).

Broad expression "used for educational or charitable purposes" necessarily imposes upon the courts a severe task of interpretation. Charity may "cover a multitude of sins." The line of demarcation cannot be projected. It can take shape only by the gradual process of adjudicating this or that purpose or use on the one side of it or on the other, or by change in the constitutional criteria. Mountain View Homes, Inc. v. State Tax Comm'n, 77 N.M. 649, 427 P.2d 13 (1967); NRA Special Contribution Fund v. Board of County Comm'rs, 92 N.M. 541, 591 P.2d 672 (Ct. App. 1978), cert. quashed, 92 N.M. 464, 589 P.2d 1055 (1979).

What is charity, and what is a charitable use, as these terms were understood by the membership of the constitutional convention, and by the ordinary voter who participated in adoption of the constitution containing this language, is the test to be applied. Mountain View Homes, Inc. v. State Tax Comm'n, 77 N.M. 649, 427 P.2d 13 (1967).

No all-embracing application of the term charity was contemplated by the drafters of the constitution. Mountain View Homes, Inc. v. State Tax Comm'n, 77 N.M. 649, 427 P.2d 13 (1967).

Property used in operation of a quasi-public low-rent housing project would not have been considered charitable when the constitution was adopted. Mountain View Homes, Inc. v. State Tax Comm'n, 77 N.M. 649, 427 P.2d 13 (1967).

Courts establish tax exempt standards for "used for educational purposes". — The legislature has seen fit to allow the courts to establish the standards under which property may be determined to be tax exempt when "used for educational purposes." NRA Special Contribution Fund v. Board of County Comm'rs, 92 N.M. 541, 591 P.2d 672 (Ct. App. 1978), cert. quashed, 92 N.M. 464, 589 P.2d 1055 (1979).

In determining reasonable construction of phrase "used for educational purposes," the direct and immediate use of the property must govern the decision, and not the remote and consequential benefit derived from its use. NRA Special Contribution Fund v. Board of County Comm'rs, 92 N.M. 541, 591 P.2d 672 (Ct. App. 1978), cert. quashed, 92 N.M. 464, 589 P.2d 1055 (1979).

Term "educational" is comprehensive, embracing mental, moral and physical education. NRA Special Contribution Fund v. Board of County Comm'rs, 92 N.M. 541, 591 P.2d 672 (Ct. App. 1978), cert. quashed, 92 N.M. 464, 589 P.2d 1055 (1979).

Educational institution seeking tax exemption need not prove it is supplying an educational benefit which the state would normally provide its citizens. NRA Special Contribution Fund v. Board of County Comm'rs, 92 N.M. 541, 591 P.2d 672 (Ct. App. 1978), cert. quashed, 92 N.M. 464, 589 P.2d 1055 (1979).

Scope of educational use. — Plaintiff private museum's use of its property to raise funds for operations and related programs and activities in schools or off-site did not detract from an educational use and purpose. Georgia O'Keeffe Museum v. County of Santa Fe, 2003-NMCA-003, 133 N.M. 297, 62 P.3d 754.

Portion of land for educational purposes exempted. — Where a portion of a plaintiff's land is primarily and substantially devoted to educational purposes, notwithstanding that the period of its instruction is very short, the subjects taught are confined to a narrow field and its purpose is utilitarian to the last degree, it is educational within the scope of that term as employed in the constitutional provision under consideration. NRA Special Contribution Fund v. Board of County Comm'rs, 92

N.M. 541, 591 P.2d 672 (Ct. App. 1978), cert. quashed, 92 N.M. 464, 589 P.2d 1055 (1979).

English Statute of Charitable Uses is in force in this state. Mountain View Homes, Inc. v. State Tax Comm'n, 77 N.M. 649, 427 P.2d 13 (1967).

Fact that organization is nonprofit is not sufficient to bring it under the exemption of this section. No matter how praiseworthy the purposes of the organization are, it is still subject to taxation if the standards laid down are not met. 1959-60 Op. Att'y Gen. No. 60-63.

Unless used for educational, religious or charitable purposes. — The nonprofit character of the owner of property does not permit the granting of an exemption from ad valorem taxes unless the property is used for educational, religious or charitable purposes. 1969 Op. Att'y Gen. No. 69-137.

Nonprofit organizations have to pay an ad valorem tax on their property; for example, on union halls and lodge buildings, unless such property is used primarily for educational or charitable purposes. 1961-62 Op. Att'y Gen. No. 62-36.

And fact that club is nonprofit organization and at times may operate at financial loss is not sufficient to bring it within the terms of a constitutional exemption. Where it is apparent that it is used for social and recreational purposes to enhance the mutual happiness and enjoyment of its members and guests, property is not exempt from taxation and should be placed upon the tax rolls the same as any other taxable property. 1953-54 Op. Att'y Gen. No. 5740.

Use of property determinative of right to exemption. — Use, rather than ownership, is determinative as criteria for exemption from tax liability. If the use is for charitable purposes, then the exemption from tax liability attaches. Mountain View Homes, Inc. v. State Tax Comm'n, 77 N.M. 649, 427 P.2d 13 (1967).

It is the use of property, not the declared objects and purposes of its owner, which determines the right to exemption under this section. United Veterans Organization v. New Mexico Property Appraisal Dep't, 84 N.M. 114, 500 P.2d 199 (Ct. App. 1972).

The supreme court has stated that it is not what the purpose of an organization is, it is the use made of the property which is controlling in determining whether or not the exemption from taxation will apply. 1955-56 Op. Att'y Gen. No. 6171.

Pro rata taxing according to separate uses. — Where one substantial part of a building that is owned by a charitable institution is directly and actually occupied and used for charitable purposes, and another substantial portion is primarily used for commercial leasing, such building is pro rata taxable according to its separate uses. Sisters of Charity v. County of Bernalillo, 93 N.M. 42, 596 P.2d 255 (1979).

Taint of educational purposes. — If plaintiff engages casually in promotion, propaganda and lobbying activities, then its other activities are tainted with uneducational purposes, and if any evidence is presented of such activities, plaintiff loses its standing as an educational organization whose property is "used for educational purposes." NRA Special Contribution Fund v. Board of County Comm'rs, 92 N.M. 541, 591 P.2d 672 (Ct. App. 1978), cert. quashed, 92 N.M. 464, 589 P.2d 1055 (1979).

Educational function incidental to institution's activities. — When the facts of a case show that the educational function of an institution is merely incidental to its activities in pursuance of educational purposes, exemption from taxation may be denied. NRA Special Contribution Fund v. Board of County Comm'rs, 92 N.M. 541, 591 P.2d 672 (Ct. App. 1978), cert. quashed, 92 N.M. 464, 589 P.2d 1055 (1979).

By owner, not tenant. — The charitable use specified in this section should be construed to mean use by the owner of the property rather than the use to which the property is put by the tenant. Rutherford v. County Assessor, 89 N.M. 348, 552 P.2d 479 (Ct. App.), cert. denied, 90 N.M. 8, 558 P.2d 620 (1976); Chapman's, Inc. v. Huffman, 90 N.M. 21, 559 P.2d 398 (1975); Sisters of Charity v. County of Bernalillo, 93 N.M. 42, 596 P.2d 255 (1979).

Denial of exemption to leased property. — Foremost among the reasons why exemption from taxation is denied to property leased out by an otherwise tax-exempt body is that the property is put to a profitmaking or revenue-producing use by some private nonexempt person or organization. Sisters of Charity v. County of Bernalillo, 93 N.M. 42, 596 P.2d 255 (1979).

On case by case basis. — Except to the extent that the facts as to use are so nearly alike as to logically compel like results, no case can be said to constitute a controlling precedent for another case in this area. BPOE, Lodge 461 v. New Mexico Property Appraisal Dep't, 83 N.M. 445, 493 P.2d 411 (1972).

Burden to establish right to exemption. — It is the burden of the organization seeking an exemption to establish its right to that exemption. United Veterans Organization v. New Mexico Property Appraisal Dep't, 84 N.M. 114, 500 P.2d 199 (Ct. App. 1972).

Rule of strict construction of tax exemption provisions held not controlling in determining whether Masonic lodge property is used for educational or charitable purposes. Temple Lodge No. 6, A.F. & A.M. v. Tierney, 37 N.M. 178, 20 P.2d 280 (1933).

Rule of construction in New Mexico is that of reasonable construction, without favor or prejudice to either the taxpayer or the state, to the end that the probable intent of the provision is effectuated and the public interests to be subserved thereby are furthered. BPOE, Lodge 461 v. New Mexico Property Appraisal Dep't, 83 N.M. 445, 493

P.2d 411 (1972); Sisters of Charity v. County of Bernalillo, 93 N.M. 42, 596 P.2d 255 (1979).

Use to be primary and dominant. — It is not the purpose for which an association is organized, but the use made of the property which is controlling. Further, the use on which the decision rests must be the primary and dominant use and not merely an incidental and sporadic use. 1959-60 Op. Att'y Gen. No. 60-63.

It must be both substantial and primary. — To qualify for an exemption under this section, the educational or charitable use of property must be both substantial and primary. United Veterans Organization v. New Mexico Property Appraisal Dep't, 84 N.M. 114, 500 P.2d 199 (Ct. App. 1972).

Although this section does not require property to be used exclusively for charitable purposes in order to come within the exemption, the uses for these purposes must be substantial and must be the primary uses made of the property. Retirement Ranch, Inc. v. Curry County Valuation Protest Bd., 89 N.M. 42, 546 P.2d 1199 (Ct. App.), cert. denied, 89 N.M. 206, 549 P.2d 284 (1976); BPOE, Lodge 461 v. New Mexico Property Appraisal Dep't, 83 N.M. 445, 493 P.2d 411 (1972).

Where the primary use of the property was for the social and fraternal activities of the members and their families and guests of the members of the lodge and to be entitled to the exemption, the use of the property for charitable purposes has to be "substantial and primary," denial of the exemption by the property tax appeal board was proper. BPOE, Lodge No. 461 v. New Mexico Property Appraisal Dep't, 83 N.M. 505, 494 P.2d 167 (Ct. App. 1971), aff'd, 83 N.M. 445, 493 P.2d 411 (1972).

A country club which is primarily used for social and recreational purposes to enhance the mutual happiness and enjoyment of its members and guests is not exempt from taxation and should be placed on the tax rolls. 1953-54 Op. Att'y Gen. No. 5740.

Setting aside portion for charitable use not "substantial". — Where whole office building was organized for economic and not charitable use, setting aside 30% for hospital purposes is not substantial enough to make the hospital portion exempt from taxation under this section. Rutherford v. County Assessor, 89 N.M. 348, 552 P.2d 479 (Ct. App.), cert. denied, 90 N.M. 8, 558 P.2d 620 (1976).

Property need not be used solely for educational or charitable purposes. — All property used for educational or charitable purposes is exempt from taxation, and there is no limitation that it must be used solely for that purpose. 1914 Op. Att'y Gen. 225.

Rental of rooms no effect on tax-exempt status. — Where a lodge owns a building used for lodge work and recreation and is engaged in philanthropical work, the fact that it rents rooms to some of its members, and a very few to prospective members, does not affect its tax-exempt status. Albuquerque Lodge, No. 461, B.P.O.E. v. Tierney, 39 N.M. 135, 42 P.2d 206 (1935).

Facility used for caring for aged sick and infirm deemed "charitable". — Where the recipients of a nonprofit corporation's efforts are indeed sick and largely indigent, the facility used for the purpose of caring for the aged sick and infirm falls within the category of "charitable purpose." Retirement Ranch, Inc. v. Curry County Valuation Protest Bd., 89 N.M. 42, 546 P.2d 1199 (Ct. App.), cert. denied, 89 N.M. 206, 549 P.2d 284 (1976).

Use of property by Masonic lodge held "charitable" within meaning of this section. Temple Lodge No. 6, A.F. & A.M. v. Tierney, 37 N.M. 178, 20 P.2d 280 (1933).

Sheriff's posse not primarily "educational or charitable". — Under this section, the Dona Ana county sheriff's posse, or any other sheriff's posse, is not a primarily educational or charitable enterprise. Hence, a tax-exempt status may not be claimed. 1957-58 Op. Att'y Gen. No. 58-2.

Nor are chambers of commerce. — This section enumerates exemptions to taxes. Chambers of commerce are not included therein by name - the only enumeration under which chambers of commerce might be counted would be "all property used for educational or charitable purposes." A chamber of commerce purpose is neither educational nor charitable in the sense dealt with in this section. 1957-58 Op. Att'y Gen. No. 57-10.

Culture afforded by college sorority life is not "educational" within meaning of this section, exempting from taxation property used for educational purposes. Albuquerque Alumnae Ass'n of Kappa Kappa Gamma Fraternity v. Tierney, 37 N.M. 156, 20 P.2d 267 (1933).

Commercial television primarily entertainment, not educational. — The customary television programs of a commercial television station, whether broadcast or rebroadcast, are primarily for entertainment, and only primarily educational procedures are intended in this section, insofar as it pertains to the nonprofit class of tax exemptions. 1957-58 Op. Att'y Gen. No. 57-325.

Alumni association of university fraternity not exempt from taxation. NRA Special Contribution Fund v. Board of County Comm'rs, 92 N.M. 541, 591 P.2d 672 (Ct. App. 1978), cert. quashed, 92 N.M. 464, 589 P.2d 1055 (1979).

United Veterans Organization not exempt from property taxes. NRA Special Contribution Fund v. Board of County Comm'rs, 92 N.M. 541, 591 P.2d 672 (Ct. App. 1978), cert. quashed, 92 N.M. 464, 589 P.2d 1055 (1979).

Lessee of university-owned land is not liable for ad valorem taxes based on the assessed value of the land itself, as distinct from the value of the improvements erected upon the land. 1970 Op. Att'y Gen. No. 70-24.

Exemption provided by section does not extend to special assessments for improvements, and the Drainage Law of 1912, ch. 84, § 39 (73-7-1 NMSA 1978), authorizing such assessments, is not void. Lake Arthur Drainage Dist. v. Board of Comm'rs, 29 N.M. 219, 222 P. 389 (1924).

Improvement assessments not deemed "tax". — A specific assessment of property for improvement, the cost of which is assessed against the property, is not a tax within the constitutional sense; but a drainage improvement on lands granted by the Enabling Act could not be paid from the income fund, for the state had no authority to improve such lands. Lake Arthur Drainage Dist. v. Field, 27 N.M. 183, 199 P. 112 (1921).

Specific assessments on property for improvements, based on benefits, the cost of which is assessed against the property, is not a tax within the inhibition of this section, and Laws 1923, ch. 140, § 402 (now repealed), regarding appraisal of benefits to property of public corporations, did not violate this section. In re Proposed Middle Rio Grande Conservancy Dist., 31 N.M. 188, 242 P. 683 (1925).

Assessment for local sewer improvement is not a tax from which state property is exempt, unless lands were granted to state by Enabling Act. 1931-32 Op. Att'y Gen. 40.

Real property owned by the state armory board held not subject to a paving assessment by a municipality for a street paving project adjoining such property. 1959-60 Op. Att'y Gen. No. 59-161. See also notes to N.M. Const., art. VIII, § 1.

Improvements made on federal or state land which immediately vest in federal or state governments are not taxable, but if they do not vest in such governments until the expiration or lapse of the lease, they are taxable. 1937-38 Op. Att'y Gen. 71.

Taxation of oil and gas leases. — Oil and gas leases on state and government property cannot be assessed and taxed as such, but such leases on privately owned fee lands can be taxed, and production taxes are in lieu of other taxes. 1931-32 Op. Att'y Gen. 140.

Former exemption of newly constructed railroads. — Constitutional provisions cited in declaring that the constitutional amendment of 1914, omitting section 8 of this article of prior constitution, which omitted section permitting legislature to exempt newly constructed railroads from taxation, gave rise to doubt as to whether prior statute, §§ 1761 and 3881, 1897 C.L., so exempting such railroads, remained effective. 1915-16 Op. Att'y Gen. 11.

Res judicata and collateral estoppel in quiet title suits. — District court decree holding that certain property was exempt from taxation was res judicata as to a claim of exemption from taxes in a quiet title suit involving the realty. McDonald v. Padilla, 53 N.M. 116, 202 P.2d 970 (1948).

In quiet title action in which question of exemption from taxes for 1936 and 1939 was involved, doctrine of collateral estoppel by judgment applied in view of 1920 decree which restrained assessor from assessing certain real estate on ground it was exempt from taxation. McDonald v. Padilla, 53 N.M. 116, 202 P.2d 970 (1948).

Listing of exempt property on tax roll. — Exempt property should be properly described on the tax roll and should be valued at its proper value and listed as exempt. Payment made in lieu of taxes has no bearing upon the valuation and should not be considered by the assessor. 1955-56 Op. Att'y Gen. No. 6233.

Property which is constitutionally exempt from taxation is not required to be reported under 7-36-7B(1) NMSA 1978 and the assessor has no authority to value the property. Lovelace Center for Health Sciences v. Beach, 93 N.M. 793, 606 P.2d 203 (Ct. App. 1980).

Remedy for claims of tax exemption for property owned by masonic lodges. — The legislature, in enacting a comprehensive scheme for administrative and judicial review, has provided the exclusive remedy for claims presented to the district court that property owned by all masonic lodges is exempt from taxation under this section and the administrative remedies provided by the legislature must be exhausted before a declaratory judgment action will lie. Grand Lodge of Ancient & Accepted Masons v. Taxation & Revenue Dep't, 106 N.M. 179, 740 P.2d 1163 (Ct. App. 1987).

B. PROPERTY NOT SUBJECT TO TAX.

Property of federal government and its agencies is exempt from property taxation in New Mexico. 1961-62 Op. Att'y Gen. No. 62-53.

Property owned by town or school district is exempt from the taxes imposed on the severance and sale of hydrocarbons. 1961-62 Op. Att'y Gen. No. 61-64.

Since the supreme court has stated directly that ownership of the property is the test in determining whether or not the exemption applies to property held by the state or school district, it goes without saying that property owned by a school district is exempt from taxation if the land is presently being used for school purposes. 1955-56 Op. Att'y Gen. No. 6183.

Property owned by town is exempt from real and personal property taxation. 1963-64 Op. Att'y Gen. No. 63-147.

Where the state retains title to state lands, the state property appraisal department is without authority to assess taxes against the land after the cancellation of a contract of sale. Any tax deed held by the department is void; therefore, any deed issuing from a foreclosure sale conveys nothing. Romero v. State, 97 N.M. 569, 642 P.2d 172 (1982).

Property of state university. — Under this section, it is apparent that property of a state university is not taxable. A property tax cannot be levied against that property. 1955-56 Op. Att'y Gen. No. 6146.

Bonds of state or political subdivisions. — Nothing in the language of this section of the constitution requires an interpretation that only such bonds as evidence a debt of the state or its political subdivisions are exempt from taxation. State ex rel. State Park & Recreation Comm'n v. New Mexico State Auth., 76 N.M. 1, 411 P.2d 984 (1966).

Municipal bonds. — Under this section, all bonds of municipalities are exempt from taxation. 1963-64 Op. Att'y Gen. No. 64-17.

Municipal industrial development revenue bonds. — Statute authorizing issuance of revenue bonds by municipality for industrial development and providing that bonds so authorized, the income therefrom, etc., shall be exempt from all taxation by state on any subdivision, was not violation of constitutional provision requiring that taxes be equal and uniform, insofar as the exemption was confined to municipal property. Village of Deming v. Hosdreg Co., 62 N.M. 18, 303 P.2d 920 (1956). See also notes under analysis line III, "Equal and Uniform," of N.M. Const., art. VIII, § 1.

Bonds of joint inter-community nonprofit corporation. — This section would be applicable to the bonds issued by a joint inter-community nonprofit water or natural gas corporation formed under the provisions of Laws 1955, ch. 18 (now repealed), and under the Joint Powers Agreements Act. 1963-64 Op. Att'y Gen. No. 64-17.

Hospital used for charitable purposes. — The exemption from taxation extends to any hospital used for charitable purposes, even though service is given to some patients who pay for it. 1912-13 Op. Att'y Gen. 36.

Parsonages located on church property for the purpose of providing a place of residence for the parson, reverend, priest or other church officials are exempt from taxation. 1955-56 Op. Att'y Gen. No. 6124.

Property owned by fraternal order is exempt except such part as is rented for profit. 1925-26 Op. Att'y Gen. 58.

The property of the Independent Order of Odd Fellows is exempt. 1914 Op. Att'y Gen. 225.

Property of B.P.O. Elks held exempt from taxation if it came within the provisions of Laws 1903, ch. 51, § 3 (special act). 1912-13 Op. Att'y Gen. 231.

Bi-state railroad. — The Cumbres and Toltec Railroad, a bi-state agency of New Mexico and Colorado, is immune from property taxes in the two states. 1990 Op. Att'y Gen. No. 90-18.

Effect of proviso in this section is to maintain the lien on property acquired by "outright purchase or trade" if the tax or other assessment secures a bonded indebtedness; no other tax lien survives when property is acquired by the state. Further, unless the property is acquired in the manner specified in the proviso, liens for taxes and assessments for bonded indebtedness would also be extinguished. 1978 Op. Att'y Gen. No. 78-8.

C. PROPERTY SUBJECT TO TAX.

Property owned by property control division. — The property control division of the general services department is required to pay levies assessed by the middle Rio Grande conservancy district on real property owned by the property control division within the conservancy district. 1987 Op. Att'y Gen. No. 87-7.

Property of Las Vegas land grant is not exempt from taxation under this section, since it is not a town, city or other municipal corporation. State v. Board of Trustees, 28 N.M. 237, 210 P. 101 (1922).

Where the Las Vegas grant previously had been held for tax purposes not to be a town, city or other municipal corporation within the contemplation of this section, such holding was equally applicable within the contemplation of the provisions of the N.M. Const., art. IV, § 24. Board of Trustees v. Montano, 82 N.M. 340, 481 P.2d 702 (1971).

Common lands of town of Atrisco in Atrisco land grant do not come within either Section 3 or Section 5 of this article and are, therefore, subject to taxation. Town of Atrisco v. Monohan, 56 N.M. 70, 240 P.2d 216 (1952).

Lands of community grant of town of Tome, incorporated under Laws 1891, ch. 86 (now repealed), and §§ 2148-2184, 1897 C.L., held not exempt from taxation. Board of Trustees v. Sedillo, 28 N.M. 53, 210 P. 102 (1922).

One having lease to construct military housing on federal land. — Congress having explicitly removed the bar of sovereign immunity as it applied to property belonging to the United States, the immunity granted the federal government by this section and N.M. Const., art. XXI, § 2, clearly was not available to one who had a lease to construct military housing on federal land. It was his interest that was subject to taxation. Kirtland Heights, Inc. v. Board of County Comm'rs, 64 N.M. 179, 326 P.2d 672 (1958).

Dam impounding water for irrigation system, though owned by a nonprofit corporation distributing water to its shareholders, is not exempt from taxation. Storrie Project Water Users Ass'n v. Gonzales, 53 N.M. 421, 209 P.2d 530 (1949).

Income-producing property of church is not exempt, although the proceeds therefrom are used for religious purposes. 1953-54 Op. Att'y Gen. No. 5740.

Property owned by high official of religious order is not exempt. 1925-26 Op. Att'y Gen. 58.

Railroad hospital used and supported by employees is not exempt. 1925-26 Op. Att'y Gen. 58.

Self-supporting low-cost housing. — Where there is an enterprise to furnish low-cost housing to a certain segment of the population that is intended to be self-supporting, without any thought that gifts or charity be involved, in that the tenants are required to pay for the premises occupied by them with the rentals being fixed so as to return the amount estimated as being necessary to pay out the project, the use is not charitable so as to exempt the property from taxes under this section. Mountain View Homes, Inc. v. State Tax Comm'n, 77 N.M. 649, 427 P.2d 13 (1967).

Property owned by labor unions not used solely for an exempt purpose enumerated in the constitution is not exempt from property taxes. 1959-60 Op. Att'y Gen. No. 59-7.

Legacies to charitable or educational institutions. — This constitutional exemption does not apply to legacies to charitable or educational institutions which are subject to the inheritance tax. 1937-38 Op. Att'y Gen. 85.

III. TRANSFERRED PROPERTY.

Generally. — When property is acquired by the state in its sovereign capacity, it thereupon becomes absolved, freed and relieved from any further liability for taxes previously assessed against it, and which are unpaid at the time it becomes so acquired; and from the moment of its acquisition, the power to enforce a lien is arrested or abated. State v. Locke, 29 N.M. 148, 219 P. 790, 30 A.L.R. 407 (1923) (decided prior to 1946 amendment).

Escheat property freed from liability for former taxes. — Land which is acquired by state through escheat is forthwith freed from any further liability for taxes previously levied, and there is no longer any power to collect or enforce the tax. Schmitz v. New Mexico State Tax Comm'n, 55 N.M. 320, 232 P.2d 986 (1951).

Tax liability where real property acquired by municipality. — The real property of any municipality within the state is exempt from taxation under the express provisions of this section, and a county assessor may not subject such real property, the title to which has passed to a municipality, with further liability for the payment of taxes. Although the tax lien upon such property is unenforceable against the real property so acquired by a municipality, the former owner in whose name the property was assessed on January 1 of such year remains personally responsible for the taxes upon the property for the remainder of the year. 1961-62 Op. Att'y Gen. No. 61-103.

IV. AD VALOREM TAX EXEMPTIONS.

All tangible property subject to tax unless specifically exempt. — All tangible property in New Mexico is subject to taxation in proportion to value, and should be taxed, unless specifically exempted by the constitution or by its authority. Sims v. Vosburg, 43 N.M. 255, 91 P.2d 434 (1939).

By constitution or legislative act. — It is the policy of this state that tangible property must be taxed unless specifically exempted by the constitution, or by legislative act authorized by the constitution. Town of Atrisco v. Monohan, 56 N.M. 70, 240 P.2d 216 (1952).

Constitution sets forth only areas of allowable ad valorem tax exemption. 1969 Op. Att'y Gen. No. 69-137.

Veterans exemption laws do not exempt veteran from payment of ad valorem taxes for the taxable year during which property was purchased by the veteran from a nonveteran owning the property on January 1 of such year. 1959-60 Op. Att'y Gen. No. 59-133.

Sec. 4. [Misuse and deposit of public money.]

Any public officer making any profit out of public money or using the same for any purpose not authorized by law, shall be deemed guilty of a felony and shall be punished as provided by law and shall be disqualified to hold public office. All public money not invested in interest-bearing securities shall be deposited in national banks in this state, in banks or trust companies incorporated under the laws of the state, in federal savings and loan associations in this state, in savings and loan associations incorporated under the laws of this state whose deposits are insured by an agency of the United States and in credit unions incorporated under the laws of this state or the United States to the extent that such deposits of public money in credit unions are insured by an agency of the United States, and the interest derived therefrom shall be applied in the manner prescribed by law. The conditions of such deposits shall be provided by law. (As amended November 3, 1914, November 7, 1967 and November 4, 1986.)

ANNOTATIONS

Cross references. — For statutory provisions relating to public money, see 6-1-1 to 6-11-9 NMSA 1978.

The 1914 amendment, which was proposed by J.R. No. 10 (Laws 1913) and adopted at the general election held on November 3, 1914, with a vote of 18,468 for and 13,593 against, amended this section, which was formerly Section 10 of this article, and which, prior to this amendment read: "There shall be levied annually for state revenue a tax not to exceed four mills on each dollar of the assessed valuation of the property in the state, except for the support of the educational, penal and charitable institutions of the state, payment of the state debt and interest thereon. For the first two years after this Constitution goes into effect the total annual tax levy for all state purposes exclusive of

necessary levies for the state debt shall not exceed twelve mills; and thereafter it shall not exceed ten mills." See also compiler's note to N.M. Const., art. VIII, § 8.

The 1967 amendment, which was proposed by H.J.R. No. 11, § 1 (Laws 1967) and adopted at a special election held November 7, 1967, with a vote of 34,669 for and 18,785 against, inserted the provisions authorizing deposits in federal or insured domestic savings and loan associations and added the last sentence.

The 1986 amendment, which was proposed by H.J.R. No. 13 (Laws 1985) and adopted at the general election held on November 4, 1986, by a vote of 198,766 for and 78,948 against, substituted "money" for "moneys" in the first and second sentences and added the provisions relating to credit unions in the second sentence.

Meaning of provisions generally. — This section simply means that public funds, when not so used, shall be deposited for safekeeping in the named institutions; but when funds are required to meet public obligations they may be expended in a business way, and according to business methods and practices. Davy v. Day, 31 N.M. 519, 247 P. 842 (1926).

Section requires judicial finding of misuse. — This section does not require that a public officer be convicted of a felony before he can be disqualified, but merely requires a judicial finding that the officer has knowingly misused public funds. State ex rel. Martinez v. Padilla, 94 N.M. 431, 612 P.2d 223 (1980).

"Disqualification" synonymous with "forfeiture". — Though this section speaks of "disqualification" rather than "forfeiture," the terms are synonymous in this context, as both go to eligibility to hold office. State ex rel. Martinez v. Padilla, 94 N.M. 431, 612 P.2d 223 (1980).

Court may remove disqualified officers. — Where public officers are disqualified for a misuse of public funds, the court has the jurisdiction to remove them by a writ of quo warranto. State ex rel. Martinez v. Padilla, 94 N.M. 431, 612 P.2d 223 (1980).

Appropriations to private corporation prohibited. — The state may not properly appropriate public moneys to the use and benefit of the historical society of New Mexico, a private corporation. 1963-64 Op. Att'y Gen. No. 64-41.

Any appropriation to a private corporation, whether directly or indirectly made, would clearly be violative of the state constitutional provisions of N.M. Const., art. IV, § 31, art. VIII, § 4 and art. IX, § 14. 1963-64 Op. Att'y Gen. No. 64-41.

Public moneys may be invested in interest-bearing securities, but such investment of public funds is limited to those interest-bearing securities as may be provided by statute. 1970 Op. Att'y Gen. No. 70-98.

Loans to private individuals not included. — Investments of public funds are limited to such interest-bearing securities as are provided by statute, which does not include loans to private individuals. 1933-34 Op. Att'y Gen. 84.

But loans to resident students not deemed inconsistent. — A student loan plan whereby the state could loan money to resident students who are enrolled in an institution of higher learning in the state, and who otherwise qualify under the federal-guaranteed loan program under the Higher Education Act of 1965, is not inconsistent with this section or N.M. Const., art. IX, § 14. 1970 Op. Att'y Gen. No. 70-23.

Investment in mutual funds or investment trusts. — Investment by the state treasurer in a mutual fund acting as an investment conduit (i.e., an open-end mutual fund or a unit investment trust meeting the requirements of Subsection O(1) of 6-10-10 NMSA 1978) is constitutional. 2000 Op. Att'y Gen. No. 00-03.

Deposit or investment of funds in savings and loan associations. — A savings and loan association, not being a bank, and a deposit or purchase of investment shares in such an institution not being one of the permissible investments of surplus county funds, a county could not deposit or invest any of its funds in such an institution. 1961-62 Op. Att'y Gen. No. 62-9 (opinion rendered prior to 1967 amendment).

Los Alamos county may not deposit its cemetery funds in a federally insured savings and loan association. 1961-62 Op. Att'y Gen. No. 62-9 (opinion rendered prior to 1967 amendment).

Bonds may be payable outside state. — An irrigation district may issue its bonds and make them payable outside the state. Davy v. Day, 31 N.M. 519, 247 P. 842 (1926).

Installment sale not void. — Sale by municipality of its light and water system to utility company was not void under this section on ground only part of purchase price was paid in cash and balance was to be paid for on terms. City of Clovis v. Southwestern Pub. Serv. Co., 49 N.M. 270, 161 P.2d 878, 161 A.L.R. 504 (1945).

Exaction and deposition of interest. — State treasurer is not required to exact interest from banks in which he may, of his own volition, deposit public moneys; but where such moneys do earn interest, the interest is the property of the state, and treasurer may not contract to award it to any person. Catron v. Marron, 19 N.M. 200, 142 P. 380 (1914).

Although it is provided that interest on county funds deposited or invested by county treasurers shall be applied according to law, it is not imperative that funds be deposited so that they draw interest. But a treasurer may not deposit county funds without interest in a bank of which he is a stockholder, for he personally would profit indirectly thereby. 1914 Op. Att'y Gen. 252.

If county treasurer obtains interest on money deposited in banks, it belongs to the county and not to him, and should be accounted for as part of the county funds in his hands. 1915-16 Op. Att'y Gen. 10.

Interest on principal in game protection fund is credited to state general fund. 1980 Op. Att'y Gen. No. 80-17.

Authority to require additional security from banks depends on statutory scheme. — The authority vested in the state board of finance by 6-10-20 NMSA 1978 to require additional security from banks depends on the other provisions of the statutory scheme. 1980 Op. Att'y Gen. No. 80-11.

Comparable provisions. — Utah Const., art. XIII, § 8.

Wyoming Const., art. XV, §§ 7, 8.

Law reviews. — For annual survey of New Mexico law relating to administrative law, see 12 N.M.L. Rev. 1 (1982).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 63A Am. Jur. 2d Public Funds §§ 7, 8, 10 to 12.

Interest: liability of public officer for interest or other earnings received on public money in his possession, 5 A.L.R.2d 257.

Contributions or subscriptions, construction of statute, forbidding solicitation or acceptance of, by public officers or employees, as regards purpose or object for which funds are solicited, 85 A.L.R. 1146.

Liability of public officer or his bond to public body in respect of fees or charges which he illegally or improperly collected from members of public, 99 A.L.R. 647.

Conduct contemplated by statute which makes neglect of duty by public officer or employee a punishable offense, 134 A.L.R. 1250.

Payments made without compliance with procedure prescribed for payment of claims, liability of officer in respect of, 146 A.L.R. 762.

81A C.J.S. States § 225.

Sec. 5. [Head of family and veteran exemptions.] (2004)

The legislature shall exempt from taxation the property of each head of the family in the amount of two thousand dollars ($2,000). The legislature shall also exempt from taxation the property, including the community or joint property of husband and wife, of every honorably discharged member of the armed forces of the United States and the

widow or widower of every such honorably discharged member of the armed forces of the United States, in the sum of three thousand dollars ($3,000) in 2004; three thousand five hundred dollars ($3,500) in 2005; and four thousand dollars ($4,000) in 2006 and each subsequent year. Provided, that in every case where exemption is claimed on the ground of the claimant's having served with the armed forces of the United States as aforesaid, the burden of proving actual and bona fide ownership of such property upon which exemption is claimed, shall be upon the claimant. (As amended November 3, 1914, September 20, 1921, September 20, 1949, September 15, 1953, November 6, 1973 and November 8, 1988, November 5, 2002, and November 2, 2004.)

ANNOTATIONS

Cross references. — As to head-of-family exemption, see 7-37-4 NMSA 1978.

As to veteran exemption, see 7-37-5 NMSA 1978.

The 1914 amendment, which was proposed by J.R. No. 10 (Laws 1913) and adopted at the general election held on November 3, 1914, with a vote of 18,468 for and 13,593 against, inserted the present first clause of this section, which was formerly in Section 11 of this article, and which, prior to this amendment read: "A state board of equalization is hereby created which shall consist of the governor, traveling auditor, state auditor, secretary of state and attorney general. Until otherwise provided, said board shall have and exercise all the powers now vested in the territorial board of equalization." See also compiler's note to N.M. Const., art. VIII, § 8.

The 1921 amendment, which was proposed by H.J.R. No. 41 (Laws 1921) and adopted at a special election held on September 20, 1921, with a vote of 24,216 for and 22,946 against, added provisions regarding discharged soldiers, sailors, marines, and army nurses and their widows, so that the section then read: "The legislature may exempt from taxation property of each head of a family to the amount of two hundred dollars, and the property of every honorably discharged soldier, sailor, marine and army nurse, and the widow of every such soldier, sailor, or marine, who served in the armed forces of the United States at any time during the period in which the United States was regularly and officially engaged in any war, in the sum of two thousand dollars. Provided, that in every case where exemption is claimed on the ground of the claimants having served with the military or naval forces of the United States as aforesaid, the burden of proving actual and bona fide ownership of such property, upon which exemption is claimed, shall be upon the claimant."

The 1949 amendment, which was proposed by H.J.R. No. 6 (Laws 1949) and adopted at a special election held on September 20, 1949, with a vote of 23,478 for and 5,238 against, inserted "including the community or joint property of husband and wife" and substituted "member of the armed forces of the United States and the widow of every such honorably discharged member of the armed forces of the United States" for "soldier, sailor, marine and army nurse, and the widow of every such soldier, sailor or marine" in the first sentence.

The 1953 amendment, which was proposed by S.J.R. No. 19 (Laws 1953) and adopted at a special election held on September 15, 1953, with a vote of 20,700 for and 7,900 against, substituted "who served in such armed forces during any period in which they were or are engaged in armed conflict under orders of the President of the United States, and the widow of every such honorably discharged member of the armed forces of the United States, in the sum of two thousand dollars ($2,000)" for "and the widow of every such honorably discharged member of the armed forces of the United States who served in the armed forces of the United States at any time during which the United States was regularly and officially engaged in any war, in the sum of two thousand dollars ($2,000)" at the end of the first sentence.

The 1973 amendment, which was proposed by H.J.R. No. 5 (Laws 1973) and adopted at a special election held on November 6, 1973, with a vote of 31,358 for and 11,294 against, inserted "or widower" following "widow" in the first sentence.

The 1988 amendment, which was proposed by H.J.R. No. 3, § 2 (Laws 1988) and adopted at the general election held on November 8, 1988, by a vote of 282,926 for and 93,218 against, near the beginning, substituted "shall" for "may" and "two thousand dollars ($2,000) as follows: in 1989, the legislature shall exempt from taxation eight hundred dollars ($800), in 1991, one thousand four hundred dollars ($1,400) and beginning in 1993, two thousand dollars ($2,000). The legislature shall also exempt from taxation" for "two hundred dollars ($200) and ".

The 2002 amendment, which was proposed by S.J.R. No. 1 (Laws 2001) and adopted at the general election held on November 5, 2002, by a vote of 311,369 for and 123,260 against, deleted "as follows: in 1989, the legislature shall exempt from taxation eight hundred dollars ($800), in 1991, one thousand four hundred dollars ($1,400) and beginning in 1993, two thousand dollars ($2,000)" from the end of the first sentence and added "in tax years prior to 2003; two thousand five hundred dollars ($2,500) in 2003; three thousand dollars ($3,000) in 2004; three thousand five hundred dollars ($3,500) in 2005; and four thousand dollars ($4,000) in 2006 and each subsequent year" at the end of the second sentence.

The 2003 amendment, which was proposed by H.J.R. 2 (Laws 2003) and adopted at a general election held November 2, 2004, by a vote of 452,386 for and 214,844 against, provides a property tax exemption of each head of family and also to honorably discharged veterans.

Compiler's notes. — An amendment to this section proposed by H.J.R. No. 2 (Laws 1969), which would have allowed the legislature to exempt property from taxation, was, according to 1969-70 Op. Att'y Gen. No. 69-151, nullified by submission of the proposed constitution to the voters in 1969.

Generally. — State board of equalization succeeded to all the power of the territorial board, which included fixing the value of shares of all national banks and other banking institutions, the tax to be imposed being in lieu of any taxes which otherwise might be

assessed upon their property. First Nat'l Bank of Raton v. McBride, 20 N.M. 381, 149 P. 353 (1915) (decided prior to 1914 amendment).

State board of equalization had power to equalize valuations of property for taxation purposes by classes, both as between classes in the same county and as between counties throughout the state, and fact that the action taken resulted in increase or decrease of total valuations in state was immaterial. South Spring Ranch & Cattle Co. v. State Bd. of Equalization, 18 N.M. 531, 139 P. 159 (1914) (decided prior to 1914 amendment).

For provisions relating to county valuation protests boards, see 7-38-25 NMSA 1978 et seq.

All tangible property subject to tax unless specifically exempt. — All tangible property in New Mexico is subject to taxation in proportion to value, and should be taxed, unless specifically exempted by the constitution, or by its authority. Sims v. Vosburg, 43 N.M. 255, 91 P.2d 434 (1939).

It is the policy of this state that tangible property must be taxed unless specifically exempt by the constitution, or by legislative act authorized by the constitution. Town of Atrisco v. Monohan, 56 N.M. 70, 240 P.2d 216 (1952).

The constitution sets forth the only areas of allowable ad valorem tax exemption. 1969 Op. Att'y Gen. No. 69-137. See also N.M. Const., art. VIII, § 3, and notes thereto.

Territorial provisions deemed repealed. — The constitutional provisions covering the whole subject of exemption from taxation repealed the territorial statutes on that subject. Albuquerque Alumnae Ass'n of Kappa Kappa Gamma Fraternity v. Tierney, 37 N.M. 156, 20 P.2d 267 (1933).

Classification of property generally. — The constitution, in effect, classes tangible property into that exempt from taxation, that which may be exempted and that which must be taxed. State ex rel. Attorney Gen. v. State Tax Comm'n, 40 N.M. 299, 58 P.2d 1204 (1936). See also N.M. Const., art. VIII, §§ 1, 3, and notes thereto.

Power to grant exemptions. — Judicial department has no power to extend time fixed by legislature for payment of taxes or to postpone delinquency date designated in statute, since power to grant exemptions is legislative, unless given in the constitution itself, as in this section. State v. Fifth Judicial Dist. Court, 36 N.M. 151, 9 P.2d 691 (1932).

It is an open question in this jurisdiction whether the legislature has power to create tax exemptions, or to recognize any property as exempt, save as created or expressly authorized in the constitution. Oden Buick, Inc. v. Roehl, 36 N.M. 293, 13 P.2d 1093 (1932).

Effect of 1921 amendment. — Amendment of this section in 1921 had effect of modifying it pro tanto. Asplund v. Alarid, 29 N.M. 129, 219 P. 786 (1923).

This section, as amended in 1921, permitted legislature to exempt soldiers of World War II as well as those of the first World War. Flaska v. State, 51 N.M. 13, 177 P.2d 174 (1946).

The amendment of this section in 1921 effected an exception to the earlier Section 32 of Article IV, to the extent that the legislature was authorized to exempt the qualified property from a tax already a fixed liability or obligation. This right to exempt did not extend to accrued taxes. Asplund v. Alarid, 29 N.M. 129, 219 P. 786 (1923).

Section is not self-executing, and exemptions are granted by means of enabling legislation. 1963-64 Op. Att'y Gen. No. 64-24.

Residency requirements not set forth. — This section, in and of itself, does not set forth any requirements as to residency in order for one to qualify. 1963-64 Op. Att'y Gen. No. 64-24.

Authority of legislature. — Legislature is authorized to exempt certain property from taxation and that means none other. Dillard v. New Mexico State Tax Comm'n, 53 N.M. 12, 201 P.2d 345 (1948).

By this section, the legislature is authorized to grant an exemption on property to the value of $2000 to one who qualifies as a veteran and $2000 to one who qualifies as a widow (or widower now) of a veteran, and both exemptions to one who qualifies as both. 1964 Op. Att'y Gen. No. 64-125.

Legislature could limit the veterans' exemption to disabled members of the armed forces, but should take care to define carefully what it means by "disabled" so as to avoid endless controversy and litigation. 1947-48 Op. Att'y Gen. No. 4987.

Extent of power granted. — The supreme court is concerned in this section with an express power granted by the people to the legislature to allow tax exemptions to soldiers of a class defined, and it is not privileged to restrict that power by reading into the provision granting it words that are not there; nor may it confine the language used to one narrow channel of meaning, granting a limited power, when a broader meaning, granting a broader power, is implicit in the terms used unless proofs show that the narrower sense was intended. Flaska v. State, 51 N.M. 13, 177 P.2d 174 (1946).

Legislature may require listing of all persons to whom exemptions may be allowed, either originally, by adding their names upon application to the assessor, or on order of district court, before delivery of tax rolls to county treasurer. Dillard v. New Mexico State Tax Comm'n, 53 N.M. 12, 201 P.2d 345 (1948).

Name on list prima facie proof of right to exemption. — Name of honorably discharged soldier on list of assessments entitled to exemption stands as prima facie proof that he is entitled to the exemption, and it can be removed only on showing he is not so entitled. Dillard v. New Mexico State Tax Comm'n, 53 N.M. 12, 201 P.2d 345 (1948).

Burden of establishing right to exemption. — Claimant of exemption has responsibility of furnishing necessary proof where assessor does not have knowledge which authorizes him to place claimant upon exemption list, since assessor need not search out this information. Dillard v. New Mexico State Tax Comm'n, 53 N.M. 12, 201 P.2d 345 (1948).

A war veteran has burden of establishing his right to the exemption and if he fails to follow the method prescribed by statute, he waives his right thereto. Dillard v. New Mexico State Tax Comm'n, 53 N.M. 12, 201 P.2d 345 (1948).

Formal declaration of war held unnecessary. — This section and enabling legislation referred to "any time in which the United States is regularly and officially engaged in any war." This language did not say that the war must be declared. To be officially engaged in war does not necessarily mean that the United States must be in a formally declared war. In spite of the fact that there was an undeclared war, the United States was regularly and officially engaged in war in Korea. Therefore, a veteran of the Korean conflict was held entitled to a "soldier's tax" exemption. 1953-54 Op. Att'y Gen. No. 5660.

Hence, veteran of Korean conflict is a "soldier" within the meaning of the constitution and statutes regarding tax exemption and is entitled to such exemption if otherwise qualified. 1953-54 Op. Att'y Gen. No. 5660.

Soldier's tax exemption statute (now repealed) allowing exemptions to every honorably discharged soldier of any prior war, who served for 30 days or more in the armed forces of the United States at any time in which the nation was engaged in war, applied to a soldier of World War II, provided he acquired his residence prior to January 1, 1934. Flaska v. State, 51 N.M. 13, 177 P.2d 174 (1946).

Where amendatory act increasing time of service to make exemption available to 90 days became effective on March 13, 1947, widow of World War I soldier who served more than 30 but less than 90 days was entitled to exemption on 1947 taxes, since exemption status was determined on January 1, 1947. Dillard v. New Mexico State Tax Comm'n, 53 N.M. 12, 201 P.2d 345 (1948).

Soldier's exemptions allowed and not allowed. — Exemptions held not allowable to the parents of a soldier, the husband of a war nurse or to a soldier whose property is in the name of his wife. Exemptions held allowed for a soldier's interest in his father's estate when established, to widows of Civil War veterans and to soldiers discharged for physical disability, after 30 days' service. 1923-24 Op. Att'y Gen. 78.

No exemption from tax in year of purchase from nonveteran. — The veterans exemption laws do not exempt a veteran from the payment of ad valorem taxes for the taxable year during which property was purchased by the veteran from a nonveteran owning the property on January 1st of such year. 1959-60 Op. Att'y Gen. No. 59-133.

Participation in training in student's army training corps does not qualify a person for the tax exemption. 1957-58 Op. Att'y Gen. No. 58-94.

Civilian World War II merchant marine seamen held not exempt. — While Congress has recognized the service of certain civilian groups in World War II for the purpose of receiving federal benefits, civilian World War II merchant marine seamen did not "serve in the armed forces of the United States" as contemplated in this provision and 7-37-5 NMSA 1978. 1989 Op. Att'y Gen. No. 89-01.

Common lands of Atrisco not within exemptions. — The common lands of the town of Atrisco in the Atrisco land grant do not come within either this section or Section 3 of this article and are, therefore, subject to taxation. Town of Atrisco v. Monohan, 56 N.M. 70, 240 P.2d 216 (1952).

Full exemption where joint tenancy in veteran and nonveteran. — Where property is owned in joint tenancy by a veteran and a nonveteran, the exemption should be allowed to the full extent. 1963-64 Op. Att'y Gen. No. 63-148.

Community interest in property. — War veteran's wife's community interest in property was not entitled to exemption from taxation under this section. Dillard v. New Mexico State Tax Comm'n, 53 N.M. 12, 201 P.2d 345 (1948) (decided prior to 1949 amendment).

Partnership property held not within exemption. — Partnership property being neither joint or community property nor individually owned, and not individually owned under 54-1-25 NMSA 1978, did not come within any exemption for property tax granted by statute or authorized by the constitution; a veteran partner could not therefore apply any portion of his exemption pursuant to this section and 72-1-11 to 72-1-16, 1953 Comp. [since repealed] (similar to 7-37-5 NMSA 1978) to property owned by a partnership of which he was a partner. 1963-64 Op. Att'y Gen. No. 63-148 (rendered under former law).

Exemption to be deducted from true or cash value of property. — The $200 exemption was to be deducted from true or cash value of taxpayer's property, since all property is taxable at that value, and not from the one-third thereof which legislature had fixed arbitrarily as the value for purposes of taxation. Samosa v. Lopez, 19 N.M. 312, 142 P. 927 (1914).

Voting in bond elections. — Property owner and his wife, exempt from property tax under this section, were qualified electors in voting on general obligation bonds for municipal improvements. Hair v. Motto, 82 N.M. 226, 478 P.2d 554 (1970).

A veteran whose exemption is $2000 and who does not pay property tax above that sum is not entitled to vote in county bond elections. 1953-54 Op. Att'y Gen. No. 5809.

Levies of special taxes are not to be extended and assessed on livestock which is otherwise nontaxable because of the owner's soldier and head-of-family exemptions. 1937-38 Op. Att'y Gen. 193.

Comparable provisions. — Utah Const., art. XIII, § 2.

Law reviews. — For article, "Ad Valorem Tax Status of a Private Lessee's Interest in Publicly Owned Property: Taxability of Possessory Interests in Industrial Projects under the New Mexico Industrial Revenue Bond Act," see 3 N.M. L. Rev. 136 (1973).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 71 Am. Jur. 2d State and Local Taxation § 334.

Time: tax exemption of real property as affected by time of acquisition of title by private owner entitled to exemption, 54 A.L.R.2d 996.

Military service as basis of exemption, 83 A.L.R. 1235.

Remission, release or compromise of tax as an invalid exemption from taxation, 99 A.L.R. 1068, 28 A.L.R.2d 1425.

Failure to claim or delay in claiming exemption for past years, tax exemption as affected by, 115 A.L.R. 1484.

Veterans of world war, state statutes relating to exemption from taxation of amount paid as pension, war risk insurance, compensation, bonus or other relief, 116 A.L.R. 1437.

Military service, construction and application of statutory and constitutional provisions exempting property of persons in, or formerly in, such service, from taxation, 149 A.L.R. 1485.

Taxation of rights of insured or beneficiary under insurance policy as affected by exemption statutes, 150 A.L.R. 796, 167 A.L.R. 1052.

Tax on property held under executory contract with exempt vendor, 166 A.L.R. 595.

Impairment of obligation of contract with respect to tax exemption, 173 A.L.R. 15.

Constitutional exemption from taxation as subject to legislative regulation respecting conditions of its assertion, 4 A.L.R.2d 744.

84 C.J.S. Taxation §§ 219, 241.

Sec. 6. [Assessment of lands.]

Lands held in large tracts shall not be assessed for taxation at any lower value per acre then [than] lands of the same character or quality and similarly situated, held in smaller tracts. The plowing of land shall not be considered as adding value thereto for the purpose of taxation. (As amended November 3, 1914.)

ANNOTATIONS

Cross references. — As to valuation of property, see 7-36-1 NMSA 1978 et seq.

The 1914 amendment, which was proposed by J.R. No. 10 (Laws 1913) and was adopted at the general election held on November 3, 1914, with a vote of 18,468 for and 13,593 against, substituted the present section, which formerly was Section 12 of this article for former Section 6 which, prior to amendment, read: "The legislature shall have no power to release or discharge any county, city, town, school district or other municipal corporation or subdivision of the state, from its proportionate share of taxes levied for any purpose." See also compiler's note to N.M. Const., art. VIII, § 8.

Bracketed material. — The bracketed word "than" was inserted by the compiler although the word "then" appears in the enrolled law. However, the correct wording appeared in Section 12 of this article in the original constitution, which was renumbered as this section by the 1914 amendment.

Courts may not reclassify, revalue or reassess property. — Neither supreme court nor the district court may reclassify, revalue or reassess property, improperly classified by taxing officials, and consequently, assess at an excessive valuation. Gerner v. State Tax Comm'n, 71 N.M. 385, 378 P.2d 619 (1963).

Valuations to be established and taxes levied by some standard. — To have uniformity and equality in a form of tax, the valuations must be established by some standard, and after valuations are fixed, the taxes based upon such valuations must be levied by a standard. It is only thus that each taxpayer may bear his fair share of the burden of government. Gerner v. State Tax Comm'n, 71 N.M. 385, 378 P.2d 619 (1963). See also N.M. Const., art. VIII, § 1, and notes thereto.

Assessment not to be premised upon hypothetical or speculative values. — Classification or assessment of property for tax purposes, premised upon hypothetical or speculative values believed, ultimately or at some later time, to be, or become, the true market value of such land, cannot legitimately be the basis of determining its value. Gerner v. State Tax Comm'n, 71 N.M. 385, 378 P.2d 619 (1963).

Valuation held excessive and discriminatory. — Classification and valuation of property suitable for grazing purposes at 10 times the valuation of other property of the same character and quality and similarly situated because of its classification as lots held for speculation for oil or other purposes, absent any evidence of such speculative

purposes, was so excessive and discriminatory as to entitle taxpayer to relief, despite fact that some other owners of like tracts were similarly assessed or that these lands, while similar to grazing lands, were not actually used for grazing purposes. Gerner v. State Tax Comm'n, 71 N.M. 385, 378 P.2d 619 (1963).

Valuation of farming land higher than grazing land permissible. — There is nothing to prohibit the valuation of farming land at a higher rate than grazing land. 1919-20 Op. Att'y Gen. 183.

If the taxing authorities reasonably find that land which is farmed under the dry-farming method is of greater value than grazing lands in the vicinity, a greater assessed valuation would be legal. 1921-22 Op. Att'y Gen. 93.

Seed planting and harrowing affect value. — Although the mere plowing of land does not affect its value, cultivation, seed planting and harrowing does. 1921-22 Op. Att'y Gen. 144.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 71 Am. Jur. 2d State and Local Taxation §§ 759 to 769.

Corporate property, assessment of, at full value when valuations generally are illegally fixed lower, 3 A.L.R. 1370, 28 A.L.R. 983, 55 A.L.R. 503.

Prospective value as basis for valuation of land for purposes of property taxation, 24 A.L.R. 649.

Additional tax levy necessitated by failure of some property owners to pay their proportions of original levy as violating requirement of uniformity, 79 A.L.R. 1157.

Leasehold interest, method or rule for valuation of, 84 A.L.R. 1310.

Original cost of construction or reproduction cost as factors in assessing real property, 104 A.L.R. 790.

Appurtenant rights, easements, restrictions or charges in respect of land as factors in taxation, 108 A.L.R. 829.

Easement as factor in property taxation, 134 A.L.R. 963.

Flowage rights as factor in property taxation, 134 A.L.R. 963.

Price paid or received by taxpayer for property as evidence of its value for tax purposes, 160 A.L.R. 684.

84 C.J.S. Taxation § 411.

Sec. 7. [Judgments against local officials.]

No execution shall issue upon judgment rendered against the board of county commissioners of any county, or against any incorporated city, town or village, school district or board of education; or against any officer of any county, incorporated city, town or village, school district or board of education, upon any judgment recovered against him in his official capacity and for which the county, incorporated city, town or village, school district or board of education, is liable, but the same shall be paid out of the proceeds of a tax levy as other liabilities of counties, incorporated cities, towns or villages, school districts or boards of education, and when so collected shall be paid by the county treasurer to the judgment creditor. (As amended November 3, 1914.)

ANNOTATIONS

Cross references. — For statutory provisions relating to judgments generally, see Article 1 of Chapter 39 NMSA 1978.

As to judgments, see Rule 1-054 NMRA.

The 1914 amendment, which was proposed by J.R. No. 10 (Laws 1913) and adopted at the general election held on November 3, 1914, with a vote of 18,468 for and 13,593 against, substituted the present section, which, prior to amendment was former Section 13 of this article, and former Section 7 of this article was incorporated as the first paragraph of Section 3 of this article. See also compiler's note to N.M. Const., art. VIII, § 8.

Generally. — This section cannot be relied upon to enforce an unauthorized judgment, nor is it self-executing. McAtee v. Gutierrez, 48 N.M. 100, 146 P.2d 315 (1944).

Special tax to be levied to pay judgment. — Judgments against county can be paid only by county levying a sufficient special tax to pay them, and until such levy, they cannot be set off against taxes owed by judgment creditors, who cannot set them up as a defense when sued for taxes. 1933-34 Op. Att'y Gen. 53.

No levy against county as a whole. — Only school district benefited shall be called upon to pay for materials used, and mandamus will not lie to compel levy against property of county as a whole to pay judgment against county board of education. McAtee v. Gutierrez, 48 N.M. 100, 146 P.2d 315 (1944).

Constructive notice and knowledge chargeable. — One who sells to a county school board is chargeable with constructive notice and knowledge of statutes which govern payment of school obligations. McAtee v. Gutierrez, 48 N.M. 100, 146 P.2d 315 (1944).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Relieving officer or public depository or his surety from liability for public funds as taxation for private purpose, 38 A.L.R. 1516, 96 A.L.R. 295.

Municipality's power to consent or confess to judgment against itself, 67 A.L.R. 1503.

Bonds, judgment in proceeding to secure judicial approval of, before issuance or sale, as required by statute, 87 A.L.R. 716, 102 A.L.R. 107.

Right to go behind money judgment against public body in a mandamus proceeding to enforce it, 155 A.L.R. 464.

Liability of public officer for accountability for interest or earnings received on public moneys in officer's possession, 5 A.L.R.2d 257.

67 C.J.S. Officers and Public Employees §§ 216, 217, 251 to 254.

Sec. 8. [Exemption of certain personalty in transit through the state.]

Personal property which is moving in interstate commerce through or over the state of New Mexico, or which was consigned to a warehouse, public or private, or factory within New Mexico from outside the state for storage in transit to a final destination outside the state of New Mexico, manufacturing, processing or fabricating while in transit to a final destination, whether specified when transportation begins or afterwards, which destination is also outside the state, shall be deemed not to have acquired a situs in New Mexico for purposes of taxation and shall be exempt from taxation. Such property shall not be deprived of such exemption because while in the warehouse the property is assembled, bound, joined, processed, disassembled, divided, cut, broken in bulk, relabeled or repackaged. (As added November 6, 1973.)

ANNOTATIONS

The 1973 amendment, which was proposed by H.J.R. No. 39 (Laws 1973) and adopted at a special election held on November 6, 1973, with a vote of 27,474 for and 13,899 against, added a new Section 8 to Article VIII.

Compiler's notes. — Sections 8 to 13 of the original constitution were deleted when the amendment proposed by J.R. No. 10 (Laws 1913) was adopted at the general election November 3, 1914, by a vote of 18,468 for and 13,593 against. The amendment amended Article VIII in its entirety and contained only seven sections. The contents of former Sections 10 to 13 of this article were inserted in present Sections 4 to 7 of this article, respectively. Former Sections 8 and 9, which were deleted, read as follows:

"Section 8. The power to license and tax corporations and corporate property shall not be relinquished or suspended by the state or any subdivision thereof; provided, that the legislature may, by general law, exempt new railroads from taxation for not more than six years, from and after the completion of any such railroad and branches; such railroad being deemed to be completed for the purpose of taxation as to any operative

division thereof, when the same is opened for business to the public; and new sugar factories, smelters, reduction and refining works, and pumping plants for irrigation purposes, and irrigation works, for not more than six years from and after their establishment."

"Sec. 9. All property within the territorial limits of the authority levying the tax, and subject to taxation, shall be taxed therein for state, county, municipal and other purposes; provided, that the state board of equalization shall determine the value of all property of railroad, express, sleeping-car, telegraph, telephone and other transportation or transmission companies, used by such companies in the operation of their railroad, express, sleeping-car, telegraph or telephone lines, or other transportation or transmission lines, and shall certify the value thereof as so determined to the county and municipal taxing authorities."

For decisions relating to former Sections 10 to 13 of this article, see notes to Sections 4 to 7 of this article.

Sec. 9. [Elected governing authority prerequisite to levy of tax.]

No tax or assessment of any kind shall be levied by any political subdivision whose enabling legislation does not provide for an elected governing authority. This section does not prohibit the levying or collection of a tax or special assessment by an initial appointed governing authority where the appointed governing authority will be replaced by an elected one within six years of the date the appointed authority takes office. The provisions of this section shall not be effective until July 1, 1976. (As added November 5, 1974.)

ANNOTATIONS

The 1974 amendment, which was proposed by H.J.R. No. 8 (Laws 1974) and adopted at the general election held on November 5, 1974, with a vote of 62,103 for and 62,083 against, added a new Section 9 to Article VIII. The resolution did not state whether the provision would be a new Section 9 in Article VIII, but the former compiler so designated it, and the present compiler has left it as such for the sake of consistency.

Compiler's notes. — See compiler's note to N.M. Const., art. VIII, § 8.

Fees imposed by mining commission constitutional. — The provision authorizing the imposition of fees by the mining commission was not violative of this section since the commission is not a political subdivision. Old Abe Co. v. New Mexico Mining Comm'n, 121 N.M. 83, 908 P.2d 776 (Ct. App. 1995).

Sec. 10. [Severance tax permanent fund.]

A. There shall be deposited in a permanent trust fund known as the "severance tax permanent fund" that part of state revenue derived from excise taxes that have been or

shall be designated severance taxes imposed upon the severance of natural resources within this state, in excess of that amount that has been or shall be reserved by statute for the payment of principal and interest on outstanding bonds to which severance tax revenue has been or shall be pledged. Money in the severance tax permanent fund shall be invested as provided by law. Distributions from the fund shall be appropriated by the legislature as other general operating revenue is appropriated for the benefit of the people of the state.

B. All additions to the fund and all earnings, including interest, dividends and capital gains from investment of the fund shall be credited to the corpus of the fund.

C. The annual distributions from the fund shall be one hundred two percent of the amount distributed in the immediately preceding fiscal year until the annual distributions equal four and seven-tenths percent of the average of the year-end market values of the fund for the immediately preceding five calendar years. Thereafter, the amount of the annual distributions shall be four and seven-tenths percent of the average of the year-end market values of the fund for the immediately preceding five calendar years.

D. The frequency and the time of the distributions made pursuant to Subsection C of this section shall be as provided by law. (As added November 2, 1976; as amended November 2, 1982 and November 5, 1996.)

ANNOTATIONS

Cross references. — For creation of severance tax permanent and income funds, see 7-27-3 NMSA 1978.

The 1976 amendment, which was proposed by H.J.R. No. 5 (Laws 1975) and adopted at the general election held on November 2, 1976, with a vote of 155,365 for and 99,386 against, added a new Section 10 to Article VIII. The resolution did not state whether the provision would be a new Section 10, but the former compiler so designated it, and the present compiler has left it as such for the sake of consistency.

The 1982 amendment, which was proposed by H.J.R. No. 12 (Laws 1981) and adopted at the general election held on November 2, 1982, by a vote of 125,727 for and 125,324 against, deleted the third sentence of the first paragraph, as set out in the original pamphlet.

The 1996 amendment, which was proposed by S.J.R. No. 2 (Laws 1996) and adopted at the general election held November 5, 1996, by a vote of 307,442 for and 153,021 against, divided the section into subsections, rewrote Subsection A, and added Subsections B, C, and D.

Compiler's notes. — See compiler's note to N.M. Const., art. VIII, § 8.

An amendment proposed by H.J.R. No. 7 (Laws 1994), which would have rewritten this section to provide that all earnings of the fund be deposited in it and providing for limited distributions from the fund was submitted to the people in the general election held on November 8, 1994. It was defeated by a vote of 173,924 for and 208,556 against.

Constitutionality of 1990 workers' compensation legislation. — The 1990 workers' compensation legislation is constitutionally infirm under this section to the extent the legislature intends to supplant its judgment for that of the state investment council and the state investment officer in determining whether to invest the severance tax permanent fund in bonds issued by the employers mutual company and to direct that the severance tax permanent fund purchase those bonds. To that extent also, the legislation may constitute a prohibited loan guaranty arrangement under N.M. Const., art. IX, § 14. However, the legislature has not clearly and unequivocally mandated the purchase. Consequently, it may not be concluded that the legislation is patently unconstitutional on those grounds. 1990 Op. Att'y Gen. No. 90-25.

Fund not "permanent" as contemplated in investment of permanent school fund. — The severance tax permanent fund is not a permanent fund as contemplated by N.M. Const., art. XII, § 7, relating to investment of permanent school fund. The severance tax fund and the various land grant permanent funds are fundamentally different. 1977 Op. Att'y Gen. No. 77-10.

Sec. 11. [Exemption of national guard members.]

ANNOTATIONS

Compiler's notes. — For disposition of former Article VIII, § 11, see compiler's note following Article VIII, § 8.

An amendment to Article VIII, proposed by H.J.R. No. 17 (Laws 1981), which would have added a new Section 11, establishing an income tax exemption for members of the national guard, was submitted to the people at the general election held on November 2, 1982. It was defeated by a vote of 113,247 for and 143,574 against.

Sec. 12, 13. Repealed.

ANNOTATIONS

Compiler's notes. — See compiler's note to N.M. Const., art. VIII, § 8.

Sec. 14. [Accrual of elderly taxpayers' real property taxes.]

ANNOTATIONS

Compiler's notes. — An amendment to Article VIII proposed by S.J.R. No. 1 (Laws 1978), which would have provided for the accrual of real property taxes during the

lifetime of certain elderly taxpayers, the payment of which would be held in abeyance until death or transfer of the property, was submitted to the people at the general election held on November 7, 1978. It was defeated by a vote of 78,796 for and 113,034 against. The resolution did not actually assign any section number to this amendment, but the compiler has assigned it Section 14 for the sake of numerical continuity.

Sec. 15. [Property tax exemption for disabled veterans.] (2001)

The legislature shall exempt from taxation the property, including the community or joint property of husband and wife, of every veteran of the armed forces of the United States who has been determined pursuant to federal law to have a one hundred percent permanent and total service-connected disability, if the veteran occupies the property as his principal place of residence. The legislature shall also provide this exemption from taxation for property owned by the widow or widower of a veteran who was eligible for the exemption provided in this section, if the widow or widower continues to occupy the property as his principal place of residence. The burden of proving eligibility for the exemption in this section is on the person claiming the exemption. (As added November 3, 1998; as amended November 5, 2002.)

ANNOTATIONS

Cross references. — For statutory provision, see 7-37-5.1 NMSA 1978.

The 1998 amendment to Article VIII, which was proposed by H.J.R. No. 21 (Laws 1998) and adopted at the general election held on November 3, 1998 by a vote of 279,787 for and 143,585 against, added this section.

The 2002 amendment, which was proposed by H.J.R. No. 5 (Laws 2001) and adopted at the general election held on November 5, 2002, by a vote of 314,948 for and 118,913 against, inserted "one hundred percent" near the middle of the first sentence, deleted "and has specially adapted the residence to his disability using a grant for specially adapted housing granted to the veteran by the federal government based on his permanent and total disability" from the end of the first sentence, and deleted "specially adapted" preceding "property" near the end of the second sentence.

ARTICLE IX
State, County and Municipal Indebtedness

Section 1. [Debts of territory and its counties assumed.]

The state hereby assumes the debts and liabilities of the territory of New Mexico, and the debts of the counties thereof, which were valid and subsisting on June twentieth, nineteen hundred and ten, and pledges its faith and credit for the payment thereof. The legislature shall, at its first session, provide for the payment or refunding thereof by the issue and sale of bonds, or otherwise.

ANNOTATIONS

Authority of state to issue certificate of indebtedness or borrow money. — Debts of territory became liabilities of state, and appropriations were made to pay deficiencies incurred by requirements of existing law, so there was no reason why state could not issue certificates of indebtedness or borrow money with which to pay such debts, so long as such evidences of indebtedness did not exceed constitutional limitations. State ex rel. Lucero v. Marron, 17 N.M. 304, 128 P. 485 (1912).

Liability to repay counties overpayment for territorial expenses. — The liability of the territory to repay, acknowledged by Laws 1907, ch. 92 (now obsolete), to repay to certain counties their overpayment for territorial expenses required by Laws 1903, ch. 89 (now obsolete), is a liability assumed by the state by this section. 1912-13 Op. Att'y Gen. 31.

Payment of interest on territorial bonds. — Statutory and constitutional provisions referred to in holding that interest on series "A" state bonds, by which territorial bonds for insane asylum and for military institute were assumed by the state, was properly payable from proceeds of sales and rentals of lands donated by congress to the two institutions respectively. 1915-16 Op. Att'y Gen. 31.

Claims for wild animal bounties not authorized. — This section does not authorize payment by state of claims against a county for wild animal bounties. State ex rel. Beach v. Board of Loan Comm'rs, 19 N.M. 266, 142 P. 152 (1914).

Compensation for services rendered by county treasurer as practicing physician. — County treasurer, who was practicing physician, was entitled to compensation for services rendered to board of county commissioners for examining persons said to be insane, for medical attention to prisoners in jail and for making post-mortem examinations of bodies. 1915-16 Op. Att'y Gen. 331.

But not for services rendered by county clerk as surveyor. — County commissioners were not authorized to employ and pay a county clerk for services as a surveyor, which services the county surveyor was enjoined by law to perform. 1915-16 Op. Att'y Gen. 331.

Comparable provisions. — Utah Const., art. III, Third.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 72 Am. Jur. 2d States, Territories and Dependencies §§ 14, 15.

81A C.J.S. States §§ 4, 5.

Sec. 2. [Payment of county debts by another county.]

No county shall be required to pay any portion of the debt of any other county so assumed by the state, and the bonds of Grant and Santa Fe counties which were validated, approved and confirmed by act of congress of January sixteenth, eighteen hundred and ninety-seven, shall be paid as hereinafter provided.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 72 Am. Jur. 2d States, Territories and Dependencies §§ 14, 15.

81A C.J.S. States §§ 4, 5.

Sec. 3. [State refunding bonds for assumed debts.]

The bonds authorized by law to provide for the payment of such indebtedness shall be issued in three series, as follows:

Series A. To provide for the payment of such debts and liabilities of the territory of New Mexico.

Series B. To provide for the payment of such debts of said counties.

Series C. To provide for the payment of the bonds and accrued interest thereon of Grant and Santa Fe counties which were validated, approved and confirmed by act of congress, January sixteenth, eighteen hundred and ninety-seven.

ANNOTATIONS

Payment of interest on territorial bonds. — Statutory and constitutional provisions referred to in holding that interest on series "A" state bonds, by which territorial bonds for insane hospital and for military institute were assumed by the state, was properly payable from proceeds of sales and rentals of lands donated by congress to the two institutions respectively. 1915-16 Op. Att'y Gen. 31.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 72 Am. Jur. 2d States, Territories and Dependencies § 85.

Funding or refunding obligations as subject to conditions respecting approval by voters, 97 A.L.R. 442.

Mandatory or permissive character of legislation in relation to payment of state bonds, 103 A.L.R. 813.

Smaller political units, constitutionality of statutory plan for financing or refinancing bonds of, by larger political units, 106 A.L.R. 608.

Power of municipality or other governmental body to issue refunding bonds to retire obligation in respect of which the creation and maintenance of a sinking fund by taxation is required, 157 A.L.R. 794.

Power of governmental unit to issue bonds as implying power to refund them, 1 A.L.R.2d 134.

Validity of governmental borrowing or expenditure for purposes of acquiring, maintaining or improving stadium for use of professional athletic team, 67 A.L.R.3d 1186.

81A C.J.S. States § 259.

Sec. 4. [Sale of lands for certain bond payments.]

The proper officers of the state shall, as soon as practicable, select and locate the one million acres of land granted to the state by congress for the payment of the said bonds of Grant and Santa Fe counties, and sell the same or sufficient thereof to pay the interest and principal of the bonds of Series C issued as provided in Section Three hereof. The proceeds of rentals and sales of said land shall be kept in a separate fund and applied to the payment of the interest and principal of the bonds of Series C. Whenever there is not sufficient money in said fund to meet the interest and sinking fund requirements therefor, the deficiency shall be paid out of any funds of the state not otherwise appropriated, and shall be repaid to the state or to the several counties which may have furnished any portion thereof under a general levy, out of the proceeds subsequently received of rentals and sales of said lands.

Any money received by the state from rentals and sales of said lands in excess of the amounts required for the purposes above-mentioned shall be paid into the current and permanent school funds of the state respectively.

ANNOTATIONS

Law reviews. — For note, "Administration of Grazing Lands in New Mexico: A Breach of Trust," see 15 Nat. Resources J. 581 (1975).

Sec. 5. [Remission of county debts to state prohibited.]

The legislature shall never enact any law releasing any county, or any of the taxable property therein, from its obligation to pay to the state any moneys expended by the state by reason of its assumption or payment of the debt of such county.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 72 Am. Jur. 2d States, Territories and Dependencies § 86.

Smaller political units, constitutionality of statutory plan for financing or refinancing bonds of, by larger political units, 106 A.L.R. 608.

81A C.J.S. States § 209.

Sec. 6. [Militia warrants.]

No law shall ever be passed by the legislature validating or legalizing, directly or indirectly, the militia warrants alleged to be outstanding against the territory of New Mexico, or any portion thereof; and no such warrant shall be prima facie or conclusive evidence of the validity of the debt purporting to be evidenced thereby or by any other militia warrant. This provision shall not be construed as authorizing any suit against the state.

ANNOTATIONS

Payment of territorial militia warrants is permanently prohibited by this section. 1915-16 Op. Att'y Gen. 224.

Sec. 7. [State indebtedness; purposes.]

The state may borrow money not exceeding the sum of two hundred thousand dollars [($200,000)] in the aggregate to meet casual deficits or failure in revenue, or for necessary expenses. The state may also contract debts to suppress insurrection and to provide for the public defense.

ANNOTATIONS

Cross references. — As to state indebtedness, see 6-12-1, 6-12-2 and 6-12-6 to 6-12-14, NMSA 1978.

Phrase "to provide for the public defense" means to provide a militia of the kind required by N.M. Const., art. XVIII, § 2. State ex rel. Charlton v. French, 44 N.M. 169, 99 P.2d 715 (1940).

Limitation not applicable to debts contracted to suppress insurrection or provide for public defense. — The $200,000 limitation on the state's borrowing to meet "casual deficits or failure in revenue, or for necessary expenses," does not apply to debts contracted to suppress insurrection or to provide for the public defense. 1951-52 Op. Att'y Gen. No. 5438.

The last sentence in this section, to the effect that the state may also contract debts to suppress insurrection and to provide for the public defense, is authority for issuance of certificates of indebtedness for debts contracted without any limitation, dependent only upon the extent and degree of the emergency and the wisdom of the governor and legislature in meeting the same. 1953-54 Op. Att'y Gen. No. 5854.

Militia and public defense provisions in pari materia. — Constitutional provisions concerning the organization, discipline and equipment of the militia, the calling out of the militia and contracting debts to provide for public defense are in pari materia. State ex rel. Charlton v. French, 44 N.M. 169, 99 P.2d 715 (1940). For constitutional provisions relating to the militia, see N.M. Const., art. XVIII.

Territorial debts included. — This section authorizes the issuance and sale of certificates of indebtedness for casual deficits or failure of revenue of the territory, as all debts and liabilities of the territory were assumed by the state. The legislature must be the sole judge of "necessary expenses." State ex rel. Lucero v. Marron, 17 N.M. 304, 128 P. 485 (1912). As to assumption of debts of territory by state, see N.M. Const., art. IX, § 1.

Where purpose for which an agency proposes to contract a debt is not included in this section, N.M. Const., art. IX, § 8, specifically prohibits the contraction of the debt. 1957-58 Op. Att'y Gen. No. 58-228.

Debentures for construction of addition to capitol. — Proposed debentures provided for in Laws 1921, ch. 81 (now obsolete), relating to construction of an addition to the capitol building at Santa Fe, were not to pay an indebtedness of the state, but were to be issued in anticipation of the revenues. 1921-22 Op. Att'y Gen. 59. See also catchline, "Bonds for capitol additions not included," in notes to N.M. Const., art. IX, § 8.

Debentures to anticipate proceeds of gasoline excise tax authorized by Laws 1927, ch. 20 (now repealed) did not constitute state borrowing or debt requiring a popular referendum. State v. Graham, 32 N.M. 485, 259 P. 623 (1927).

State highway bonds issued under Laws 1912, ch. 58 (now executed), were clearly not within the exception specified in this section. Catron v. Marron, 19 N.M. 200, 142 P. 380 (1914).

State highway debentures were held general obligations of the state within contemplation of U.S. Rev. Stat. § 5136 (12 U.S.C. § 24). 1937-38 Op. Att'y Gen. 202.

Laws 1921, ch. 153 (temporary), authorizing levy of taxes and issuance and sale of state debentures in anticipation of taxes, for construction and improvement of public highways, and to meet, dollar for dollar, allotments to the state of federal funds under Federal Aid Road Act (23 U.S.C. §§ 101 to 158) was validated by adoption of amendment to state constitution adding Section 16 to Article IX. Lopez v. State Hwy. Comm'n, 27 N.M. 300, 201 P. 1050 (1921).

See also notes to N.M. Const., art. IX, § 8.

Comparable provisions. — Idaho Const., art. VIII, § 1.

Iowa Const., art. VII, §§ 2, 4.

Montana Const., art. VIII, § 8.

Utah Const., art. XIV, §§ 1, 2.

Wyoming Const., art. XVI, § 1.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 72 Am. Jur. 2d States, Territories and Dependencies §§ 78, 80.

Power of legislature to add to or make more onerous the conditions or limitations prescribed by constitution upon incurring public debts, 106 A.L.R. 231.

Constitutional or statutory provision limiting state or municipal indebtedness or taxation or regulating issuance of bonds as affecting bonds or other obligations authorized but not delivered prior to adoption or effective date of the provision, 109 A.L.R. 961.

Presumptions and burden of proof as to violation of or compliance with public debt limitation, 16 A.L.R.2d 515.

81A C.J.S. States §§ 213 to 222.

Sec. 8. [State indebtedness; restrictions.]

No debt other than those specified in the preceding section shall be contracted by or on behalf of this state, unless authorized by law for some specified work or object; which law shall provide for an annual tax levy sufficient to pay the interest and to provide a sinking fund to pay the principal of such debt within fifty years from the time of the contracting thereof. No such law shall take effect until it shall have been submitted to the qualified electors of the state and have received a majority of all the votes cast thereon at a general election; such law shall be published in full in at least one newspaper in each county of the state, if one be published therein, once each week, for four successive weeks next preceding such election. No debt shall be so created if the total indebtedness of the state, exclusive of the debts of the territory, and the several counties thereof, assumed by the state, would thereby be made to exceed one percent of the assessed valuation of all the property subject to taxation in the state as shown by the preceding general assessment.

ANNOTATIONS

Cross references. — As to state indebtedness, see 6-12-1, 6-12-2 and 6-12-6 to 6-12-14 NMSA 1978.

Bond issues. — Laws 1959, ch. 315, authorizes the state board of finance to sell bonds in the sum of eight million dollars ($8,000,000) to mature not later than twenty years after their date of issue for constructing, equipping, etc., buildings and purchase of land for certain state educational institutions; levies a tax for payment of such bonds

and submits the act to qualified electors at the general election in November, 1960. (Adopted November 8, 1960.)

Laws 1963, ch. 228, authorizes the state board of finance to sell bonds in the sum of eight million dollars ($8,000,000) to mature not later than twenty years after date of issuance, for constructing, equipping, etc., buildings and utility facilities and purchase of land for certain state educational institutions; levies a tax for payment of such bonds and submits the act to qualified electors at the general election in November, 1964. (Adopted November 3, 1964.)

Laws 1965, ch. 238, authorizes the state board of finance to sell bonds in the amount of six million dollars ($6,000,000) for 1967, eight million dollars ($8,000,000) for 1969, nine and one-half million dollars ($9,500,000) for 1971, nine million dollars ($9,000,000) for 1973 and ten million dollars ($10,000,000) for 1975, to mature not later than five years after the date of their issuance, for constructing, purchasing, equipping, etc., buildings and utility facilities and purchase of land for state educational institutions named in N.M. Const., art. XII, § 11; levies a tax for payment of such bonds and submits the act to qualified electors at the general election in November, 1966. (Adopted November 8, 1966.)

Laws 1972, ch. 13, authorizes the state board of finance to sell bonds in the amount of two million dollars ($2,000,000) for each of the years 1973 through 1977, to mature not later than five years after the date of issuance, for capital expenditures on the libraries of state educational institutions named in N.M. Const., art. XII, § 11, and others; levies a tax for payment of such bonds and submits the act to qualified electors at the general election in November, 1972. (Adopted November 7, 1972.)

Laws 1975 (1st S.S.), ch. 4, authorizes the state board of finance to sell bonds in the amount of five million dollars ($5,000,000) for each of the years 1977 through 1981, to mature not later than five years after the date of their issuance, for constructing, remodeling, etc., of buildings and utility facilities at state educational institutions named in N.M. Const., art. XII, § 11, and others; levies a tax for payment of such bonds and submits the act to qualified electors at the general election in November, 1976. (Adopted November 2, 1976.)

As to bond provisions, see also Appendix to Chapter 21.

Bond issues. — This section does not apply to severance tax bonds. 1991 Op. Att'y Gen. No. 91-01.

When contraction of debt prohibited. — Where the purpose for which an agency proposes to contract a debt is not included in N.M. Const., art. IX, § 7, this section specifically prohibits the contraction of the debt. 1957-58 Op. Att'y Gen. No. 58-228.

"Debt" is used in this section in the same sense as in Section 12 of this article, as comprehending a debt pledging for its repayment the general faith and credit of the

state or municipality, and contemplating the levy of a general property tax as the source of funds with which to retire the debt. State ex rel. Capitol Addition Bldg. Comm'n v. Connelly, 39 N.M. 312, 46 P.2d 1097, 100 A.L.R. 878 (1935).

Bonds for capitol additions not included. — Debentures authorized under Laws 1934 (S.S.), ch. 14 (now repealed), to provide funds for the capitol addition building, which funds were to be supplied by a fee of $2.50 upon each civil action filed in the state courts, did not constitute a general obligation on the part of the state and were not within the interdiction of this section. State ex rel. Capitol Addition Bldg. Comm'n v. Connelly, 39 N.M. 312, 46 P.2d 1097, 100 A.L.R. 878 (1935).

Proposed debentures in Laws 1921, ch. 81 (now obsolete), relating to construction of an addition to the capitol building at Santa Fe, were not an indebtedness of the state under this section. 1921-22 Op. Att'y Gen. 59.

Single propositions required. — This section requires that the legislature submit single bond propositions to the voters. Ryan v. Gonzales, 114 N.M. 346, 838 P.2d 963 (1992).

"The betterment of the welfare of the people" is not a specified object that necessarily relates capital outlay projects to each other; and therefore proposition which lumped together objects with no commonality but welfare and which did not interrelate did not satisfy tests for commonality sufficient to satisfy the constitutional purpose of avoiding logrolling. Ryan v. Gonzales, 114 N.M. 346, 838 P.2d 963 (1992).

Unconstitutional debt created for erection and operation of state office building. — Laws 1941, ch. 62 (now repealed), providing for erection and operation of state office building by the state office building commission, which was authorized to issue debentures payable from rentals received from state agencies leasing space, was unconstitutional as creating a debt of the state in the constitutional sense, not specified in N.M. Const., art. IX, § 7, which was not submitted for approval of electorate. Bryant v. State Office Bldg. Comm'n, 46 N.M. 58, 120 P.2d 452 (1941); State Office Bldg. Comm'n v. Trujillo, 46 N.M. 29, 120 P.2d 434 (1941).

Lease-purchase contract and installment purchase agreement with right of termination constitutional. — A contract in the nature of a lease-purchase or installment purchase agreement, with a right of termination by the lessee, used as a method of financing the possible purchase of personal property by public entities of the state is constitutional and does not constitute the creation of a debt. 1976 Op. Att'y Gen. No. 76-20.

The mere fact that the state enters into a lease agreement with an option to purchase property in the future is not violative of this section. An option to purchase does not obligate the state to purchase the property; therefore there is no debt. 1975 Op. Att'y Gen. No. 75-15.

Long-term lease of disposal site for radioactive waste no violation. — There would be no violation of this section if the environmental improvement agency entered into a license agreement with a regulated business which would obligate the state for the long-term lease of a disposal site or tailings pile. The fact that the problems inherent in the licensing of radioactive waste disposal sites may necessitate payments to the state to absorb the cost of maintaining the sites and that that cost may someday be borne by the state does not create a contract of debt out of what is essentially an exercise of police power. 1976 Op. Att'y Gen. No. 76-36.

Bonds of university not deemed obligations of state. — Bonds issued by the university of New Mexico under 21-7-15 to 21-7-25 NMSA 1978 are not obligations of the state; no provision for taxation to provide interest and sinking fund need be made and approval of voters is not necessary. The bonds are obligations of university. State v. Regents of Univ. of N.M., 32 N.M. 428, 258 P. 571 (1927). For statutory provisions relating to bonds and state educational institutions, see Pamphlets 16 and 39.

Issuance of debentures in anticipation of proceeds of gasoline tax, as authorized by Laws 1927, ch. 20 (now repealed), did not constitute state borrowing or debt requiring a popular referendum. State v. Graham, 32 N.M. 485, 259 P. 623 (1927).

And issuance in anticipation for construction and improvement of public highways. — Laws 1921, ch. 153 (temporary), authorizing levy of taxes and issuance and sale of state debentures in anticipation of taxes, for construction and improvement of public highways, and to meet, dollar for dollar, allotments to the state of federal funds under Federal Aid Road Act (23 U.S.C. §§ 101 to 158) was validated by adoption of amendment to state constitution adding Section 16 to Article IX. Lopez v. State Hwy. Comm'n, 27 N.M. 300, 201 P. 1050 (1921).

State highway debenture bonds, authorized by Laws 1955, ch. 269 (64-26-59 to 64-26-65 1953 Comp.), are such general obligations of the state as to place them within the constitutional provisions pertaining to restrictions upon state indebtedness. 1959-60 Op. Att'y Gen. No. 60-56.

This section was not violated by State Highway Bond Act (Laws 1912, ch. 58, now executed). Catron v. Marron, 19 N.M. 200, 142 P. 380 (1914).

Laws 1949, ch. 42 (now repealed), was excepted from popular referendum, as highway debentures were evidences of public debts in sense words "public debt" are used in N.M. Const., art. IV, § 1, relating to referendum on legislation. State ex rel. Linn v. Romero, 53 N.M. 402, 209 P.2d 179 (1949).

See also notes to N.M. Const., art. IX, § 7.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 72 Am. Jur. 2d States, Territories and Dependencies §§ 78, 80, 86.

Employees, submission to voters of bond issue for the purpose of paying, as essential to its validity, 96 A.L.R. 1204.

Funding or refunding obligations as subject to conditions respecting approval by voters, 97 A.L.R. 442.

Power of legislature to add to or make more onerous the conditions or limitations prescribed by constitution upon incurring public debts, 106 A.L.R. 231.

Retroactive effect of laws, constitutional or statutory provision limiting state or municipal indebtedness or taxation or regulating issuance of bonds as affecting bonds or other obligations authorized but not delivered prior to adoption or effective date of the provision, 109 A.L.R. 961.

Revenue or other bonds not creating indebtedness as within constitutional or statutory requirement of prior approval by electors of issuance of bonds or incurring indebtedness by municipality, 146 A.L.R. 604.

Bond issue in excess of amount authorized by law, validity of, within authorized debt, tax or voted limit, 175 A.L.R. 823.

Presumptions and burden of proof as to violation of or compliance with public debt limitation, 16 A.L.R.2d 515.

Inclusion of tax-exempt property in determining value of taxable property for debt limit purposes, 30 A.L.R.2d 903.

81A C.J.S. States §§ 213 to 222.

Sec. 8. *(Proposed) [State indebtedness; restrictions.]*

A. No debt other than those specified in the preceding section shall be contracted by or on behalf of this state, unless authorized by law for some specified work or object; which law shall provide for an annual tax levy sufficient to pay the interest and to provide a sinking fund to pay the principal of such debt within fifty years from the time of the contracting thereof. No such law shall take effect until it shall have been submitted to the qualified electors of the state and have received a majority of all the votes cast thereon at a general election; such law shall be published in full in at least one newspaper in each county of the state, if one be published therein, once each week, for four successive weeks next preceding such election. No debt shall be so created if the total indebtedness of the state, exclusive of the debts of the territory, and the several counties thereof, assumed by the state, would thereby be made to exceed one percent of the assessed valuation of all the property subject to taxation in the state as shown by the preceding general assessment.

B. For the purposes of this section and Article 4, Section 29 of the constitution of New Mexico, a financing agreement entered into by the state for the leasing of a building or other real property with an option to purchase for a price that is reduced according to the payments made by the state pursuant to the financing agreement is not a debt if:

(1) there is no legal obligation for the state to continue the lease from year to year or to purchase the real property; and

(2) the agreement provides that the lease shall be terminated if sufficient appropriations are not available to meet the current lease payments.

ANNOTATIONS

Compiler's note. — Section 3 of H.J.R. No. 9 (Laws 2005) provides that this proposed amendment shall be submitted to the people for their approval or rejection at the next general election or at any special election prior to that date that may be called for that purpose.

Sec. 9. [Use of borrowed funds.]

Any money borrowed by the state, or any county, district or municipality thereof, shall be applied to the purpose for which it was obtained, or to repay such loan, and to no other purpose whatever.

ANNOTATIONS

Section places limitation on use of funds borrowed by municipality whose utility system, together with the net revenues derived therefrom, is the sole security therefor. Scott v. City of Truth or Consequences, 57 N.M. 688, 262 P.2d 780 (1953).

Revenues derived from municipally owned and operated revenue producing enterprises, for the purchases or improvement of which the municipality shall have issued its bonds, may not be used for other corporate purposes so long as rights of bondholders are outstanding. Scott v. City of Truth or Consequences, 57 N.M. 688, 262 P.2d 780 (1953).

Interest from investments deemed part of proceeds. — This section restricts the use of proceeds from general obligation bonds to the purpose for which they were obtained or to repay the loan. Interest obtained from the investment of such proceeds is part of those proceeds. The constitution restricts the use of any accrued interest to the purpose for which the bonds were issued and to pay the principal and interest on the bonds. Any other purpose would be inconsistent with the constitution and contrary to general law and cannot be authorized by the home rule doctrine, N.M. Const., art. X, § 6D. State ex rel. Bd. of County Comm'rs v. Montoya, 91 N.M. 421, 575 P.2d 605 (1978).

Interest from temporary investment not to be used for general operating expenses of city. — A city may not use the interest earned from the temporary investment of general obligation bond proceeds for general operating expenses of the city. Where there is no statute to the contrary, the interest earned becomes part of the fund by whose investment it was produced. Thus, the interest must be deposited in either the sinking fund (to repay the loan) or in the capital projects fund (to be used for purposes for which the proceeds were borrowed). 1976 Op. Att'y Gen. No. 76-16.

Limitation on expenditure of obligation bond. — In addition to actual construction-related costs, the proceeds of general obligation bond issues of a county may be expended only for the purchase of the construction site and for equipment which becomes an integral part of the building being constructed (i.e., fixtures) or which is of a permanent or nondepletable nature and reasonably necessary to the use of the building for its intended purpose (e.g., beds, mattresses and other permanent furnishings). 1980 Op. Att'y Gen. No. 80-2.

No authority to purchase building where bonds voted for new erection. — A town does not have authority to purchase, for municipal purposes, a building already erected from the proceeds of a bond issue voted for the purpose of erecting such a building. 1953-54 Op. Att'y Gen. No. 5957.

Unless building so altered or reconstructed as to be new or different. — The power to become indebted to erect a public building does not include the power to become indebted to purchase such a building, unless, in connection with the purchase, the building is so altered or reconstructed as to amount to the erection of a new or different building. 1953-54 Op. Att'y Gen. No. 5957.

Proceeds from utility bond sale not usable for flood control. — Because this constitutional provision prohibits a municipality from applying proceeds from the sale of municipal bonds for any purpose other than that specified in the bond resolution, a municipality may not use moneys obtained from the sale of utility bonds for other purposes, such as flood control projects. 1963-64 Op. Att'y Gen. No. 63-98.

Bonds issued for airport other than the one specified. — Where the legislature clearly and unambiguously authorized issuance of severance tax bonds to enlarge the facilities of an existing airport in Questa, those bonds could not be used for a new airport at a site different from the existing airport. 1988 Op. Att'y Gen. No. 88-46.

Inapplicability of section to severance tax bonds. — This section does not apply to severance tax bonds. 1991 Op. Att'y Gen. No. 91-01.

Payment of salaries on authorized project not prohibited. — This section does not prohibit using proceeds of a bond issue to pay the salaries of payroll clerks, timekeepers, etc., or of all workers upon the proposed construction of a county hospital for the construction of which a bond issue was authorized. 1951-52 Op. Att'y Gen. No. 5426.

Disposition of surplus. — A surplus remaining in a trunk line sewer fund may not be expended for any other purpose, but may constitute a trust fund to repay bonds when due. 1925-26 Op. Att'y Gen. 72.

Care of sick and indigent persons. — It was held not compulsory on the part of a county to pay for the care of sick and indigent persons at St. Mary's hospital which was already the recipient of a state appropriation. 1929-30 Op. Att'y Gen. 196.

Comparable provisions. — Montana Const., art. VIII, § 11.

Utah Const., art. XIV, § 5.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 63A Am. Jur. 2d Public Funds §§ 5, 36, 37, 39, 47.

81A C.J.S. States §§ 204 to 206.

Sec. 10. [County indebtedness; restrictions.] (1991)

No county shall borrow money except for the following purposes:

A. erecting, remodeling and making additions to necessary public buildings;

B. constructing or repairing public roads and bridges and purchasing capital equipment for such projects;

C. constructing or acquiring a system for supplying water, including the acquisition of water and water rights, necessary real estate or rights-of-way and easements;

D. constructing or acquiring a sewer system, including the necessary real estate or rights-of-way and easements;

E. constructing an airport or sanitary landfill, including the necessary real estate;

F. acquiring necessary real estate for open space, open space trails and related areas and facilities; or

G. the purchase of books and other library resources for libraries in the county.

In such cases, indebtedness shall be incurred only after the proposition to create such debt has been submitted to the registered voters of the county and approved by a majority of those voting thereon. No bonds issued for such purpose shall run for more than fifty years. Provided, however, that no money derived from general obligation bonds issued and sold hereunder shall be used for maintaining existing buildings and, if so, such bonds shall be invalid. (As amended November 3, 1964, November 2, 1982, November 8, 1988 and November 5, 1996.)

ANNOTATIONS

Cross references. — For bonds for county courthouses, etc., see 4-49-1 to 4-49-21 NMSA 1978.

The 1964 amendment, which was proposed by S.J.R. No. 2 (Laws 1963) and adopted at the general election held on November 3, 1964, with a vote of 70,619 for and 47,858 against, inserted "remodeling and making additions to" following "erecting" near the beginning of the first sentence, substituted "has" for "shall have" preceding "been submitted" near the middle of the first sentence and added the proviso.

The 1982 amendment, which was proposed by H.J.R. No. 9 (Laws 1982), was adopted at the general election held on November 2, 1982, by a vote of 156,113 for and 97,644 against. The amendment restructured the former language which had one undesignated paragraph containing three sentences into the present provisions. The former first sentence was broken to constitute the present first paragraph and first sentence of the second paragraph, while the former second and third sentences are now the second and third sentences of the present second paragraph. The amendment, in the present first paragraph, substituted "following purposes" for "purpose of" in the introductory language, deleted "or" and "and" at the end of Subdivisions A and B, respectively, and added Subdivisions C to E. In the first sentence of the present second paragraph, the amendment inserted "indebtedness shall be incurred" and deleted "who paid a property tax therein during the preceding year" following "of the county."

The 1988 amendment, which was proposed by H.J.R. No. 10, § 2 (Laws 1988) and adopted at the general election held on November 8, 1988, by a vote of 228,519 for and 140,676 against, added Subsection F and substituted "registered voters" for "qualified electors" in the first sentence of the last paragraph.

The 1996 amendment, which was proposed by H.J.R. No. 18 (Laws 1996) and adopted at the general election held November 5, 1996, by a vote of 228,751 for and 227,580 against, added Subsection F and redesignated existing Subsection F as Subsection G.

Compiler's notes. — Section 4-49-1 NMSA 1978, based upon the adoption of the amendment to this section proposed by S.J.R. No. 2 (Laws 1963), took effect when this amendment was adopted November 3, 1964.

An amendment to this section proposed by H.J.R. No. 7 (Laws 1991), which would have inserted "repairing" following "remodeling" in Subsection A, was submitted to the people at the general election held on November 3, 1992. It was defeated by a vote of 225,749 for and 246,366 against.

An amendment proposed by H.J.R. No. 9, (Laws 1993), which would have added a new Subsection F providing for acquiring real estate for open space and other public purposes and redesignating the existing Subsection F as Subsection G, was submitted

to the people at the general election held on November 8, 1994. It was defeated by a vote of 192,861 for and 210,001 against.

Intent of section. — Framers of constitution were thinking of a debt repayment from proceeds of property tax levy against the general assessment rolls, and the debt whose creation is prohibited or limited is one pledging the general faith and credit of the subdivision, with a consequent right in the holders of such indebtedness to look to the general taxing power to satisfy the debt. State ex rel. Capitol Addition Bldg. Comm'n v. Connelly, 39 N.M. 312, 46 P.2d 1097 (1935).

It relates to debt-contracting powers of counties, and provides that none can be contracted except after the proposition has been approved by a majority of the people voting thereon. 1933-34 Op. Att'y Gen. 78.

It is a limitation on, and not a grant of, power to issue bonds. Board of Comm'rs v. State, 43 N.M. 409, 94 P.2d 515 (1939); 1980 Op. Att'y Gen. No. 80-2;.

It is not self-executing, and therefore, counties, when proceeding to issue bonds for courthouse and jail purposes, must proceed according to the general laws provided in such cases. State ex rel. Haas v. Board of Comm'rs, 32 N.M. 309, 259 P. 37 (1927).

De Baca County Act (Laws 1917, ch. 11, § 17) (now obsolete), authorizing a bond issue for courthouse and jail purposes, was inoperative since it did not direct county to proceed in accord with general law. State ex rel. Haas v. Board of Comm'rs, 32 N.M. 309, 259 P. 37 (1927).

Section 4-11-3 NMSA 1978 authorized Harding county, created thereby, to issue bonds for courthouse and jail purposes without submission to a vote of the people as required by this section. Martinez v. Gallegos, 28 N.M. 170, 210 P. 575 (1922).

No applicability to liability of new county to parent county. — This section has no application to right of legislature, in creation of a new county, to fix liability of new county to parent county, and to require new county to issue bonds therefor. State ex rel. Perea v. Board of Comm'rs, 25 N.M. 338, 182 P. 865 (1919).

No applicability when debt payable from special funds. — The limitation contained in this section, prohibiting a county from incurring an indebtedness without first submitting the question of the indebtedness to a vote of the electorate, does not apply when the obligation is payable solely from a special fund or funds and the county has not pledged its general full faith and credit. Bolton v. Board of County Comm'rs, 119 N.M. 355, 890 P.2d 808 (Ct. App. 1994).

Bonds for construction of buildings on removal of county seat may not be issued until county commissioners have complied with constitutional requirements. Orchard v. Board of Comm'rs, 42 N.M. 172, 76 P.2d 41 (1938).

Words "no county shall borrow money except for the purpose (specified)" as used in this section are clear enough in their meaning to exclude the purchase of voting machines by pledging the general faith and credit of the county. Shoup Voting Mach. Corp. v. Board of Comm'rs, 57 N.M. 196, 256 P.2d 1068 (1953).

A board of county commissioners cannot bind the county by the creation of a debt for the payment of which it has no power to pledge the county's credit. Shoup Voting Mach. Corp. v. Board of Comm'rs, 57 N.M. 196, 256 P.2d 1068 (1953).

A board of county commissioners could not carry out the provisions of Laws 1951, ch. 192 (now repealed), authorizing the purchase of voting machines to be paid for in annual installments over not more than 10 years, without incurring an indebtedness which is forbidden by the constitution. Shoup Voting Mach. Corp. v. Board of Comm'rs, 57 N.M. 196, 256 P.2d 1068 (1953).

Enumeration of buildings by legislature. — While it is clear that the legislature cannot declare, carte blanche, any possible class of buildings as necessary, without violating this section, it certainly can declare certain other buildings other than those now enumerated as necessary. 1959-60 Op. Att'y Gen. No. 60-45.

Limitation on expenditure of obligation bonds. — In addition to actual construction-related costs, the proceeds of general obligation bond issues of a county may be expended only for the purchase of the construction site and for equipment which becomes an integral part of the building being constructed (i.e., fixtures) or which is of a permanent or nondepletable nature and reasonably necessary to the use of the building for its intended purpose (e.g., beds, mattresses and other permanent furnishings). 1980 Op. Att'y Gen. No. 80-2.

Bonds for remodeling. — This section prevented a county from issuing bonds for purpose of remodeling a courthouse. Board of Comm'rs v. State, 43 N.M. 409, 94 P.2d 515 (1939) (decided prior to 1964 amendment).

An issuance of bonds by a county for the purpose of "remodeling" an old hospital was violative of this section. 1953-54 Op. Att'y Gen. No. 5678 (opinion rendered prior to 1964 amendment).

Effect of 1964 amendment. — This section was amended effective November 3, 1964, for the purpose of permitting bond moneys to be used for the purpose of remodeling and making additions to necessary public buildings. Prior to the amendment the county was limited, insofar as public buildings were concerned, to the use of bond moneys for the purpose of erecting necessary public buildings. 1966 Op. Att'y Gen. No. 66-1.

The 1964 amendment also added the proviso at the end of the section, which is designed to put the county on notice as to what it cannot do with bond moneys, and does not invalidate bonds in the hands of the bondholders. The purpose for which the bond moneys are to be used must be set out in the resolution and publication thereof,

and if one such specified purpose is maintaining existing buildings, the bonds shall be invalidated at that point and cannot be issued even if a buyer has been selected. 1966 Op. Att'y Gen. No. 66-1.

Word "necessary" construed. — As used in this section, "necessary" is construed, not as meaning "indispensable," but as synonymous with "needful." Hutcheson v. Atherton, 44 N.M. 144, 99 P.2d 462 (1940).

Coronado memorial buildings not "necessary public buildings". — Laws 1939, ch. 149, authorizing county bond issues to be employed in constructing public auditoriums in fulfillment of legislative authorization to counties to co-operate with the New Mexico Fourth Centennial Coronado Corporation in conducting expositions commemorative of the four hundredth anniversary of the arrival in New Mexico in 1540 of Francisco Vasquez de Coronado, could not be sustained as authorizing necessary public buildings. Hutcheson v. Atherton, 44 N.M. 144, 99 P.2d 462 (1940).

But juvenile detention home is. — Juvenile detention home for county of first class was a necessary public building within this section. Hutcheson v. Atherton, 44 N.M. 144, 99 P.2d 462 (1940).

Legislative classification of juvenile detention homes for first class counties as necessary public buildings is entitled to great weight when question comes to court for determination. Hutcheson v. Atherton, 44 N.M. 144, 99 P.2d 462 (1940).

Erection of school buildings. — Fact that one provision of the constitution authorizes school districts to buy a site upon which to erect school buildings, being thus more specific than another section, does not necessarily establish an intent to limit use of funds provided for under the other section to the erection of a bare building without site or equipment. Board of County Comm'rs v. McCulloh, 52 N.M. 210, 195 P.2d 1005 (1948).

Section inapplicable to revenue bonds repayable from special retirement fund. — This constitutional provision has been interpreted to pertain exclusively to general obligation bonds which are retired by funds resulting from the levy of a general property tax and not to revenue bonds which are repayable from a special fund created for their retirement. 1978 Op. Att'y Gen. No. 78-15.

Debt limitations applicable only to specified governmental subdivisions. — When Sections 10, 11, 12 and 13 of Article IX of the constitution are considered together, it appears that its framers intended to apply debt limitations only to the specified governmental subdivisions and to leave to the sound discretion of the legislature whether to limit other government agencies created by the legislature. Albuquerque Metropolitan Arroyo Flood Control Auth. v. Swinburne, 74 N.M. 487, 394 P.2d 998 (1964).

Anticipation of tax levies no violation. — Laws 1921, ch. 48, § 17 (temporary), providing for certificates of indebtedness to anticipate tax levies of a newly created county, did not violate this section. State v. Southern Pac. Co., 34 N.M. 306, 281 P. 29 (1929).

The provisions of Laws 1929 (S.S.), ch. 1 (temporary), relating to the issuance of debentures by the state highway commission [state transportation commission] to anticipate the collection of tax levies, do not violate this section. 1929-30 Op. Att'y Gen. 232.

Special taxing district held not to create debt. — If legislature lawfully created a special taxing district, embracing territory within one county, for purpose of raising funds for improvement of portion of a new state road therein, then anticipation of revenue raised by such tax would not create a debt against the county in violation of this section, but simply a debt of taxpayers within such special district repayable out of proceeds of special tax. Borrowdale v. Board of County Comm'rs, 23 N.M. 1, 163 P. 721, 1917E L.R.A. 456 (1916).

A "debt" in the constitutional sense is an unconditional obligation. Allstate Leasing Corp. v. Board of County Comm'rs, 450 F.2d 26 (10th Cir. 1971).

Leasing of chattels not "debt". — The leasing of chattels by a municipality has been held to be a "contingent" obligation and, as such, not a "debt" as is prohibited under this section. Allstate Leasing Corp. v. Board of County Comm'rs, 450 F.2d 26 (10th Cir. 1971).

Lease-purchase agreements. — Despite the language of 6-6-12 NMSA 1978, certain lease purchase agreements may constitute the creation of "debt" within N.M. Const., art. IX, §§ 10, 11 and 12. 1969 Op. Att'y Gen. No. 69-39.

A contract in the nature of a lease-purchase or installment purchase agreement, with a right of termination by the lessee, used as a method of financing the possible purchase of personal property by public entities of the state is constitutional and does not constitute the creation of a debt. 1976 Op. Att'y Gen. No. 76-20.

If an option price required to be paid by a county is nominal or nonexistent, a purported lease may be treated as a sale, creating the type of future economic commitment that requires the arrangement be approved by the voters, pursuant to this provision. Montano v. Gabaldon, 108 N.M. 94, 766 P.2d 1328 (1989).

Lease with option to purchase agreement requiring county to make semi-annual payments, denominated as rent, for the use of a new facility to be built by a private contractor on county-owned land was in essence an installment-purchase agreement, and such lease created indebtedness within the meaning of this provision. Montano v. Gabaldon, 108 N.M. 94, 766 P.2d 1328 (1989).

Employment contract between county board and county manager. — Employment contract between board of county commissioners and county manager, while not in violation of the Bateman Act (6-6-11 NMSA 1978 et seq.), which was enacted to require municipalities to live within their annual incomes, was nonetheless void because it created an unconstitutional debt of the county and was an illegal attempt to bind future boards. 1988 Op. Att'y Gen. No. 88-67.

Proposition to create debt to be submitted to vote. — The board of county commissioners cannot mortgage old courthouse and jail to raise funds to buy equipment for new courthouse, for county cannot borrow money except where proposition to create debt is submitted to qualified electors of county who paid property tax in prior year and with approval of majority voting thereon. 1935-36 Op. Att'y Gen. 144.

Bases for bond question before voters. — A road bond question may be placed before the voters either by special election on petition of voters under 67-6-3 NMSA 1978 or at a general election by resolution of the board of county commissioners under this section. State ex rel. Board of County Comm'rs v. Jones, 101 N.M. 660, 687 P.2d 95 (1984).

Duty to call election. — Board of county commissioners is under a legal obligation to call an election only when a petition is presented which meets all of the prescribed constitutional and statutory requirements, and any efforts on their part to reframe the petition to read in a legal manner would be ineffective since the petition must be in legal form at the moment it is presented to them. Kiddy v. Board of County Comm'rs, 57 N.M. 145, 255 P.2d 678 (1953).

Mandamus was properly refused where there was an unsettled judicial question as to whether board of county commissioners had been presented with a petition which called for a single or a dual proposition. Kiddy v. Board of County Comm'rs, 57 N.M. 145, 255 P.2d 678 (1953).

Necessity of notice. — The constitutional provisions of this section, although not specifying the exact procedure for conducting an election upon a bond issue, do imply (by reference) proper notice to the voters before the election. 1953-54 Op. Att'y Gen. No. 5656.

Variance between notice and actual use fatal. — Under the laws of the state of New Mexico, which require a specific procedure for notice of an election and holding of an election on a bond issue, any variance between the notice and the actual use of the funds would be fatal. 1953-54 Op. Att'y Gen. No. 5656.

The laws of this state require a specific procedure for notice and holding of an election on a bond issue, and any variance between the notice and the actual use of the funds would be fatal; it would prohibit splitting of the proceeds of bond sums by erecting one hospital for the osteopaths and another for the M.D.'s where that was not set forth in the notice. 1953-54 Op. Att'y Gen. No. 5656.

Bond issue for erection of courthouse and jail was void where notice of election had stated the bond issue to be for erecting, remodeling and repairing the existing courthouse. There must be a substantial compliance with the constitution. Tom v. Board of County Comm'rs, 43 N.M. 292, 92 P.2d 167 (1939).

Conducting of election. — There being no constitutional inhibition against the use of one box for depositing ballots on the county bond proposition and other ordinary ballots cast at the general election, in the absence of a statutory restriction, the two types of ballots may be deposited in the same ballot box. And as to county fair bonds, no such statutory restriction exists. 1955-56 Op. Att'y Gen. No. 6524.

Propositions. — Proposals on two or more propositions may be submitted at same election and on same ballot, but each one must stand alone so that voters may have opportunity to express their choice independently upon each proposition. Carper v. Board of County Comm'rs, 57 N.M. 137, 255 P.2d 673 (1953).

Over-all test as to whether proposal to build several county buildings constitutes one or more propositions "is the existence of a natural relationship between the various structures or objects united in one proposition so that they form but one rounded whole." Carper v. Board of County Comm'rs, 57 N.M. 137, 255 P.2d 673 (1953).

Petition, under law providing for building of courthouses, jails and bridges, asking for a vote upon bond issues for courthouse and jail, designated separately, did not authorize submission by ballot as a joint proposition, and an election at which the ballot submitted a single proposition, for or against "courthouse and jail bonds," was void. Dickinson v. Board of Comm'rs, 34 N.M. 337, 281 P. 33 (1929).

Proposal to build two hospitals with isolation wards within same county, 35 miles apart, illegally joined two propositions and was properly disapproved by board of county commissioners. Kiddy v. Board of County Comm'rs, 57 N.M. 145, 255 P.2d 678 (1953); Carper v. Board of County Comm'rs, 57 N.M. 137, 255 P.2d 673 (1953).

The language of Laws 1947, ch. 148, § 4 (4-48B-6 NMSA 1978) leaves no doubt that the legislature regarded the construction of each hospital, with or without an isolation ward, as a separate and independent proposition. Carper v. Board of County Comm'rs, 57 N.M. 137, 255 P.2d 673 (1953).

It is not necessary that ballots used have concealed number. 1937-38 Op. Att'y Gen. 256.

Issuance of bonds. — When a city and a county build a hospital jointly, they must issue their respective bonds separately. 1947-48 Op. Att'y Gen. No. 5071.

Comparable provisions. — Idaho Const., art. VIII, § 3.

Utah Const., art. XIV, §§ 3, 4, 7.

Wyoming Const., art. XVI, §§ 3, 4.

Law reviews. — For comment, "The Last Bastion Crumbles: All Property Restrictions on Franchise Are Unconstitutional," see 1 N.M. L. Rev. 403 (1971).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 56 Am. Jur. 2d Municipal Corporations, Counties and Other Political Subdivisions §§ 167 to 178; 64 Am. Jur. 2d Public Securities and Obligations §§ 50, 54, 65.

Lease of property by municipality or other political subdivision, with option to purchase same, as evasion of constitutional or statutory limitation of indebtedness, 71 A.L.R. 1318, 145 A.L.R. 1362.

Pledge or appropriation of revenue from utility or other property in payment therefor as indebtedness within constitutional or statutory indebtedness of municipality or other political subdivision, 72 A.L.R. 687, 96 A.L.R. 1385, 146 A.L.R. 328.

Obligation to meet which money is appropriated at time of its creation as indebtedness within limitation, 92 A.L.R. 1299, 134 A.L.R. 1399.

Constitutional or statutory debt limit as affected by existence of separate political units with identical or overlapping boundaries, 94 A.L.R. 818.

Liability for tort or judgment based on tort as within constitutional or statutory limitation on municipal indebtedness or tax rate for municipal purposes, 94 A.L.R. 937.

Allowance to contractor for extras in accordance with provisions of contract made before debt limit was reached as creation of indebtedness within meaning of debt limit provisions, 96 A.L.R. 397.

Funding or refunding obligations as subject to conditions respecting limitation of indebtedness or approval of voters, 97 A.L.R. 442.

Limitation on power to tax as limitation on power to incur indebtedness, 97 A.L.R. 1103.

Liability imposed by reason of benefits from improvement made by independent public unit as debt within meaning of debt limitation, 98 A.L.R. 749.

Interest on indebtedness as part of debt within constitutional or statutory debt limitation, 100 A.L.R. 610.

Obligation payable from special fund created by fees, penalties or excise taxes as within debt limit, 100 A.L.R. 900.

Limitation of municipal indebtedness as affected by combination or merger of two or more municipalities, 103 A.L.R. 154.

Installments payable under continuing service contract as present indebtedness within organic limitation of municipal indebtedness, 103 A.L.R. 1160.

Municipal debt limit as affected by obligations to municipality, 105 A.L.R. 687.

Power of legislature to add to or make more onerous the conditions or limitations prescribed by constitution upon incurring public debts, 106 A.L.R. 231.

Constitutional or statutory provision limiting state or municipal indebtedness or taxation or regulating issuance of bonds as affecting bonds or other obligations authorized but not delivered prior to adoption or effective date of the provision, 109 A.L.R. 961.

Exception regarding "emergency," "urgency," etc., within statute or charter forbidding municipal corporation to expend money or incur indebtedness in absence, or in excess, of appropriation, 111 A.L.R. 703.

Aggregate of rent for entire period of lease of property to municipality as present indebtedness for purposes of condition of incurring, or limitation of amount of, municipal debt, 112 A.L.R. 278.

What are "necessary expenses" within exception in constitutional or statutory provision requiring vote of people to authorize contracting of debt by municipality, county or other political body, or limiting amount of such indebtedness, 113 A.L.R. 1202.

Right of municipality to invoke constitutional provisions against acts of state legislature, 116 A.L.R. 1037.

Actual levy or permissible maximum levy of taxes as determining limit of indebtedness of municipality, county or other political unit, under statute or constitutional provision limiting indebtedness with reference to income or revenue, 122 A.L.R. 330.

Existing sinking fund as a factor in determining whether indebtedness or proposed indebtedness of municipality or other political subdivision exceeds constitutional or statutory limit, 125 A.L.R. 1393.

Structures: inclusion of several structures or units as affecting validity of submission of proposition to voters at bond election, 4 A.L.R.2d 617.

Presumptions and burden of proof as to violation of or compliance with public debt limitation, 16 A.L.R.2d 515.

Inclusion of tax-exempt property in determining value of taxable property for debt limit purposes, 30 A.L.R.2d 903.

Validity of governmental borrowing or expenditure for purposes of acquiring, maintaining or improving stadium for use of professional athletic team, 67 A.L.R.3d 1186.

20 C.J.S. Counties §§ 185 to 192.

Sec. 11. [School district indebtedness; restrictions.]

A. Except as provided in Subsection C of this section, no school district shall borrow money except for the purpose of erecting, remodeling, making additions to and furnishing school buildings or purchasing or improving school grounds or any combination of these purposes, and in such cases only when the proposition to create the debt has been submitted to a vote of such qualified electors of the district as are owners of real estate within the school district and a majority of those voting on the question has voted in favor of creating such debt.

B. No school district shall ever become indebted in an amount exceeding six percent on the assessed valuation of the taxable property within the school district as shown by the preceding general assessment.

C. A school district may create a debt by entering into a lease-purchase arrangement to acquire education technology equipment without submitting the proposition to a vote of the qualified electors of the district, but any debt created is subject to the limitation of Subsection B of this section. (As amended September 19, 1933, September 28, 1965 and November 5, 1996.)

ANNOTATIONS

I. GENERAL CONSIDERATION.

Cross references. — For qualifications of voters, see N.M. Const., art. VII, § 1.

For propriety of refunding bonds, see N.M. Const., art. IX, § 15.

For provision limiting local government expenditures to income, see 6-6-11 NMSA 1978.

For exemptions from expenditure limitation, see 6-6-12 NMSA 1978.

For the Education Technology Equipment Act, see Chapter 6, Article 15A NMSA 1978.

For voter qualifications and procedures in school bond elections, see 22-18-2 NMSA 1978.

For requirement that voters be registered, see 22-18-4 NMSA 1978.

The 1933 amendment, which was proposed by S.J.R. No. 7 (Laws 1933) and adopted at a special election held on September 19, 1933, with a vote of 44,862 for and 21,783 against, amended the first sentence of this section which formerly read: "No school district shall borrow money, except for the purpose of erecting and furnishing school buildings or purchasing school grounds, and in such cases only when the proposition to

create the debt shall have been submitted to the qualified electors of the district, and approved by a majority of those voting thereon."

The 1965 amendment, which was proposed by S.J.R. No. 3 (Laws 1965) and adopted at a special election held on September 28, 1965, with a vote of 33,768 for and 17,287 against, amended this section which formerly read: "No school district shall borrow money, except for the purpose of erecting and furnishing school buildings or purchasing school grounds, and in such cases only when the proposition to create the debt shall have been submitted to a vote of such qualified electors of the district as are owners of real estate within such school district, and a majority of those voting on the question shall have voted in favor of creating such debt. No school district shall ever become indebted in an amount exceeding six per centum on the assessed valuation of the taxable property within such school district, as shown by the preceding general assessment."

The 1996 amendment, which was proposed by S.J.R. No. 1 (Laws 1996) and adopted at the general election held November 5, 1996, by a vote of 238,126 for and 230,850 against, divided the section into subsections, added "Except as provided in Subsection C of this section" and made a stylistic change in Subsection A, and added Subsection C.

"Debt" construed. — Framers of constitution considered a "debt," as used in this section and others in this article, as one repayable upon proceeds of property tax levy against general assessment rolls, so that a debt whose creation is thereby prohibited, or whose amount is limited, is one pledging general faith and credit of subdivision, with a consequent right in holders of such indebtedness to look to general taxing power for payment. State ex rel. Capitol Addition Bldg. Comm'n v. Connelly, 39 N.M. 312, 46 P.2d 1097, 100 A.L.R. 878 (1935).

Dormitories not school buildings. — While the balance of a building fund may be used for repairs for school buildings, dormitories for public schools are not school buildings, and such buildings are not authorized. 1919-20 Op. Att'y Gen. 59.

Debt limitations applicable only to specified governmental subdivisions. — See same catchline in notes to N.M. Const., art IX, § 10.

Securities irregularly issued. — Where certificates of indebtedness of a school district had been issued irregularly and not in compliance with this section or statute under which they were issued, and the proceeds had gone into the construction of school buildings, or had been partially unaccounted for and misappropriated, bona fide holders of certificates were entitled to have buildings applied to their benefit, since the issuance was not of itself illegal. Shaw v. Board of Educ., 38 N.M. 298, 31 P.2d 993 (1934).

Newly acquired territory should not be taxed for the bonded indebtedness of the original school district. 1921-22 Op. Att'y Gen. 160.

Use of leases. — A school district cannot procure a loan from the federal government to erect school building, community house and gymnasium under Public Works Act by bond issue to be paid out of proceeds of taxation or revenue from such building, nor by a mortgage on it, but may do so by a lease of it to the governmental agency for term of years beyond term of the then members of the school board who must provide annual rentals for payments under the lease. 1933-34 Op. Att'y Gen. 91.

School Leasing Law held unconstitutional. — School Leasing Law (77-17-1 to 77-17-14, 1953 Comp., since repealed) was unconstitutional, since it was simply an effort by indirection to avoid the provisions of this section, relating to 6% debt limit placed on school districts. McKinley v. Alamogordo Mun. School Dist. Auth., 81 N.M. 196, 465 P.2d 79 (1969).

Lease-purchase agreements. — Despite the language of 6-6-12 NMSA 1978 certain lease-purchase agreements may constitute the creation of debt within N.M. Const., art. IX, §§ 10, 11 and 12. 1969 Op. Att'y Gen. No. 69-39.

A contract in the nature of a lease-purchase or installment purchase agreement, with a right of termination by the lessee, used as a method of financing the possible purchase of personal property by public entities of the state is constitutional and does not constitute the creation of a debt. 1976 Op. Att'y Gen. No. 76-20.

Refunding bonds in principal amount greater than principal amount of outstanding bonds being refunded. — Subject to the approval of the Department of Finance and Administration, a board of education may issue general obligation refunding bonds in a principal amount that is greater than the principal amount of the outstanding bonds being refunded, provided the proceeds of the refunding bonds are used only for the purpose of refunding existing school district general obligation indebtedness, as provided by law, and not for new capital outlay projects, operating costs of a school district or other purposes besides refunding. 2001 Op. Att'y Gen. No. 01-3.

Comparable provisions. — Idaho Const., art. VIII, § 3.

Utah Const., art. XIV, §§ 3, 4.

Law reviews. — For comment, "The Last Bastion Crumbles: All Property Restrictions on Franchise Are Unconstitutional," see 1 N.M. L. Rev. 403 (1971).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 64 Am. Jur. 2d Public Securities and Obligations §§ 50, 54, 65 to 67; 68 Am. Jur. 2d Schools §§ 92 to 100.

Debts incurred for school purposes as part of municipal indebtedness, for purposes of debt limitation, 111 A.L.R. 544.

Structures: inclusion of several structures or units as affecting validity of submission of proposition to voters at bond election, 4 A.L.R.2d 617.

Presumptions and burden of proof as to violation of or compliance with public debt limitation, 16 A.L.R.2d 515.

Inclusion of tax-exempt property in determining value of taxable property for debt limit purposes, 30 A.L.R.2d 903.

Rescission of vote authorizing school district expenditure, or tax, 68 A.L.R.2d 1041.

79 C.J.S. Schools and School Districts §§ 323 to 328.

II. VOTER QUALIFICATIONS.

A. IN GENERAL.

"Qualified electors" construed. — When framers of constitution used term "qualified electors of the district" in this section, they referred to the class of persons theretofore made qualified electors of the school district at all school elections, and by N.M. Const., art. VII, § 1, women were so qualified. Klutts v. Jones, 20 N.M. 230, 148 P. 494 (1915).

Any person meeting the requirements of N.M. Const., art. VII, § 1 and this section is entitled to vote in a school bond election. 1963-64 Op. Att'y Gen. No. 64-27.

B. REAL ESTATE OWNERSHIP REQUIREMENT.

Real estate ownership requirement unconstitutional. — Notwithstanding our emphatic disagreement with the United States supreme court majority, City of Phoenix v. Kolodziejski (399 U.S. 204, 90 S. Ct. 1990, 26 L. Ed. 2d 523 (1970)) renders this section inoperable insofar as it requires that only real property owners be permitted to vote in school bond elections. Board of Educ. v. Maloney, 82 N.M. 167, 477 P.2d 605 (1970).

Compelling state interest standard. — As long as election in question is not one of special interest, any classification restricting franchise on grounds other than residence, age and citizenship cannot stand unless district or state can demonstrate that the classification serves a compelling state interest. Hill v. Stone, 421 U.S. 289, 95 S. Ct. 1637, 44 L. Ed. 2d 172 (1975).

The state of New Mexico had no compelling interest in the exclusion of Navajo reservation residents from district bond election and properly included them since the parents of the children who live on the reservation have a distinct interest in district affairs. Prince v. Board of Educ., 88 N.M. 548, 543 P.2d 1176 (1975).

Implementing statute unconstitutional. — Section 22-18-2 NMSA 1978, which implements this section, conflicts with equal protection clause of the United States constitution, insofar as it restricts franchise in school district bond elections to real estate owners or to those who have paid a property tax on property in the school district for the preceding year. Prince v. Board of Educ., 88 N.M. 548, 543 P.2d 1176 (1975).

C. FORMER LAW UNDER REAL PROPERTY OWNERSHIP REQUIREMENT.

Generally. — There are two reasons for the real estate ownership provision: (1) to insure that the persons voting are relatively permanent members of the community whose schools would be affected; and (2) to allow those upon whom the tax burden would fall to make the decision which would raise taxes. Gomez v. Board of Educ., 76 N.M. 305, 414 P.2d 522 (1966).

Reasonable proof of real property ownership. — Voting officials may demand from persons seeking to vote in school bond elections reasonable proof of their ownership of real property, such as recorded copies of real estate records or certified copies of real estate records, tax receipts, proof of death of former owner, affidavits of heirship, probate proceedings if initiated and any other appropriate documents evidencing ownership of realty within the school district by such persons. 1963-64 Op. Att'y Gen. No. 64-34.

Bona fide ownership required. — In order to qualify to vote in a school bond referendum, a person must be a bona fide owner of real estate within such school district. Grantees of small tracts of land conveyed for no consideration four days before the election by means of quitclaim deeds given for the purpose of qualifying grantees to vote in school bond election are not bona fide owners of real estate within the meaning of this constitutional provision. Gomez v. Board of Educ., 76 N.M. 305, 414 P.2d 522 (1966).

Interest may be fractional or undivided. — A person who owns an actual interest in real property within school district even though it be a fractional or an undivided interest, and otherwise is qualified to vote, may vote in a school district general obligation bond issue. 1965 Op. Att'y Gen. No. 65-95.

Community property. — A husband and wife may both vote in a school bond election if they are owners of realty in school district, which realty is held as community property. 1963-64 Op. Att'y Gen. No. 64-27.

Purchasers. — The term "owners of real estate within such school district" as used in this constitutional provision includes purchasers of real estate under a real estate contract which has created an escrow arrangement whereby a warranty deed to such realty will be delivered to the purchasers of the realty upon payment of the full contract price. 1963-64 Op. Att'y Gen. No. 64-87.

Heirs. — Upon the death of an owner of real property situate in a local school district, the heirs or persons named in the will to take such real property immediately become vested with title to such land and such persons become owners of realty entitling them to vote in school bond elections. 1963-64 Op. Att'y Gen. No. 64-34.

Taxpayers on personal property are qualified electors at school bond election. 1931-32 Op. Att'y Gen. 152 (opinion rendered prior to amendments).

Voters exempt from taxes because of military service are qualified electors at school bond election. 1931-32 Op. Att'y Gen. 152 (opinion rendered prior to amendments).

Resident property owner delinquent in paying his taxes may vote in a school bond election unless he is so delinquent that the county treasurer has conveyed a tax deed to the state for delinquent taxes. In such event, upon the conveyance the former property owner is divested of ownership of such property and is no longer entitled to vote in school bond elections. 1965 Op. Att'y Gen. No. 65-54.

Payment of taxes before voting. — This section does not require that the elector shall have paid his property taxes before he may vote, but 22-18-2 NMSA 1978 requires that the original petition calling for a school bond election must contain the signatures of "qualified electors of the district who shall have paid a property tax therein during the preceding year." 1951-52 Op. Att'y Gen. No. 5513.

III. ELECTION PROCEDURES.

Essential procedures for obtaining bond issue. — In obtaining funds by issuing bonds for erecting public buildings, there must be notice to the interested electorate, of the purpose for which the funds are to be used, which purpose must be authorized by law, and not be within the inhibition of the constitution; and the electorate must be given an opportunity to approve or disapprove the issuance of the bonds, at an election held for that purpose. Board of Educ. v. Robinson, 57 N.M. 445, 259 P.2d 1028 (1953).

Words to be used. — Under this section, the resolution, notice and ballot need not include the exact words as stated in the constitution, but certainly the words used cannot be so broad that, in effect, the electorate is not advised of the actual purpose of the attempt to secure funds. Board of Educ. v. Hartley, 74 N.M. 469, 394 P.2d 985 (1964).

Language "for school purposes," with no other qualification, is too broad and therefore violates this section, because such language does not sufficiently apprise the voter of the exact purpose for which the election was held. Board of Educ. v. Hartley, 74 N.M. 469, 394 P.2d 985 (1964).

Referendum improper where one of proposed uses unconstitutional. — Where electorate was asked to vote upon the question of money for (1) erecting and furnishing

a school building, which was within the constitution and (2) improvement of school buildings and grounds which were without the constitution, the duality of the questions presented denied the voters the right of free expression in a referendum on the single valid question embraced in the submission. Board of Educ. v. Robinson, 57 N.M. 445, 259 P.2d 1028 (1953).

District held to terms of notice. — Proceeds from the sale of district school bonds voted for building and equipping a school house may not be devoted to the purchase of land upon which a school house could be erected. 1915-16 Op. Att'y Gen. 370.

Sec. 11. *(Proposed) [School district indebtedness restrictions.]*

A. Except as provided in Subsection C of this section, no school district shall borrow money except for the purpose of erecting, remodeling, making additions to and furnishing school buildings or purchasing or improving school grounds or any combination of these purposes, and in such cases only when the proposition to create the debt has been submitted to a vote of such qualified electors of the district as are owners of real estate within the school district and a majority of those voting on the question has voted in favor of creating such debt.

B. No school district shall ever become indebted in an amount exceeding six percent on the assessed valuation of the taxable property within the school district as shown by the preceding general assessment.

C. A school district may create a debt by entering into a lease-purchase arrangement to acquire education technology equipment without submitting the proposition to a vote of the qualified electors of the district, but any debt created is subject to the limitation of Subsection B of this section.

D. For the purposes of this section, a financing agreement entered into by a school district or a charter school for the leasing of a building or other real property with an option to purchase for a price that is reduced according to the payments made by the school district or charter school pursuant to the financing agreement is not a debt if:

(1) there is no legal obligation for the school district or charter school to continue the lease from year to year or to purchase the real property; and

(2) the agreement provides that the lease shall be terminated if sufficient money is not available to meet the current lease payments.

ANNOTATIONS

Compiler's note. — Section 3 of H.J.R. No. 9 (Laws 2005) provides that this proposed amendment shall be submitted to the people for their approval or rejection at the next general election or at any special election prior to that date that may be called for that purpose.

Sec. 12. [Municipal indebtedness; restrictions.]

No city, town or village shall contract any debt except by an ordinance, which shall be irrepealable until the indebtedness therein provided for shall have been fully paid or discharged, and which shall specify the purposes to which the funds to be raised shall be applied, and which shall provide for the levy of a tax, not exceeding twelve mills on the dollar upon all taxable property within such city, town or village, sufficient to pay the interest on, and to extinguish the principal of, such debt within fifty years. The proceeds of such tax shall be applied only to the payment of such interest and principal. No such debt shall be created unless the question of incurring the same shall, at a regular election for councilmen, aldermen or other officers of such city, town or village, or at any special election called for such purpose, have been submitted to a vote of such qualified electors thereof as have paid a property tax therein during the preceding year, and a majority of those voting on the question by ballot deposited in a separate ballot box when voting in a regular election, shall have voted in favor of creating such debt. A proposal which does not receive the required number of votes for adoption at any special election called for that purpose, shall not be resubmitted in any special election within a period of one year. For the purpose, only, of voting on the creation of the debt, any person owning property within the corporate limits of the city, town or village who has paid a property tax therein during the preceding year and who is otherwise qualified to vote in the county where such city, town or village is situated shall be a qualified elector. (As amended November 3, 1964.)

ANNOTATIONS

I. GENERAL CONSIDERATION.

Cross references. — For registration and qualification of voters, see N.M. Const., art. VII, § 1.

As to county and municipal debt limit, see N.M. Const., art. IX, § 13.

As to refunding bonds, see N.M. Const., art. IX, § 15.

The 1964 amendment, which was proposed by Senate Rules Committee substitute for H.J.R. Nos. 10 and 18 (Laws 1963) and adopted at the general election held on November 3, 1964, with a vote of 65,791 for and 53,237 against, inserted provisions for special elections in the third sentence and added the last two sentences.

Section and enabling statutes constitutional. — The operable provisions of this section as interpreted by the New Mexico supreme court and the classifications and requirements of the enabling statutes for creation of municipal indebtedness, 3-30-2, 3-30-3, and 3-30-6 NMSA 1978, rationally promote legitimate state interests and are constitutionally justified. Snead v. City of Albuquerque, 663 F. Supp. 1084 (D.N.M.), aff'd, 841 F.2d 1131 (10th Cir. 1987), cert. denied, 485 U.S. 1009, 108 S. Ct. 1475, 99 L. Ed. 2d 704 (1988).

Amendment presumed valid. — The presumption that the 1964 amendment to this section is valid cannot reasonably be overcome. 1964 Op. Att'y Gen. No. 64-142.

New Mexico Const., art. VII, § 1, and 1964 amendment to this section can be construed to operate harmoniously without absurd or unjust results, since the former would apply to all elections for public officers and the latter would apply, as its language directs, "For the purpose, only, of voting on the creation of the debt." 1964 Op. Att'y Gen. No. 64-142.

The provisions of N.M. Const., art. VII, § 1, do not provide that a person otherwise qualified to vote can have but one place to vote in all elections, or that he can be a resident of but one precinct with fixed territorial boundaries. N.M. Const., art. VII, § 1 expressly directs that the legislature "shall regulate the manner, time and places of voting." There is nothing in this directive which says that voting precincts must be geographically identical for all elections, or that an elector is entitled to cast his vote at the same place in all elections. That additional electors may now vote, in municipal bond elections, cannot be held to apply to or affect the general voter qualifications set forth in N.M. Const., art. VII, § 1. The voter qualifications expressly recited in § 1 remain exactly the same. This section makes no provision for or mention of municipal bond elections, or the qualifications of electors at such elections. The provision of the constitution relating to elector qualifications, which is affected by and to which the amendment does apply, is the provision previously contained in this section, concerning the qualifications of electors at elections on the question of incurring municipal indebtedness. The ratification of an amendment to this provision requires only a simple majority of the votes which are cast on the question, and this majority was attained. City of Raton v. Sproule, 78 N.M. 138, 429 P.2d 336 (1967); 1964 Op. Att'y Gen. No. 64-142. For provision requiring more than a simple majority vote to amend certain constitutional provisions, see N.M. Const., art. VII, § 3.

Effect of section. — This section inhibits cities, towns and villages from entering into contracts which would, or might, create obligations resting upon future contingencies, and the amount of which is not fixed, definite and certain at time the contract is made. Thus, sewer construction debt for which town may become liable must be fixed, definite and certain in amount at time it is incurred. Henning v. Town of Hot Springs, 44 N.M. 321, 102 P.2d 25 (1940).

"Service contract doctrine" not applicable. — The "service contract doctrine," which states that a contract which obligates a municipality to pay a third party at the end of a year for all services performed during that year is not a "debt" within the meaning of constitutional debt restrictions, is not applicable in New Mexico. Hamilton Test Systems, Inc. v. City of Albuquerque, 103 N.M. 226, 704 P.2d 1102 (1985).

Nature of creditor irrelevant. — The intent and object to be accomplished was to safeguard the municipality and its citizens from ruinous taxation. The fact that an excessive indebtedness might be owing to an agency of the state instead of an

individual does not alter the effect. State ex rel. State Hwy. Comm'n v. City of Aztec, 77 N.M. 524, 424 P.2d 801 (1967).

Only limitations of section self-executing. — This section and N.M. Const., art. IX, § 13, are not self-executing in that they do not confer power upon municipalities to contract indebtedness, independent of legislative authorization. But these limitations upon the debt contracting power are self-executing. Lanigan v. Town of Gallup, 17 N.M. 627, 131 P. 997 (1913).

In absence of legislation providing for an election, which must be followed, the authority to issue bonds at all is denied. Taos County Bd. of Educ. v. Sedillo, 44 N.M. 300, 101 P.2d 1027 (1940).

Power of legislature to prescribe conditions under which municipality may issue bonds is only limited by this section, but not otherwise controlled. Varney v. City of Albuquerque, 40 N.M. 90, 55 P.2d 40 (1936).

Debt limitations applicable only to specified governmental subdivisions. — See same catchline in notes to N.M. Const., art. IX, § 10.

Liability of annexed area. — This section was not violated by Laws 1947, ch. 211 (now repealed), subjecting annexed area to taxation for retiring preexisting indebtedness of the city in the creation of which owners of annexed lands had no part. Cox v. City of Albuquerque, 53 N.M. 334, 207 P.2d 1017 (1949).

When a city and a county build hospital jointly, they must issue their respective bonds separately. 1947-48 Op. Att'y Gen. No. 5071.

Municipal power to serve as trustee. — Subject to constitutional and statutory limitations upon this power, a municipality may constitute itself as trustee or agent of bondholders or certificate holders for purpose of making assessments and the enforcement and collection thereof when authorized by statute. Purcell v. City of Carlsbad, 126 F.2d 748 (10th Cir. 1942).

Town was not estopped to deny liability on sewer certificates issued by it without election required by constitution, though certificates recited compliance with requirements of law. Henning v. Town of Hot Springs, 44 N.M. 321, 102 P.2d 25 (1939).

Municipal liability for unlawful disbursements. — Where bonds were made worthless by payment of other bonds out of numerical order, liability for the unlawful disbursement was not within statutory or constitutional limitations touching the creation and amount of municipal indebtedness. Fact that bonds were issued without submission to vote would not bar recovery on the bonds where sufficient assessments had been levied to meet indebtedness. Crist v. Town of Gallup, 51 N.M. 286, 183 P.2d 156 (1947).

Void municipal guarantee severable from assessment provision. — Guarantee of city to pay to holders of sewer certificates, payable out of assessments, any deficiency not met by the assessments, was void, in view of this section, because there was no election; but the guarantee was severable so certificate holders could compel enforcement of liens against properties benefited and equitable distribution of funds derived therefrom. City of Santa Fe v. First Nat'l Bank, 41 N.M. 130, 65 P.2d 857 (1937).

Incidental use of property purchased by bond issue acceptable. — A municipality in its discretion may authorize its property to be used incidentally for a purpose other than that for which it is primarily purchased or constructed, if the use for incidental purposes does not interfere with the use for the primary purpose; if machinery which town proposed to install was necessary for present and reasonably anticipated needs for pumping water, for which it was authorized, fact that it proposed to use such equipment in connection with producing electricity or some other municipal use would not prevent its installation; otherwise, a town could be precluded from installing any kind of equipment that might be used incidentally for another purpose. Page v. Town of Gallup, 26 N.M. 239, 191 P. 460 (1920).

But not application of funds to another use. — Where application of the proceeds of a bond issue, voted for construction and extension of the water and sewer systems, to the payment of preexisting indebtedness incurred for work done earlier on those systems was not contemplated by the electors in their consent to the current bond issue, such use constitutes a misapplication of the proceeds of such bond issue as a matter of law. 1957-58 Op. Att'y Gen. No. 58-234.

Power to become indebted to erect public building does not include power to become indebted to purchase such a building unless in connection with purchase building is so altered or reconstructed as to amount to erection of a new or different building. 1953-54 Op. Att'y Gen. No. 5957.

Comparable provisions. — Idaho Const., art. VIII, § 3.

Utah Const., art. XIV, §§ 3, 4.

Law reviews. — For comment, "The Last Bastion Crumbles: All Property Restrictions on Franchises Are Unconstitutional," see 1 N.M. L. Rev. 403 (1971).

For article, "Ad Valorem Tax Status of a Private Lessee's Interest in Publicly Owned Property: Taxability of Possessory Interest in Industrial Projects under the New Mexico Industrial Revenue Bond Act," see 3 N.M. L. Rev. 136 (1973).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 56 Am. Jur. 2d Municipal Corporations, Counties, and Other Political Subdivisions §§ 599 to 605.

Failure to comply with constitutional or statutory requirement that municipality, at or after incurring indebtedness, shall provide a tax for its payment, as affecting validity of indebtedness or obligations issued therefor, 90 A.L.R. 1240.

Legislature's power to add to or make more onerous conditions prescribed by constitution upon incurring of public debt, 106 A.L.R. 231.

Validity, construction and application of statute or ordinance requiring that judgments against municipalities be paid in order of their entry or in other particular sequence, 138 A.L.R. 1303.

Revenue or other bonds or instruments not creating indebtedness as within constitutional or statutory requirement of prior approval by electors of incurring of indebtedness by municipality, 146 A.L.R. 604.

Inclusion of several structures or units as affecting validity of submission of proposition to voters at bond election, 4 A.L.R.2d 617.

Validity of municipal bonds issue as against owners of property, annexation of which to municipality became effective after date of election at which issue was approved by voters, 10 A.L.R.2d 559.

Presumptions and burden of proof as to violation of or compliance with public debt limitation, 16 A.L.R.2d 515.

Inclusion of tax-exempt property in determining value of taxable property for debt limit purposes, 30 A.L.R.2d 903.

Rescission of vote authorizing school district or other municipal bond issue, expenditure or tax, 68 A.L.R.2d 1041.

Construction and effect of absentee voters' laws, 97 A.L.R.2d 257.

64 C.J.S. Municipal Corporations §§ 1846 to 1855.

II. NATURE OF DEBTS TO WHICH SECTION APPLIES.

"Debt" construed. — The "debt" whose creation is prohibited, or the amount of which is limited by this section, is one pledging general faith and credit of municipality, with consequent right in holders of such indebtedness to look to general taxing power for payment. State ex rel. Capitol Addition Bldg. Comm'n v. Connelly, 39 N.M. 312, 46 P.2d 1097 (1935).

Indemnification contract unconstitutional. — Provision in a contract between a city and a beverage company under which the city agreed to indemnify the company against

certain liabilities is unconstitutional under the debt restrictions of this section. 2000 Op. Att'y Gen. No. 00-04.

Obligations not engaging general taxing power not prohibited. — Revenue bonds or other state or municipal obligations which do not engage the general taxing power of the state, or a political subdivision thereof, are not within the prohibition of this section and N.M. Const., art. IX, § 13, either as to the requirement for approval of a popular referendum, or as exceeding constitutional limitation on indebtedness. Village of Deming v. Hosdreg Co., 62 N.M. 18, 303 P.2d 920 (1956).

Revenue bonds, truly such, repayable from a special fund created for their retirement, payable solely and wholly from moneys derived from sources other than general taxation, do not constitute a general obligation on part of municipality. Wiggs v. City of Albuquerque, 56 N.M. 214, 242 P.2d 865 (1952).

Special improvement bonds provided for under Laws 1947, ch. 122 (now repealed), were not invalid on theory that they constituted a debt under this section. Stone v. City of Hobbs, 54 N.M. 237, 220 P.2d 704 (1950).

No constitutional requirement existed requiring a bond election for corporations formed pursuant to 11-1-1 NMSA 1978 et seq. and 14-40-75, 1953 Comp. et seq. (now repealed), to issue and sell bonds to acquire a jointly owned public gas utility system. 1963-64 Op. Att'y Gen. No. 64-17.

Unconstitutional debt is not created by revenue bonds issued to improve and replace municipal waterworks to be paid from net revenues thereof. Seward v. Bowers, 37 N.M. 385, 24 P.2d 253 (1933).

City may be empowered to make contract for sewer improvements, without approving vote of the qualified taxpayers, so long as obligation of repayment is confined to the property benefited. City of Santa Fe v. First Nat'l Bank, 41 N.M. 130, 65 P.2d 857 (1937).

Paving bonds must be made payable out of moneys collected from assessments against the abutting lands and not otherwise. Munro v. City of Albuquerque, 48 N.M. 306, 150 P.2d 733 (1943).

Levy not necessary where water rents sufficient to meet debt. — Under provision for the levying of a tax to cover interest and to provide a sinking fund in case municipal bonds are issued, the levying and collection of the tax are not necessary, where the return from water rents are more than enough to meet those charges. 1915-16 Op. Att'y Gen. 336.

But providing for municipal payment if assessments insufficient requires referendum. — Town sewer certificates specifying payment from special assessments,

or by town in case of deficiency, were debts for which election was required. Henning v. Town of Hot Springs, 44 N.M. 321, 102 P.2d 25 (1940).

As does giving mortgage on municipal property. — Borrowing of money on security of property already belonging to municipality, without giving lender any recourse against body corporate or its property other than the particular property pledged to secure the money advanced is the creation of indebtedness within prohibition of constitution if the constitutional limitation of municipal indebtedness is thereby exceeded. The mortgage lien on municipal auditoriums declared by 5-3-3 NMSA 1978 creates a "debt" within prohibition of this section, except as the creation of same may have received an approving vote by referendum. Wiggs v. City of Albuquerque, 56 N.M. 214, 242 P.2d 865 (1952).

School bond issue is not debt of city, town or village. 1915-16 Op. Att'y Gen. 371.

Refunding bonds. — Where proceeds of municipal bonds were to be placed in escrow and invested in United States bonds for the sole purpose of paying off indebtedness on existing municipal bonds, the refunding bonds could not be considered as an increase in the city's indebtedness within this section and N.M. Const., art. IX, § 13, even though some 10 years would lapse between issuance of refunding bonds and final payment of original bonds, and though original bonds would not be paid immediately upon their initial callable date. City of Albuquerque v. Gott, 73 N.M. 439, 389 P.2d 207 (1964). For provision regarding refunding bonds, see N.M. Const., art. IX, § 15.

Lease-purchase agreements. — Despite the language of 6-6-12 NMSA 1978 certain lease-purchase agreements may constitute the creation of debt within this section and N.M. Const., art. IX, §§ 10 and 11. 1969 Op. Att'y Gen. No. 69-39.

A contract in the nature of a lease-purchase or installment purchase agreement, with right of termination by lessee, used as a method of financing the possible purchase of personal property by public entities of the state is constitutional and does not constitute the creation of a debt. 1976 Op. Att'y Gen. No. 76-20.

Option to purchase property. — Constitution allows New Mexico to fit into the prevailing view that a mere option to purchase property by a municipality does not create an indebtedness. 1972 Op. Att'y Gen. No. 72-30.

III. LIMITATION OF TAX LEVY.

Purpose of tax provision. — The provision of this section, providing "for the levy of a tax, not exceeding 12 mills on the dollar" and sufficient to pay the municipal debt, was inserted with the object of providing against the repudiation by a municipality of the indebtedness incurred by the ordinance, and to fix a limitation upon the amount of a single debt for purposes not excepted from its operation. Lanigan v. Town of Gallup, 17 N.M. 627, 131 P. 997 (1913).

Levy limitation inapplicable to debts for water and sewer systems. — The 12-mill levy limitation fixed by this section does not apply to debts contracted for purchase or construction of system for supplying water, or for a sewer system, for cities, towns or villages. Lanigan v. Town of Gallup, 17 N.M. 627, 131 P. 997 (1913). For debt limit and exceptions therefrom, see N.M. Const., art. IX, § 13.

While it is true the proviso regarding indebtedness contracted for supplying water for municipalities appears at the end of N.M. Const., art. IX, § 13, in order to carry out the manifest intention of the framers of the constitution, the supreme court has held that the proviso is, in effect, an independent provision, and that neither the limitation contained in this section, limiting the amount of the tax levy, nor the limitation contained in N.M. Const., art. IX, § 13, limiting the amount to which a municipality may become indebted, affect the debt contracting the power of a municipality with regard to indebtedness incurred for supplying water for the municipality. City of Truth or Consequences v. Robinson, 58 N.M. 111, 266 P.2d 356 (1954).

And referendum not necessary. — Section 2402, 1897 C.L. (now repealed), authorizing municipalities to contract indebtedness and issue bonds for specified purposes provided no debt was created, except for supplying water, without approval at regular election by majority of qualified elector-property owners was in full conformity, and in no way inconsistent, with this provision. Smith v. City of Raton, 18 N.M. 613, 140 P. 109 (1914).

But all other safeguards apply. — Only that part of this section which conflicts with the proviso of N.M. Const., art. IX, § 13, is inapplicable to a debt contracted for purpose of building or purchasing sewer or waterworks systems; and all other safeguards apply to such debts. Henning v. Town of Hot Springs, 44 N.M. 321, 102 P.2d 25 (1940).

Levy limitation not affected by administrative statute. — Fact that an administrative statute (Laws 1919, ch. 47, now repealed) provided that revenue from municipally owned utilities should be used to pay bond interest and principal did not affect requirement of tax levy in this section. State ex rel. City of Roswell v. State Tax Comm'n, 34 N.M. 303, 280 P. 258 (1929).

IV. ELECTIONS.

A. VOTER REQUIREMENTS.

Payment of property tax prerequisite to voting. — In order to be able to vote in any municipal bond election, it is the universal requirement that the voters shall have paid their property tax during the preceding year. This requirement does not exist for voters in elections for public officers. 1953-54 Op. Att'y Gen. No. 5643.

"Property tax" construed. — The phrase "property tax," as used in this section, covers any kind of property. 1915-16 Op. Att'y Gen. 336.

"The preceding year" construed. — As used in this section, the words "the preceding year" mean the period of time covering one year next preceding the election, and not the calendar year preceding the one in which the election is held. 1915-16 Op. Att'y Gen. 327.

Prerequisite not met by payment of conservancy district assessment. — One who has paid a conservancy district assessment on property located in a municipality, but who has not paid an ad valorem property tax on property within the municipality during the preceding year, is not eligible to vote in a city bond election. 1961-62 Op. Att'y Gen. No. 62-51.

Community property. — Married woman, otherwise a qualified elector, owning community property on which her husband paid tax, was qualified to vote in election on bond issue. Baca v. Village of Belen, 30 N.M. 541, 240 P. 803 (1925).

Property owner whose mortgagee paid assessed tax as agent for him and property owner exempt from payment of tax under soldier exemption provided in N.M. Const., art. VIII, § 5, were persons "who [had] paid a property tax during the preceding year" within constitutional and statutory requirements and therefore were qualified electors in voting on general obligation bond for municipal improvements. Hair v. Motto, 82 N.M. 226, 478 P.2d 554 (1970).

Vendors and vendees in real estate contracts were qualified electors in voting on general obligation bonds for municipal improvements. Hair v. Motto, 82 N.M. 226, 478 P.2d 554 (1970).

Voter qualifications on bond issues for sewers. — Ex-service men or heads of families whose property is exempt from taxation are not qualified to vote on municipal bond issues for sewers, but the wife who has community property on which her husband paid taxes is qualified, as are landowners who have paid tax the previous year, but not stockholders of corporation as such which has paid property tax. 1935-36 Op. Att'y Gen. 74. For soldier exemption, see N.M. Const., art. VIII, § 5.

New Mexico Const., art. VII, § 1, and 1964 amendment to this section can be construed to operate harmoniously. — See same catchline under analysis line I.

B. PROCEDURES.

"Ballot box" mandatory. — The spirit of this section could be followed by the utilization of a separate voting machine for the bond election. However, this section does provide that a "separate ballot box" shall be used, and it is questionable whether in construing this language it would be wise to depart from the sense of the words actually used. Therefore, that portion of Laws 1951, ch. 192, § 3 (now repealed), relating to the use of voting machines in bond elections should be regarded as inconsistent with this section, requiring separate ballot boxes, and for that reason separate ballot boxes should be used in all municipal bond elections. 1953-54 Op. Att'y Gen. No. 5643.

Double proposition improper. — Cities, towns and villages were not authorized to submit to voters the joint proposition of issuing bonds for double purpose of constructing a waterworks system and building a system of sewers, without providing for a separate vote upon each question. Lanigan v. Town of Gallup, 17 N.M. 627, 131 P. 997 (1913).

But must contain two separate propositions. — Bond election for issuance of bonds for a sewer system and disposal plant does not contain two separate propositions. 1925-26 Op. Att'y Gen. 68.

Submission by city council to voters of proposition to issue bonds in a stated amount for purchase or erection of a system of waterworks was not a double proposition, but was to be construed in substance as a proposition to acquire waterworks, either by purchase or construction. City of Albuquerque v. Water Supply Co., 24 N.M. 368, 174 P. 217, 5 A.L.R. 519 (1918).

And constitutional amendments treated differently. — Where there is but on portion of a single section affected, and the object or purpose of the amendment is confined to the manner in which municipal indebtedness is incurred, the fact that two points of change are involved, the fact that either might have been presented to the electorate separately, and the fact that there may be reasons why an elector might have desired one change and not the other, are not in themselves sufficient to hold the adoption of the amendment invalid. City of Raton v. Sproule, 78 N.M. 138, 429 P.2d 336 (1967).

Two-thirds vote constitutional. — Section 5-3-9 NMSA 1978 authorizing cities to issue bonds for construction of public auditorium, on two-thirds vote of legal voters, did not run counter to this section of the constitution; statute precluded issuance of such bonds under prior statute authorizing issuance of bonds for construction of public or needful buildings on majority vote. Varney v. City of Albuquerque, 40 N.M. 90, 55 P.2d 40, 106 A.L.R. 222 (1936).

Illegal votes do not vitiate election. — Receiving by election officers at bond election of illegal or improper votes will not vitiate the election, unless it is shown affirmatively that the wrongful action changed the result. Sargent v. City of Santa Fe, 24 N.M. 411, 174 P. 424 (1918).

Sec. 13. [County and municipal debt limit; exceptions.]

No county, city, town or village shall ever become indebted to an amount in the aggregate, including existing indebtedness, exceeding four per centum on the value of the taxable property within such county, city, town or village, as shown by the last preceding assessment for state or county taxes; and all bonds or obligations issued in excess of such amount shall be void; provided, that any city, town or village may contract debts in excess of such limitation for the construction or purchase of a system for supplying water, or of a sewer system, for such city, town or village.

ANNOTATIONS

I. GENERAL CONSIDERATION.

Cross references. — For restrictions on county indebtedness, see N.M. Const., art. IX, § 10.

For restrictions on municipal indebtedness, see N.M. Const., art. IX, § 12.

Evil aimed at by section was the proneness of municipalities, over-optimistic as to their futures, to adopt improvement programs in excess of their means of payment. Gutierrez v. Middle Rio Grande Conservancy Dist., 34 N.M. 346, 282 P. 1, 70 A.L.R. 1261 (1929), cert. denied, 280 U.S. 610, 50 S. Ct. 158, 74 L. Ed. 653 (1930).

Conservancy assessments not debt contracted or incurred by city. — The Conservancy Act (73-14-1 NMSA 1978 et seq.) authorized assessments against public corporations as such (73-16-2 NMSA 1978), required such assessments to be paid in not more than 10 annual installments (73-16-6 NMSA 1978), and required such installments to be paid by uniform tax upon all taxable property (73-16-15 NMSA 1978). A debt resulting from such assessments was not contracted or incurred by a city and hence did not violate this section. Gutierrez v. Middle Rio Grande Conservancy Dist., 34 N.M. 346, 282 P. 1, 70 A.L.R. 1261 (1929), cert. denied, 280 U.S. 610, 50 S. Ct. 158, 74 L. Ed. 653 (1930).

Section does not authorize borrowing. — New Mexico Const., art. IX, § 12 and this section give no authority for borrowing money, and in this respect are not self-executing. 1953-54 Op. Att'y Gen. No. 5778.

But limitations are self-executing. — This section and N.M. Const., art. IX, § 12, are not self-executing in that they confer no power upon municipalities to contract indebtedness, independent of legislative authorization. Their limitations on the debt-contracting power, however, are self-executing. Lanigan v. Town of Gallup, 17 N.M. 627, 131 P. 997 (1913).

Debt limitations applicable only to specified governmental subdivisions. — See same catchline in notes to N.M. Const., art. IX, § 10.

Voter qualifications for bond issue elections. — Only resident voters in a municipality who have paid property tax therein the preceding year may vote at election for a bond issue. 1937-38 Op. Att'y Gen. 218.

Joint proposition unlawful. — Cities, towns and villages are not authorized to submit to the voters therein the joint proposition of issuing bonds for constructing a waterworks system and building a system of sewers, without providing for a separate vote upon each question. Lanigan v. Town of Gallup, 17 N.M. 627, 131 P. 997 (1913).

But proposition to fund purchase or erection of water system not joint. — When city council submits to voters a proposition to issue bonds in a stated amount for

purchase or erection of system of waterworks, it is not a double proposition, and does not fall within the rule announced in Lanigan v. Town of Gallup, 17 N.M. 627, 131 P. 997 (1913), but is to be construed as a proposition to acquire a waterworks system, either by purchase or construction. City of Albuquerque v. Water Supply Co., 24 N.M. 368, 174 P. 217 (1918).

Water pumping machinery used for other municipal use. — Where town contracted to purchase machinery necessary for present and reasonably anticipated needs for pumping water, out of money received from bonds issued after an election for construction of waterworks, fact that it also proposed to use such machinery in connection with another municipal use could not operate to prevent town from installing the machinery. Page v. Town of Gallup, 26 N.M. 239, 191 P. 460 (1920).

Comparable provisions. — Utah Const., art. XIV, § 4.

Wyoming Const., art. XVI, § 5.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 56 Am. Jur. 2d Municipal Corporations, Counties, and Other Political Subdivisions §§ 592, 599.

Estoppel by recitals in bonds to set up violation of provision limiting indebtedness, 86 A.L.R. 1068, 158 A.L.R. 938.

Appropriation to meet obligation at time of its creation as affecting its character as an indebtedness within debt limitation, 92 A.L.R. 1299, 134 A.L.R. 1399.

Pledge or appropriation of revenue from utility or other property in payment therefor as debt within constitutional or statutory limitation, 96 A.L.R. 1385, 146 A.L.R. 328.

Taxation, limitation of power as to, as limitation of power to incur indebtedness, or vice versa, 97 A.L.R. 1103.

Disposition of revenues from operation of revenue-producing enterprise owned by municipal corporation, 103 A.L.R. 579, 165 A.L.R. 854.

Legislature's power to add to limitations prescribed by constitution limiting the public debt, 106 A.L.R. 231.

Ownership or operation of public utility by municipality or by private corporation (or individual) as basis of classification for legislative purpose, 109 A.L.R. 369.

Undelivered bonds or other obligations authorized but not delivered prior to adoption or effective date of debt limitation as affected by such limitation, 109 A.L.R. 961.

Presumptions and burden of proof as to violation of or compliance with public debt limitation, 16 A.L.R.2d 515.

Inclusion of tax-exempt property in determining value of taxable property for debt limit purposes, 30 A.L.R.2d 903.

20 C.J.S. Counties § 188; 64 C.J.S. Municipal Corporations §§ 1846 to 1855.

II. NATURE OF DEBTS TO WHICH SECTION APPLIES.

"Become indebted" construed. — Construing this section with N.M. Const., art. IX, §§ 10 and 12, the phrase "become indebted" means in the light of its context "borrow money" or "contract debt." Gutierrez v. Middle Rio Grande Conservancy Dist., 34 N.M. 346, 282 P. 1, 70 A.L.R. 1261 (1929), cert. denied, 280 U.S. 610, 50 S. Ct. 158, 74 L. Ed. 653 (1930).

Debt whose creation is prohibited or whose amount is limited in the constitution, is one pledging general faith and credit of subdivision with consequent right in holders of such indebtedness to look to general taxing power to satisfy their claims. State ex rel. Capitol Addition Bldg. Comm'n v. Connelly, 39 N.M. 312, 46 P.2d 1097 (1935).

Revenue bonds not "debt". — The indebtedness created by revenue bonds or like municipal obligations are not the kind of "debt" framers of constitution had in mind and were talking about in N.M. Const., art. IX, § 12 and this section. Village of Deming v. Hosdreg Co., 62 N.M. 18, 303 P.2d 920 (1956).

Revenue bonds or other state or municipal obligations which do not engage the general taxing power of the state, or a political subdivision thereof, are not within the prohibition of N.M. Const., art. IX, § 12 and this section either as to the requirement for approval of a popular referendum, or as exceeding constitutional limitation on indebtedness. Village of Deming v. Hosdreg Co., 62 N.M. 18, 303 P.2d 920 (1956).

Nor special improvement bonds. — Special improvement bonds provided for under Laws 1947, ch. 122 (now repealed), were not invalid on theory that they constituted a debt under this section. Stone v. City of Hobbs, 54 N.M. 237, 220 P.2d 704 (1950).

Nor refunding bonds. — Where proceeds of municipal bonds were to be placed in escrow and invested in United States bonds for the sole purpose of paying off indebtedness on existing municipal bonds, the refunding bonds could not be considered as an increase in the city's indebtedness within N.M. Const., art. IX, § 12 and this section, even though some 10 years would lapse between issuance of refunding bonds and final payment of original bonds and original bonds would not be paid immediately upon their initial callable date. City of Albuquerque v. Gott, 73 N.M. 439, 389 P.2d 207 (1964).

But mortgaging municipal property creates debt. — Borrowing of money on security of property already belonging to municipality, without giving bidder any recourse against body corporate or its property other than the particular property pledged to secure the money advanced, if the constitutional limitation of municipal indebtedness is thereby

exceeded, is the creation of indebtedness within meaning of constitution; a city, to secure completion of its city hall, cannot contract to deed its uncompleted building and land in exchange for money for such completion, to rent the property where the rental amounts to interest on the amount advanced, and take an option to repurchase the property, where its debts exceed the constitutional limit, for the contract is in equitable effect a mortgage. Palmer v. City of Albuquerque, 19 N.M. 285, 142 P. 929, 1915A L.R.A. 1106 (1914).

III. PROVISO REGARDING WATER AND SEWER SYSTEMS.

Intent of proviso. — It was the intention of the framers of the constitution that no restraints should be laid on municipalities in their efforts to procure a water supply, by either the purchase or construction of systems for such purpose, or of sewer systems. City of Truth or Consequences v. Robinson, 58 N.M. 111, 266 P.2d 356 (1954).

No limitation upon amount of water system indebtedness. — Under the constitution, there is no limitation imposed upon amount of indebtedness which may be contracted for purpose of construction or purchase of a system for supplying water. City of Albuquerque v. Water Supply Co., 24 N.M. 368, 174 P. 217 (1918).

Complete exemption from all calculations. — Municipal indebtedness for water and sewer systems is outside of the 4% limitation, and sewer bonds should not be considered as part of bonded indebtedness within constitutional limit even after such bonds are issued. 1937-38 Op. Att'y Gen. 214.

Proviso also applies to tax levy provision. — The proviso of this section is not limited to that portion of the section which precedes it. While it is true the proviso regarding indebtedness contracted for supplying water for municipalities appears at the end of this section, in order to carry out the manifest intention of the framers of the constitution, the supreme court had held that the proviso is, in effect, an independent provision, and that neither the limitation contained in N.M. Const., art. IX, § 12, limiting the amount of the tax levy, nor the limitation contained in this section, limiting the amount to which a municipality may become indebted, affect the debt contracting the power of a municipality with regard to indebtedness incurred for supplying water for the municipality. City of Truth or Consequences v. Robinson, 58 N.M. 111, 266 P.2d 356 (1954).

But only conflicting part of N.M. Const., art. IX, § 12, is inapplicable to debt contracted for purpose of building or purchasing sewer or waterworks systems, and all other safeguards apply to such debts. Henning v. Town of Hot Springs, 44 N.M. 321, 102 P.2d 25 (1939).

Revenue bonds for waterworks system. — Where a town, under the authority of Laws 1933, ch. 57 (now repealed), issues revenue bonds for a loan for the betterment, replacement and improvement of its waterworks system, payable exclusively from net revenues derived from such municipal utility, it is clearly within the exemption of this

section permitting debts in excess of the 4% limitation. Seward v. Bowers, 37 N.M. 385, 24 P.2d 253 (1933). But see notes regarding revenue bonds under analysis line II.

Proviso not applicable to electric light system. — Removal of limitation upon indebtedness for supplying water or a sewer system is not applicable to electric light system. 1915-16 Op. Att'y Gen. 271.

Sec. 14. [Aid to private enterprise; veterans' scholarship program; student loans; job opportunities; affordable housing.] (2001)

Neither the state nor any county, school district or municipality, except as otherwise provided in this constitution, shall directly or indirectly lend or pledge its credit or make any donation to or in aid of any person, association or public or private corporation or in aid of any private enterprise for the construction of any railroad except as provided in Subsections A through F of this section.

A. Nothing in this section prohibits the state or any county or municipality from making provision for the care and maintenance of sick and indigent persons.

B. Nothing in this section prohibits the state from establishing a veterans' scholarship program for Vietnam conflict veterans who are post-secondary students at educational institutions under the exclusive control of the state by exempting such veterans from the payment of tuition. For the purposes of this subsection, a "Vietnam conflict veteran" is any person who has been honorably discharged from the armed forces of the United States, who was a resident of New Mexico at the original time of entry into the armed forces from New Mexico or who has lived in New Mexico for ten years or more and who has been awarded a Vietnam campaign medal for service in the armed forces of this country in Vietnam during the period from August 5, 1964 to the official termination date of the Vietnam conflict as designated by executive order of the president of the United States.

C. The state may establish by law a program of loans to students of the healing arts, as defined by law, for residents of the state who, in return for the payment of educational expenses, contract with the state to practice their profession for a period of years after graduation within areas of the state designated by law.

D. Nothing in this section prohibits the state or a county or municipality from creating new job opportunities by providing land, buildings or infrastructure for facilities to support new or expanding businesses if this assistance is granted pursuant to general implementing legislation that is approved by a majority vote of those elected to each house of the legislature. The implementing legislation shall include adequate safeguards to protect public money or other resources used for the purposes authorized in this subsection. The implementing legislation shall further provide that:

(1) each specific county or municipal project providing assistance pursuant to this subsection need not be approved by the legislature but shall be approved by the county or municipality pursuant to procedures provided in the implementing legislation; and

(2) each specific state project providing assistance pursuant to this subsection shall be approved by law.

E. Nothing in this section prohibits the state, a county or a municipality from:

(1) donating land owned by the state, county or municipality for the construction on it of affordable housing;

(2) donating an existing building owned by the state, county or municipality for conversion or renovation into affordable housing; or

(3) providing or paying the costs of infrastructure necessary to support affordable housing projects.

F. The provisions of Subsection E of this section are not self-executing. Before the described assistance may be provided, enabling legislation shall be enacted by a majority vote of the members elected to each house of the legislature. This enabling legislation shall:

(1) define "affordable housing";

(2) establish eligibility criteria for the recipients of land, buildings and infrastructure;

(3) contain provisions to ensure the successful completion of affordable housing projects supported by assistance authorized pursuant to Subsection E of this section;

(4) require a county or municipality providing assistance pursuant to Subsection E of this section to give prior formal approval by ordinance for a specific affordable housing assistance grant and include in the ordinance the conditions of the grant; and

(5) require prior approval by law of a specific affordable housing assistance grant by the state. (As amended November 1, 1971, November 5, 1974, November 8, 1994 and November 5, 2002.)

ANNOTATIONS

I. GENERAL CONSIDERATION.

Cross references. — For section prohibiting extra compensation for public officers, see N.M. Const., art. IV, § 27.

For prohibition of aid to charities, see N.M. Const., art. IV, § 31.

As to misuse of public moneys, see N.M. Const., art. VIII, § 4.

For section prohibiting support of sectarian or private schools, see N.M. Const., art. XII, § 3.

For the Local Economic Development Act, see Chapter 5, Article 10 NMSA 1978.

For Medical Student Loan Act, see 21-22-1 to 21-22-10 NMSA 1978.

The 1971 amendment, which was proposed to H.J.R. No. 15 (Laws 1971) and adopted at the special election held on November 2, 1971, with a vote of 38,002 for and 37,008 against, added the provision regarding a veterans' scholarship program at the end of the first sentence and added the second sentence.

The 1974 amendment, which was proposed by House Floor Substitute for H.J.R. No. 7 (Laws 1974) and adopted at the general election held on November 5, 1974 with a vote of 77,761 for and 49,294 against, added the last sentence.

The 1994 amendment, proposed by H.J.R. No. 12 (Laws 1993) and adopted at the general election held on November 8, 1994, by a vote of 209,019 for and 186,505 against, divided the section into subsections and added Subsection D relating to job and economic development opportunities.

The first 2002 amendment, which was proposed by H.J.R. No. 10 (Laws 2001) and adopted at the general election held on November 5, 2002, by a vote of 239, 437 for and 190,328 against, substituted "except as provided in Subsections A through F of this section" for "provided" at the end of the introductory paragraph and added subsections E and F.

The second 2002 amendment, which was proposed by H.J.R. No. 18 (Laws 2001) and adopted at the general election held on November 5, 2002, by a vote of 303,444 for and 127,955 against, inserted "or who has lived in New Mexico for ten years or more" near the middle of the second sentence in Subsection B.

Compiler's notes. — An amendment to this section proposed by S.J.R. No. 11 (Laws 1967), which would have permitted creating new job opportunities, decreasing unemployment or improving the state's economy with loans to encourage economic development, was submitted to the people at the special election held on November 7, 1967. It was defeated by a vote of 22,353 for and 31,019 against.

An amendment to this section proposed by H.J.R. No. 23 (Laws 1970), which would have permitted student loan programs for post-secondary students at educational institutions under the exclusive control of the state, was submitted to the people at the general election held on November 3, 1970. It was defeated by a vote of 57,864 for and 78,061 against.

Amendments considered in even-numbered years. — Eight amendments to the constitution were proposed by the 1970 session of the legislature although the attorney general has stated that constitutional amendments may not be considered in even-numbered years. See 1965-66 Op. Att'y Gen. No. 65-212 and 1969-70 Op. Att'y Gen. No. 69-151.

Special election. — Laws 1971, ch. 308, §§ 1 and 2, provided that all constitutional amendments proposed by the thirtieth legislature be voted upon at a special election on the first Tuesday of November, 1971, unless otherwise specified, and appropriated $171,000 for election expenses.

Intent of this section was to prevent the giving of outright "grants" or the use of the city's credit by and for those who would not be entitled to get or receive credit in the first instance and to act as a curb on speculative ventures prevalent at the time of its adoption. 1955-56 Op. Att'y Gen. No. 6550.

Enterprise's public purpose does not justify aid. — That a private enterprise serves a highly commendable public purpose alone does not warrant the state's or any county's or city's making a donation or pledging its credit in aid of it. State ex rel. Mechem v. Hannah, 63 N.M. 110, 314 P.2d 714 (1957); State Hwy. Comm'n v. Southern Union Gas Co., 65 N.M. 84, 332 P.2d 1007, 75 A.L.R.2d 408 (1958), overruled in part by State ex rel. City of Albuquerque v. Lavender, 69 N.M. 220, 365 P.2d 652 (1961).

Even if a donation is to be used for a public purpose, it is not exempt from constitutional prohibitions. 1979 Op. Att'y Gen. No. 79-2.

Outright gifts to individuals are in violation of this section, and the fact that an appropriation may be serving a highly commendable public purpose does not exempt it from this constitutional prohibition. 1979 Op. Att'y Gen. No. 79-7.

But no language in section expressly proscribes "the giving of aid to private enterprise." Village of Deming v. Hosdreg Co., 62 N.M. 18, 303 P.2d 920 (1956).

Conformity with aid of charities provision. — The language of this section was obviously designed to conform to the aid of charities provision of N.M. Const., art. IV, § 31. 1975 Op. Att'y Gen. No. 75-7.

Enabling Act provisions continue valid. — Enabling Act (June 20, 1910, 36 Stat. 557, ch. 310) under which New Mexico became a state, became as much a part of New Mexico fundamental law as if it had been directly incorporated into the New Mexico constitution, and provisions of the constitution forbidding donations or pledges of credit by New Mexico except as otherwise permitted allowed use of trust funds as required under the Enabling Act. State ex rel. Interstate Stream Comm'n v. Reynolds, 71 N.M. 389, 378 P.2d 622 (1963). See also Pamphlet 3.

Loan or pledge of credit proscribed. — The expenditure of $3000 to be used in preliminary and advance work in preparing for the 1965 western association of state highway officials' convention is absolutely proscribed by this section of the New Mexico constitution, even though the western association of state highway officials would reimburse the department from registration fees, since the proposed expenditure would amount at the very least to a pledging or lending of highway department credit to the association. 1963-64 Op. Att'y Gen. No. 64-81.

Laws 1939, ch. 149, authorizing counties to construct public auditoriums to cooperate with New Mexico Fourth Centennial Coronado Corporation in conducting exposition violated constitutional provision prohibiting any county from pledging its credit in aid of a public or private corporation. Hutcheson v. Atherton, 44 N.M. 144, 99 P.2d 462 (1940), questioned in State ex rel. City of Albuquerque v. Lavender, 69 N.M. 220, 365 P.2d 652 (1961).

Tariff permitting utility to recover costs of relocation required by a local ordinance did not violate the antidonation clause of the New Mexico Constitution. City of Albuquerque v. New Mexico Pub. Regulatory Comm'n, 2003-NMSC-028, 134 N.M. 472, 79 P.3d 297.

But special improvement bonds valid. — Special improvement bonds provided for under Laws 1947, ch. 122 (now repealed) were not invalid on theory that they involved a lending of credit to private individuals. Stone v. City of Hobbs, 54 N.M. 237, 220 P.2d 704 (1950).

As is limited contingent liability. — It is legal for school districts, irrigation districts and other public units to insure public property in authorized mutual insurance companies, if the contingent liability assumed by public body is limited in amount; but if such liability is not so limited, the constitutional provision would be violated. 1935-36 Op. Att'y Gen. 88.

And student loan plan associated with federal law. — Plan whereby the state could loan money to resident students who are enrolled in an institution of higher learning in the state and who otherwise qualify under the federal guaranteed loan program under the Higher Education Act of 1965 (20 U.S.C. § 1001 et seq.) is not inconsistent with N.M. Const., art. VIII, § 4, or this section. 1970 Op. Att'y Gen. No. 70-23.

State Bar Act (Laws 1925, ch. 100) does not violate this section. The power of the state over the board of commissioners of the state bar appears to be absolute. In re Gibson, 35 N.M. 550, 4 P.2d 643 (1931).

Nor does public employee benefits statute. — Section 10-11-4 NMSA 1978, increasing benefits to public employees, and permitting those employees who had annuitant status under Laws 1947, ch. 167 (now repealed), to participate therein provided they elected so to do by paying an additional lump sum of money to the association does not violate N.M. Const., art. IV, §§ 27 and 31 and this section, as the

effect thereof is not to appropriate public money for private use nor to allow extra compensation to public officers for services already performed, nor does it constitute a donation or gratuity. State ex rel. Hudgins v. Public Employees Retirement Bd., 58 N.M. 543, 273 P.2d 743 (1954).

Nor flood protection appropriations. — Appropriations under Laws 1961, chs. 181, 182 and 183 (relating to flood protection) are not in violation of this section. State ex rel. Interstate Stream Comm'n v. Reynolds, 71 N.M. 389, 378 P.2d 622 (1963).

Grasshopper control program meets judicial tests. — The grasshopper control program meets the tests which have been established by the supreme court as meeting the requirements of this section; that is, (1) a public purpose is being served, and (2) complete control of the expenditure of the state's contribution rests in a state agency. Therefore, the appropriation made in Laws 1957, ch. 212, § 10, is constitutional. 1959-60 Op. Att'y Gen. No. 59-92.

So does law regarding relocation of utilities in certain condemnation situations. — Under the 1959 act (55-7-21 and 55-7-22, 1953 Comp.; 67-8-15 to 67-8-21 NMSA 1978), (1) the legislature has authorized the commission itself to expend public funds for the relocation of utility facilities; (2) the utility, as to relocations, is under the absolute control of the commission and is merely acting as a contractor for the state; and (3) the legislature has expressly prohibited reimbursement for relocation in cases where there is a specific obligation on the part of the utility to relocate. State ex rel. City of Albuquerque v. Lavender, 69 N.M. 220, 365 P.2d 652 (1961).

Money disbursed illegally must be paid back. — Public moneys are trust funds belonging to the people, and must be reimbursed by the recipient if they are paid out illegally by a public official, even though in good faith; and this is particularly true in a case involving a donation or gratuity. State ex rel. Callaway v. Axtell, 74 N.M. 339, 393 P.2d 451 (1964).

Section was never intended as a shield against responsibility for wrongful acts. Thus, where a sewage treatment facility is operated by a city in a manner which results in contamination of underground water to such a degree that it is offensive or dangerous for human consumption or use and is injurious to public health, safety and welfare and interferes with the exercise and enjoyment of public rights, including the right to use public property, the city has created a public nuisance within the meaning of 30-8-1 NMSA 1978 and relief in the nature of a mandatory injunction requiring abatement of the nuisance by ordering the city to extend its waterlines to residencies in and outside its limits free of hookup charges is no "donation" in violation of this section. State ex rel. New Mexico Water Quality Control Comm'n v. City of Hobbs, 86 N.M. 444, 525 P.2d 371 (1974).

Judgment for damages for breach of contract is not a donation as defined in this section. Sanchez v. Board of Educ., 80 N.M. 286, 454 P.2d 768 (1969).

Contracts beneficial to whole community. — Contracts between municipalities and private enterprises that are beneficial to the community as a whole are not violative of this section, when they do not involve municipal investment in the project through the lending of municipal funds. Hotels of Distinction W., Inc. v. City of Albuquerque, 107 N.M. 257, 755 P.2d 595 (1988).

Transportation of students to private schools. — If private schools or students were to reimburse the county pursuant to an enforceable contract for funds expended in contracting with a school district for the transportation of students to the private schools, there would be no violation of this provision. 1989 Op. Att'y Gen. No. 89-02.

Providing dormitory and meals to Boy Scouts. — The Department of Public Safety cannot provide use of its dormitory and meals to a Boy Scouts of America troop at a substantially reduced cost. 1990 Op. Att'y Gen. No. 90-13.

Payment of mayor's annual dues in club. — This section prohibited the township of Mesilla from paying from public funds the mayor's annual dues for membership in the Las Cruces Forum, Inc. 1988 Op. Att'y Gen. No. 88-47.

"Trading" tax exemptions for health care. — Repeal of the state income tax exemptions for teacher pensions and public employee pensions does not remedy constitutional defects of the proposed retiree health care act under a theory that those exemptions would be "traded" for retiree health care. Those exemptions are not property rights, irrepealable contractual entitlements, or pension benefits. Hence, elimination of the favorable tax treatment for current retirees is not consideration for a multi-million dollar health care plan that the state proposes to provide them. 1990 Op. Att'y Gen. No. 90-03.

Comparable provisions. — Idaho Const., art. VIII, § 4.

Iowa Const., art. VII, § 1.

Utah Const., art. VI, § 29.

Wyoming Const., art. XVI, § 6.

Law reviews. — For note, "Forest Fire Protection on Public and Private Lands in New Mexico," see 4 Nat. Resources J. 374 (1964).

For student symposium, "Constitutional Revision - State Aid to Private Enterprise in New Mexico," see 9 Nat. Resources J. 457 (1969).

For article, "Ad Valorem Tax Status of a Private Lessee's Interest in Publicly Owned Property: Taxability of Possessory Interests in Industrial Projects under the New Mexico Industrial Revenue Bond Act," see 3 N.M. L. Rev. 136 (1973).

For article, "State Investment Attraction Subsidy Wars Resulting from a Prisoner's Dilemma: The Inadequacy of State Constitutional Solutions and the Appropriateness of a Federal Legislative Response", see 28 N.M.L. Rev. 303 (1998).

For article, "New Mexico Taxes: Taking Another Look," see 32 N.M.L. Rev. 351 (2002).

For note, “Indirect Funding of Sectarian Schools: A Discussion of the Constitutionality of State School Voucher Programs Under Federal and New Mexico Law After Zelman v. Simmons-Harris,” see 34 N.M.L. Rev. 194 (2004).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 56 Am. Jur. 2d Municipal Corporations, Counties, and Other Political Subdivisions §§ 588, 589; 63A Am. Jur. 2d Public Funds §§ 3, 4, 60, 64, 68, 70.

Constitutionality of statute or ordinance authorizing use of public funds, credit, or power of taxation for restoration or repair of privately owned utility, 13 A.L.R. 313.

Releasing public school pupils from attendance for purpose of attending religious education classes as use of public money for sectarian purpose, 2 A.L.R.2d 1371.

Validity of legislation providing for additional retirement or disability allowances for public employees previously retired or disabled, 27 A.L.R.2d 1442.

Urban redevelopment by private enterprise, validity of statutes providing for, 44 A.L.R.2d 1414.

Constitutionality of state legislation to reimburse public utilities for cost of relocating their facilities because of highway construction, conditioned upon federal reimbursement of state under terms of Federal-Aid Highway Act (23 U.S.C. § 123), 75 A.L.R.2d 419.

Use of public school premises for religious purposes during nonschool time, 79 A.L.R.2d 1148.

Public payment of tuition, scholarship or the like, to sectarian school, 81 A.L.R.2d 1309.

Permissible use of funds from parking meters, 83 A.L.R.2d 625.

Use of public money for furnishing free textbooks to sectarian school or student therein, 93 A.L.R.2d 986.

Use of school property for other than public school or religious purposes, 94 A.L.R.2d 1274.

20 C.J.S. Counties § 204; 64 C.J.S. Municipal Corporations § 1870; 79 C.J.S. Schools and School Districts § 330; 81A C.J.S. States §§ 204 to 208.

II. DONATION.

Municipalities without power to make gifts. — Municipal corporations are creatures of statute; they have only the powers with which they are invested by the statutes creating them. Powers of cities and towns are set out in 3-18-1 NMSA 1978. No power to make a gift of any kind is mentioned. 1959-60 Op. Att'y Gen. No. 60-160.

"Donation" construed. — The term "donation" as found in this proviso has been applied in its ordinary sense and meaning, as a "gift," an allocation or appropriation of something of value, without consideration, to a "person, association or public or private corporation." Village of Deming v. Hosdreg Co., 62 N.M. 18, 303 P.2d 920 (1956).

A donation within the meaning of this section has been defined as a gift, an allocation or appropriation of something of value, without consideration. 1979 Op. Att'y Gen. Nos. 79-2, 79-7.

But phrase "giving of aid to private enterprise" should not be read into proviso prohibiting a donation to a private corporation as a matter of construction except where the "aid or benefit" disclosed, by reason of its nature and the circumstances surrounding it, take on character as a donation in substance and effect.

Accordingly, statute (Laws 1955, ch. 234, now repealed) authorizing issuance of bonds by municipalities to finance projects for the purpose of promoting industry and trade did not violate this section, proscribing the making of "any donation to or in aid of . . . a private corporation," by giving aid to private enterprise. Village of Deming v. Hosdreg Co., 62 N.M. 18, 303 P.2d 920 (1956).

Development agreements. — Under a development agreement, a home rule municipality may reimburse a developer out of gross receipts tax proceeds in exchange for the developer's services in building public infrastructure in connection with a contract to facilitate the construction of retail business establishments. 2002 Op. Att'y Gen. No. 02-02.

Tax exemptions and deductions not unconstitutional donations unless retroactive. — Gross receipts tax exemptions and deductions do not violate the antidonation clause of this section unless they are applied retroactively to taxes due and payable. 1991 Op. Att'y Gen. No. 91-14.

Constitutionality of 1990 workers' compensation legislation. — The latest pronouncements of the New Mexico Supreme Court indicate that a loan of state funds to the employers mutual company, as authorized by the workers' compensation law, violates the antidonation clause of this section. 1990 Op. Att'y Gen. No. 90-25.

Scholarships out of public money. — Grants of scholarships by state educational institutions out of public money, but not out of endowments for that purpose, would probably violate this section. 1937-38 Op. Att'y Gen. 101.

Based on its authority to provide and charge tuition for educational services, a technical-vocational institute may, consistently with the antidonation clause, use public money for scholarships in the form of tuition waivers or reductions if the criteria used to award them are education-related and applied in a reasonable and even-handed manner. Past opinions suggesting that scholarship awards violate the antidonation clause are overruled to the extent they limit scholarships to those paid from private or federal sources. 1997 Op. Att'y Gen. No. 97-02.

No contributions to American Legion memorial allowed. — County commissioners may not contribute $500 to an American Legion war memorial which is erected upon the county courthouse grounds. 1943-44 Op. Att'y Gen. No. 4422.

Nor to community chest. — It is not legal for the state fair to donate the proceeds, in excess of costs, from horse races to the community chest. 1955-56 Op. Att'y Gen. No. 6279.

Nor to chamber of commerce. — A city cannot make donations to the chamber of commerce and include such contributions in the city budget. 1943-44 Op. Att'y Gen. No. 4368.

Arts commission may not pay expenses of students' art efforts. — Because it would be considered a donation, the New Mexico arts commission could not help defray the expenses of high school students painting and shipping a fence as a donation to the Kennedy Center in Washington D.C., which was receiving such artistic donations from every state. 1967 Op. Att'y Gen. No. 67-30.

It is unconstitutional for school district to pay for students' insurance (of any type) with school district funds other than funds raised through the student activity account. 1963-64 Op. Att'y Gen. No. 64-83.

Use of school resources by school official running for office prohibited. — This section prohibits the use of school resources and personnel by school officials running for the State Board of Education or other elected office. 1992 Op. Att'y Gen. No. 92-04.

Reimbursement now permitted. — The public benefit exception to this section embraces reimbursement of travel expenses to prospective highway department employees as the benefit and convenience to the department constitutes consideration. 1981 Op. Att'y Gen. No. 81-5.

Users of public facilities must reimburse state for expenses. — It is incumbent upon any public agency or commission to obtain reimbursement for any actual expenses occasioned by reason of permitted private use of public facilities. 1963-64 Op. Att'y Gen. No. 64-92.

Conditions under which religious or private group may use school. — A local board of education may permit a particular religious denomination or private group to

use public school buildings or facilities after school hours where such use, in the opinion of the school board, will not interfere with normal school activities; however the school board may not in any respect sanction or give endorsement to such religious denominational programs. 1963-64 Op. Att'y Gen. No. 63-106 (rendered under former law).

Include equal treatment of all groups. — A local school board must, in exercising its discretion as to whether a particular religious denomination may use public school facilities after school hours, either make the use of school facilities available to all religious groups on an equal basis and without preference as to any particular group or not permit such use at all. 1963-64 Op. Att'y Gen. No. 63-106 (rendered under former law).

And reimbursement of school's expenses. — Since a school district may not in any manner lend its financial or other support to any private religious denomination, it is incumbent upon school authorities to obtain reimbursement for any actual expenses occasioned by a religious group's private use of public school facilities. 1963-64 Op. Att'y Gen. No. 63-106 (rendered under former law).

Gratis transfer of portable classrooms not violative of section. — A gratis transfer by the public school capital outlay council of portable classrooms to local school boards does not violate this section since the prohibition does not apply as between the state and one of its subordinate agencies. 1980 Op. Att'y Gen. No. 80-5.

Roughage drought feed appropriations unconstitutional. — Laws 1957, ch. 22, making appropriation to state board of finance for federal-state cooperative agreement for roughage drought feed program, violated provision of this section providing that state shall not directly or indirectly make any donation to or in aid of any person. State ex rel. Mechem v. Hannah, 63 N.M. 110, 314 P.2d 714 (1957).

Providing school district employees with membership in private health club. — A school district may spend public funds to provide its full-time employees with membership in a private health club if the membership is provided in return for services rendered to the district. 1989 Op. Att'y Gen. No. 89-20.

Relocation costs of physicians. — Luna County could not use taxpayer funds to pay relocation costs of physicians opening a practice in the county. 1989 Op. Att'y Gen. No. 89-22.

Payment of relocation costs to utility also invalid. — Laws 1957, ch. 237, §§ 1(B) and (D) (now repealed) are repugnant to this section, insofar as they provide for payment of relocation costs to utilities affected by highway projects. State Hwy. Comm'n v. Ruidoso Tel. Co., 65 N.M. 101, 332 P.2d 1019 (1958); State Hwy. Comm'n v. Mountain States Tel. & Tel. Co., 65 N.M. 99, 332 P.2d 1018 (1958); State Hwy. Comm'n v. Southern Union Gas Co., 65 N.M. 84, 332 P.2d 1007 (1958), overruled in State ex rel. City of Albuquerque v. Lavender, 69 N.M. 220, 365 P.2d 652 (1961).

As well as contributions to scouts or salvation army. — Municipality may not contribute or spend any money of fund to or for the girl scouts, boy scouts or the salvation army if the contribution is to those organizations in their private capacities. 1955-56 Op. Att'y Gen. No. 6253.

Even though their efforts come within spirit of statute. — Such groups as the 4-H, boy scouts and girl scouts conduct juvenile recreation programs that come within the spirit of 7-12-15 NMSA 1978. But the framers of the constitution have clearly provided that public funds shall not be donated to private persons or associations, and it is the court's opinion that the juvenile recreation fund cannot be expended by, or on behalf of, a 4-H club. 1961-62 Op. Att'y Gen. No. 61-2.

Disbursement to nonpublic schools unconstitutional. — New Mexico Const., art. IV, § 31, this section and art. XII, § 3, would be violated if public money was disbursed to nonpublic schools in order to purchase secular education service. 1969 Op. Att'y Gen. No. 69-6.

Vouchers for private school education. — Tuition assistance in the form of vouchers for private education constitutes an unconstitutional state donation to a private entity. 1999 Op. Att'y Gen. No. 99-01.

Proper to regulate garb and behavior of clerics teaching in public schools. — Wearing of religious garb and religious insignia must be barred during time members of religious orders are on duty as public school teachers. They also must refrain from teaching sectarian religion and doctrines and from disseminating religious literature while on duty, and they must be under actual control and supervision of the responsible school authorities. Zellers v. Huff, 55 N.M. 501, 236 P.2d 949 (1951).

Penalty for sectarian teaching proper. — Barring of certain members of religious orders from again teaching in public schools after they had knowingly taught sectarian religion during regular school hours was not improper. Zellers v. Huff, 55 N.M. 501, 236 P.2d 949 (1951).

Transfer for nominal consideration within prohibition. — The county commissioners of Dona Ana county cannot convey through donation or nominal consideration county land to the county humane society, a nonprofit, charitable, private organization. 1967 Op. Att'y Gen. No. 67-149.

Likewise retroactive benefits. — The provisions of Laws 1959, ch. 289 (55-7-21 and 55-7-22, 1953 Comp.), which attempt to provide for reimbursement of relocation costs retrospectively to March 29, 1957, are in direct conflict with this section. State ex rel. City of Albuquerque v. Lavender, 69 N.M. 220, 365 P.2d 652 (1961).

This section will not permit payment of pension to person who left service of state before passage of Pension Act. State ex rel. Sena v. Trujillo, 46 N.M. 361, 129 P.2d 329, 142 A.L.R. 932 (1942).

If retired district judges and retired supreme court justices were in state service at the time of the initial enactment of the Judges Retirement Law (10-12-1 NMSA 1978), such law would not be repugnant to this section. 1957-58 Op. Att'y Gen. No. 57-221.

Retroactive sick leave benefits would constitute an illegal donation as they would not be paid in consideration for services rendered. 1977 Op. Att'y Gen. No. 77-18.

School district would not be authorized to present a bonus to any teacher inasmuch as that would be giving extra compensation to a public servant after the services were rendered and a contract made. 1943-44 Op. Att'y Gen. No. 4440.

Counties may appropriate money for constructing building in which to show exhibits installed by counties at the state fair. 1915-16 Op. Att'y Gen. 248.

And may pay to install displays which will benefit counties. — Counties may make appropriations with which to install displays at the state fair which, presumably, will be of benefit to the counties. 1915-16 Op. Att'y Gen. 155.

But not where duty had been assumed by private corporation. — Laws 1913, ch. 51, appropriating money or directing a county to appropriate money to a private corporation engaged in conducting a county fair, for purpose of paying premiums on agricultural, horticultural and other exhibits, which was a duty assumed by such a corporation, conflicted with this section. Harrington v. Atteberry, 21 N.M. 50, 153 P. 1041 (1915), questioned in State ex rel. City of Albuquerque v. Lavender, 69 N.M. 220, 365 P.2d 652 (1961).

Salaries do not constitute donations. — Since salaries of members of religious orders who serve as teachers are the same as that of other teachers, this is not the aid to religion or to the church denounced by federal and state constitutions. Zellers v. Huff, 55 N.M. 501, 236 P.2d 949 (1951).

Apportionment of costs not donation. — Statute (55-7-21 and 55-7-22, 1953 Comp.; 67-8-15 to 67-8-21 NMSA 1978) provides a legitimate and equitable apportionment of costs of relocations rather than a donation to utility companies. State ex rel. City of Albuquerque v. Lavender, 69 N.M. 220, 365 P.2d 652 (1961).

Entertainment, travel, and meal expenditures. — Officials and employees of a technical-vocational institute may, within limitations, spend public money for certain entertainment, meals, travel, and membership expenses without violating the antidonation clause if the expenditures are demonstrably related to the institute's constitutionally or statutorily authorized functions and do not amount to a subsidy of private individuals or businesses. 1997 Op. Att'y Gen. No. 97-02.

Taxpayer political contribution designation option would violate section. — Legislation granting New Mexico taxpayers the option of designating $1.00 of their state

income taxes for distribution as a contribution to a political party would be in violation of this section. 1979 Op. Att'y Gen. No. 79-2.

As would state retirement benefits for private employees. — Individuals employed by a private nongovernmental association are not eligible for retirement benefits from state funds. 1963-64 Op. Att'y Gen. No. 63-5.

And free public education for nonresidents. — To permit nonresident students to attend New Mexico public schools without payment of any kind would constitute a gift to them and would violate this section. 1978 Op. Att'y Gen. No. 78-14.

Even if local school district refused state allotment. — To the extent that a local school district would undertake the total burden of educating nonresident students without benefit of state allotment as dispensed on the basis of average daily membership, the school district would still be making a donation in aid of those students in violation of this section. 1978 Op. Att'y Gen. No. 78-14.

Grants to defray private tuition costs would be outright gifts. — Under the terms of a house bill providing that a sum of money be appropriated to the board of educational finance for allocation as grants to students for the purpose of defraying tuition costs at private colleges and universities, a grant to a student would appear to be an outright gift as there is no consideration or benefit accruing to the state in exchange for the grant, nor any provision that it be repaid. 1979 Op. Att'y Gen. No. 79-7.

Legislative pension benefits cannot be gifts because this section prohibits the state from directly or indirectly lending its credit or from making any donation to or in aid of any person. State ex rel. Udall v. Public Employees Retirement Bd., 118 N.M. 507, 882 P.2d 548 (Ct. App. 1994), rev'd on other grounds, 120 N.M. 786, 907 P.2d 190 (1995).

Judges' retirement benefits constitutional. — State may constitutionally pay its share to retired district judges and retired members of the supreme court for their retirement benefits. 1957-58 Op. Att'y Gen. No. 57-221.

So is educational leave for state employees. — Provision for educational leave granted in accordance with state personnel board rules does not violate constitutional anti-donation provision when a state employee is granted educational leave with pay to attend a state university program for advanced study. 1972 Op. Att'y Gen. No. 72-67.

And payment of teachers' dues to education associations. — Within the bounds of state board regulations and the requirements of the Public School Finance Act (Chapter 22 Article 8 NMSA 1978), a local board of education could, without violating this article, make membership dues payments on behalf of individual employees who voluntarily elect to be members of the national education association of New Mexico, American federation of teachers, classroom teachers association or any other teacher/education association that is deemed appropriate by those who desire to join. 1976 Op. Att'y Gen. No. 76-27.

A public school of this state may lawfully expend public moneys in a reasonable amount for the purpose of the payment of membership dues to an association or organization having for its stated and actual purposes the providing of direct assistance and aid to effect the betterment of local education and the rendering of service and actual benefits to such schools in the advancement of public education, as long as such expenditures are in the best interest of the individual school concerned. 1963-64 Op. Att'y Gen. No. 63-5.

Gift of employee's share of retirement plan contribution prohibited. — An outright gift by the state of an employee's share of his retirement plan contribution is a donation in aid of a person and prohibited by this section. 1981 Op. Att'y Gen. No. 81-16.

Aid to Santa Fe Film Festival. — New Mexico film commission cannot provide the Santa Fe Film Festival the use of its offices and telephones without charge. 1987 Op. Att'y Gen. No. 87-33.

Providing space inCapitol Building tonews media. — Providing free space in the State Capitol Building to the news media for use during legislative sessions is not an unconstitutional donation by the legislature. However, the allocation of private office space in the Capitol to members of the press for their permanent use does constitute an unconstitutional donation under this section. 1992 Op. Att'y Gen. No. 92-03.

Free space for vending machines. — State and local governments may provide space for newspaper vending machines and similar devices free of charge without violating the antidonation clause unless the vending machines take up space otherwise required for public or official use, require buildings to remain open after hours or require state agencies and local governments to provide custodial, maintenance, utility or other services. 1992 Op. Att'y Gen. No. 92-03.

Use of tax proceeds to operate privately owned racetrack. — The City of Raton would violate the anti-donation clause if it spent lodgers' tax proceeds to operate the privately owned La Mesa Park racetrack or to defer its expenses. 1988 Op. Att'y Gen. No. 88-38.

Federal funds used for hotel development project. — City's channeling of federal funds to a hotel development project did not violate the antidonation clause. Hotels of Distinction W., Inc. v. City of Albuquerque, 107 N.M. 257, 755 P.2d 595 (1988).

Conveyance price sufficiently related to value of property. — Arms-length conveyance of property from the New Mexico Military Institute to the New Mexico Military Institute Foundation was proper, and did not violate this section, where the $250,000 contract price bore a sufficient relationship to the actual value of the property. 1988 Op. Att'y Gen. No. 88-79.

III. BARGAINED-FOR EXCHANGE.

Section prohibits appropriations without consideration. — This section does not prohibit indirect aid or benefit to a private corporation; it only prohibits an allocation or appropriation of something of value without consideration to a person, association or public or private corporation. 1967 Op. Att'y Gen. No. 67-29.

Where value received, bond issue appropriate. — A proposed bond issue to erect high school in conjunction with state school is not unconstitutional as a pledge of credit or donation by district in aid of state. District will get value received for every dollar put into the enterprise. White v. Board of Educ., 42 N.M. 94, 75 P.2d 712 (1938).

Bargained-for employee benefits valid. — Constitution would not prohibit legislation authorizing local school boards to devise plan of compensation which would include the payment of benefits to retiring employees for accumulated, unused sick leave. The various prohibitions contained in N.M. Const., art. IV, § 27, N.M. Const., art. IV, § 31 and this section would not be violated so long as the benefit was, in fact, bargained for consideration in the form of compensation for services rendered as defined by contract between the employee and the local school board. 1977 Op. Att'y Gen. No. 77-18.

Provision by state of group or other forms of insurance for the benefit of eligible employees is a valid use of public funds and not a pledge of credit or donation in contravention of the state constitution, since such contribution is in fact an increment to a public employee's salary and is a benefit to the state or its subdivisions through its concomitant effect of attracting and maintaining capable public personnel in public positions. 1963-64 Op. Att'y Gen. No. 64-83; 1939-40 Op. Att'y Gen. 144.

Prohibition of section is directed against payment of obligation belonging to a public or private corporation. — Payment by school district of a contribution or advance to a public utility for construction purposes is not the payment of the utility's obligation and therefore is not a contribution within the scope of the constitutional prohibition. Furthermore, money so expended by a school district or any other such agency is money expended for value received and therefore not prohibited. 1966 Op. Att'y Gen. No. 66-58.

City may sell property on part cash, part credit terms. — Sale of city light and power system to privately owned public utility company, partly for cash and partly on terms, did not constitute a lending or pledging of credit and was not a donation under this section. City of Clovis v. Southwestern Pub. Serv. Co., 49 N.M. 270, 161 P.2d 878, 161 A.L.R. 504 (1945).

And may dispose of property received subject to reversionary interest. — Surrender of property donated to city subject to a reversionary interest may be effected without consideration, or the city could quitclaim its interest to another agency for $1.00 and "other good and valuable consideration" upon proper resolution of the city council and the grantee agency could then purchase the reversionary interest of the original donor. 1951-52 Op. Att'y Gen. No. 5427.

City may give credits for business reasons. — Consistent with this section, a city as owner of a natural gas system, in order to promote the use of natural gas and compete with other utilities, could give credits of $12.50 to $50.00 to customers if they installed a new gas water heater, changed to a gas water heater from another type of water heater or replaced the existing gas water heater with a new gas water heater. 1963-64 Op. Att'y Gen. No. 64-53.

But sale prices must be reasonably related to value. — County property can only be sold for at least an amount having some reasonable relation to the value of the property. 1967 Op. Att'y Gen. No. 67-149.

And city must consider all aspects in fixing price. — Fact that election and election notice did not mention interest on delayed payments upon purchase of utility from city did not constitute a donation to utility company so long as this item was considered in determining the ultimate purchase and sale figure. City of Clovis v. Southwestern Pub. Serv. Co., 49 N.M. 270, 161 P.2d 878, 161 A.L.R. 504 (1945).

Outright contributions could not be made by municipality to community action agency under office of economic opportunity. If the city wished to pay out any money to the community action committee, it could not make an outright contribution, but could pay moneys under the terms of a personal service contract. 1966 Op. Att'y Gen. No. 66-117.

IV. RECIPIENTS OF AID.

"Public or private corporation" construed. — The language of this section wherein the words "public or private corporation" are used extends to the city's operation of water and sewage systems. State ex rel. City of Albuquerque v. Lavender, 69 N.M. 220, 365 P.2d 652 (1961).

Proprietary function equivalent to private enterprise. — Operation of water and sewer systems is a proprietary function of a municipality, not a governmental function, and therefore must stand on the same footing as privately owned utility facilities. State ex rel. City of Albuquerque v. Lavender, 69 N.M. 220, 365 P.2d 652 (1961).

Reimbursement now permitted. — The public benefit exception to this section embraces reimbursement of travel expenses to prospective highway department employees as the benefit and convenience to the department constitutes consideration. 1981 Op. Att'y Gen. No. 81-5.

But intragovernmental transfers outside prohibition. — This provision has no application where the lending of credit is under legislative sanction by one subordinate governmental agency to another. Wiggs v. City of Albuquerque, 56 N.M. 214, 242 P.2d 865 (1952); 1957-58 Op. Att'y Gen. No. 58-231.

This section does not prevent the leasing of a state park to a city for $1.00 per year, even if such lease amounted to a donation, since this section is not applicable to a legislatively sanctioned donation by the state or one of its governmental agencies to another such agency. City of Gallup v. New Mexico State Park & Recreation Comm'n, 86 N.M. 745, 527 P.2d 786 (1974).

Yet municipality may not fund specially created nonprofit corporation. — City or county may not appropriate public funds for economic development to be used by nonprofit corporation formed for this purpose. 1967 Op. Att'y Gen. No. 67-29.

V. EXCEPTIONS FROM PROHIBITION.

Sick leave benefits for state employees are not compensation for services rendered but are payable under this section, which prohibits donations to private persons, as provisions "for the care and maintenance of sick and indigent persons." 1983 Op. Att'y Gen. No. 83-4.

Definition of "indigent patient" in 27-5-4C NMSA 1978 is not unconstitutional under this section. Humana of N.M., Inc. v. Board of County Comm'rs, 92 N.M. 34, 582 P.2d 806 (1978).

Effect of proviso regarding care of sick and indigent. — City could enter into contract with county whereby former conveys hospital facilities for a nominal amount and the added consideration that the county agree to provide for the care and maintenance of the city's sick and indigent citizens. By so doing, the restrictive provisions of this section would not be applicable. 1957-58 Op. Att'y Gen. No. 58-78.

Not necessary that recipients of aid be both sick and indigent. — To hold that a person must be both sick and indigent, rather than sick or indigent, would disqualify the large amount of recipients now obtaining welfare aid and old age assistance who are in financial need but are not sick. Therefore, the department of public health may use its moneys to provide drugs to persons who are ill with tuberculosis but not indigent. 1957-58 Op. Att'y Gen. No. 58-135.

Nor that person be sick when aid given. — Department of public health may provide drugs for preventing the development or reestablishment of a disease in a person presumed well at the time the drug is administered because such treatment serves a public purpose and is, therefore, not a donation or gift even though the recipients may be incidentally benefited. 1957-58 Op. Att'y Gen. No. 58-135.

Ambulance service proper. — It is legally possible to make an arrangement whereby county in the legitimate exercise of its health and welfare powers could provide ambulance service to sick and indigent residents of the county. 1961-62 Op. Att'y Gen. No. 61-84.

Likewise county road work for charitable institution. — It may be implied from construction of this section that a county would have the power to do road work for a charitable institution which was providing for the care of sick and indigent persons. 1969 Op. Att'y Gen. No. 69-103.

But not pensions for blind persons. — A statute providing a "pension" plan for the blind without regard to financial need would not be constitutional. 1957-58 Op. Att'y Gen. No. 57-26.

Nor assistance to those not in danger of becoming paupers. — Since assistance under emergency roughage program is not limited to paupers or even to those who although not paupers are in danger of becoming such and is thus unable to come within the most liberal interpretation of the "sick and indigent persons" exception of this section, this provision, as well as N.M. Const., art. IV, § 31, prohibits the state's contribution of $2.50 per ton toward the purchase of hay. 1957-58 Op. Att'y Gen. No. 57-62.

Nor aid to hospital operated by private lessee. — The evident purpose of Laws 1955, ch. 224 (4-48-11 and 4-48-14 NMSA 1978) was to provide a means by which the county operating the hospital itself could pay for such operation. To construe Laws 1955, ch. 224, as allowing the county commissioners to use the funds authorized in this section for the purpose of supporting and maintaining a hospital owned by the county but leased to a private organization, would be in direct violation of N.M. Const., art. IV, § 31 and this section. 1955-56 Op. Att'y Gen. No. 6426.

Courts should require reimbursement for copying costs incurred. — The supreme court and the court of appeals should require reasonable reimbursement for the costs incurred by them for copying opinions for the public or for retrieving their opinions for inspection. However, such a charge need not be made in those cases in which the courts receive some other form of consideration in return for supplying their opinions to private individuals or enterprises. 1979 Op. Att'y Gen. No. 79-14.

Intragovernmental transfers outside prohibition. — The prohibition against donations does not apply as between the state or one of its subordinate agencies and another such agency. 1979 Op. Att'y Gen. No. 79-2.

Donation between political subdivisions permitted. — A donation of property from one political subdivision of the state to another is not prohibited by this section. 1981 Op. Att'y Gen. No. 81-27.

Sec. 15. [State and local refunding bonds.]

Nothing in this article shall be construed to prohibit the issue of bonds for the purpose of paying or refunding any valid state, county, district or municipal bonds and it shall not be necessary to submit the question of the issue of such bonds to a vote as herein provided.

ANNOTATIONS

Municipal bonds to be put in escrow constitute refunding bonds. — Where proceeds of municipal bonds were to be placed in escrow and invested in United States bonds for the sole purpose of paying off indebtedness on existing municipal bonds over a 10-year period, the proposed issue constituted refunding bonds within contemplation of this section. City of Albuquerque v. Gott, 73 N.M. 439, 389 P.2d 207 (1964).

School refunding bonds. — Laws 1927, ch. 128 (6-15-11 to 6-15-19 NMSA 1978), authorizing issuance of refunding bonds that might be in excess of 6% of assessed valuation of taxable property within school district, did not run counter to the prohibition of Section 11 of this article, in view of the exemption in this section. Southwest Sec. Co. v. Board of Educ., 40 N.M. 59, 54 P.2d 412 (1936).

Subject to the approval of the Department of Finance and Administration, a board of education may issue general obligation refunding bonds in a principal amount that is greater than the principal amount of the outstanding bonds being refunded, provided the proceeds of the refunding bonds are used only for the purpose of refunding existing school district general obligation indebtedness, as provided by law, and not for new capital outlay projects, operating costs of a school district or other purposes besides refunding. 2001 Op. Att'y Gen. No. 01-3.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 56 Am. Jur. 2d Municipal Corporations, Counties, and Other Political Subdivisions §§ 656 to 659; 64 Am. Jur. 2d Public Securities and Obligations 131, 136, 261, 266 to 269; 72 Am. Jur. 2d States, Territories, and Dependencies § 85.

Special assessment bond, power of municipality to refund, 102 A.L.R. 202.

Smaller political units, constitutionality of statutory plan for financing or refinancing bonds of, by larger political unit, 106 A.L.R. 608.

Governmental unit's power to issue bonds as implying power to refund them, 1 A.L.R.2d 134.

20 C.J.S. Counties §§ 218 to 226; 64 C.J.S. Municipal Corporations § 1910; 81A C.J.S. States § 259.

Sec. 16. [State highway bonds.]

Laws enacted by the fifth legislature authorizing the issue and sale of state highway bonds for the purpose of providing funds for the construction and improvement of state highways and to enable the state to meet and secure allotments of federal funds to aid in construction and improvement of roads, and laws so enacted authorizing the issue and sale of state highway debentures to anticipate the collection of revenues from motor vehicle licenses and other revenues provided by law for the state road fund, shall take

effect without submitting them to the electors of the state, and notwithstanding that the total indebtedness of the state may thereby temporarily exceed one per centum of the assessed valuation of all the property subject to taxation in the state. Provided, that the total amount of such state highway bonds payable from proceeds of taxes levied on property outstanding at any one time shall not exceed two million dollars [($2,000,000)]. The legislature shall not enact any law which will decrease the amount of the annual revenues pledged for the payment of state highway debentures or which will divert any of such revenues to any other purpose so long as any of the said debentures issued to anticipate the collection thereof remain unpaid. (As added September 20, 1921.)

ANNOTATIONS

Cross references. — For general popular referendum, see N.M. Const., art. IV, § 1.

As to proper purposes of state indebtedness, see N.M. Const., art. IX, § 7.

For restrictions on indebtedness, see N.M. Const., art. IX, § 8.

The 1921 amendment to Article IX, which was proposed by H.J.R. No. 25 (Laws 1921) and adopted at a special election held on September 20, 1921, with a vote of 29,267 for and 21,259 against, added this section to the article.

Compiler's notes. — An amendment to this article, proposed by H.J.R. No. 4 (Laws 1990), which would have added a new Section 17 providing that obligations of the state or any political subdivision, agency, or instrumentality of the state, which are payable out of general revenues beyond the then current fiscal year, which are incurred after the effective date of the section and which are contingent upon annual appropriations, were to be incurred subject to the provisions of that section and were not to constitute debt, indebtedness or borrowing under and were not to be subject to the limitations of Sections 8, 10, 11, 12, and 13 of Article 9, was submitted to the people at the general election held on November 6, 1990. It was defeated by a vote of 97,460 for and 210,575 against.

"So" construed. — If the word "so" had been omitted from this section, there would be no difficulty in interpreting the amendment as applying to laws at any time enacted. The word "so" may simply refer to "laws enacted by the . . . legislature." That meaning will be attached to it, because otherwise the mere inclusion of the word renders inapplicable an important and deliberately included provision, since there was no enactment of the fifth legislature to which it could apply. State v. Graham, 32 N.M. 485, 259 P. 623 (1927).

Section permits subsequent debentures without referendum. — By virtue of this section, debentures to anticipate proceeds of the gasoline excise tax, authorized by Laws 1927, ch. 20 (now repealed), which were to be covered into the state road fund "to be used for maintenance, construction, and improvement of state highways and to meet the provisions of the Federal Aid Road Law (U.S. Comp. St. §§ 7477a to 7477i) [23

U.S.C. §§ 101 to 158]" did not constitute such state borrowing or debt as required popular referendum. State v. Graham, 32 N.M. 485, 259 P. 623 (1927).

Validating effect. — Provision of statute (Laws 1921, ch. 153) authorizing levy of taxes, and sale of state debentures in anticipation of taxes, for construction and improvement of public highways, and to meet, dollar for dollar, allotments to state of federal funds under Federal Aid Road Act (23 U.S.C. §§ 101 to 158) was validated for adoption of this section. Lopez v. State Hwy. Comm'n, 27 N.M. 300, 201 P. 1050 (1921).

Highway debentures excepted from referendum by another section. — Laws 1949, ch. 42 (now repealed), was excepted from popular referendum because the highway debentures, payable from a fund, the source of a part of which is a general property tax, were evidences of public debts in sense words "public debt" are used in N.M. Const., art. IV, § 1. State ex rel. Linn v. Romero, 53 N.M. 402, 209 P.2d 179 (1949).

Tax refund valid. — Laws 1931, ch. 31 (now repealed), authorizing refund of gasoline excise taxes only out of surplus not necessary to payment of interest and principal of highway debentures, did not violate provision of constitution against decrease of pledged revenues. Streit v. Lujan, 35 N.M. 672, 6 P.2d 205 (1931), appeal dismissed, 285 U.S. 527, 52 S. Ct. 405, 76 L. Ed. 924 (1932).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 39 Am. Jur. 2d Highways, Streets, and Bridges, §§ 122, 124.

40 C.J.S. Highways § 176.

ARTICLE X
County and Municipal Corporations

Section 1. [Classification of counties; salaries and fees of county officers.]

The legislature shall at its first session classify the counties and fix salaries for all county officers, which shall also apply to those elected at the first election under this constitution. And no county officer shall receive to his own use any fees or emoluments other than the annual salary provided by law, and all fees earned by any officer shall be by him collected and paid into the treasury of the county.

ANNOTATIONS

I. GENERAL CONSIDERATION.

Cross references. — For prohibition of extra compensation to public officers, see N.M. Const., art. IV, § 27.

As to limitation of state officer to salary, see N.M. Const., art. XX, § 9.

For general salary provisions, see 4-44-1 to 4-44-45 NMSA 1978.

Intent of section. — Prior to adoption of the constitution, county officers had been compensated for their services upon a fee basis, but by N.M. Const., art. IV, § 27, and this section, it was intended to dispense with such method and to substitute in lieu thereof a salary method, with provision that such compensation should be neither increased nor diminished during term of any such officer. State ex rel. Peck v. Velarde, 39 N.M. 179, 43 P.2d 377 (1935); State ex rel. Gilbert v. Board of Comm'rs, 29 N.M. 209, 222 P. 654 (1924).

County commissioner serving as tribal council member. — A Native American may serve as a tribal council member and as a county commissioner at the same time, as long as his duties as tribal council member do not physically interfere with his duties as county commissioner during the ordinary working hours of that position and the functions of the two positions are not otherwise incompatible. 1990 Op. Att'y Gen. No. 90-14.

Comparable provisions. — Arizona Const., Art. XXII, § 17.

Idaho Const., art. XVIII, §§ 7, 8.

Utah Const., art. XXI, §§ 1, 2.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 56 Am. Jur. 2d Municipal Corporations, Counties, and Other Subdivisions § 33; 63A Am. Jur. 2d Public Officers and Employees §§ 431 to 434.

Challenging acts or proceedings by which its boundaries are affected, right of county as to, 86 A.L.R. 1373.

Constitutional provision fixing or limiting salary of public officer as precluding allowance for expenses or disbursements, 5 A.L.R.2d 1182.

20 C.J.S. Counties §§ 5, 107 to 121; 67 C.J.S. Officers and Public Employees §§ 219, 224.

II. LEGISLATURE TO FIX SALARIES.

All county officers on salary. — The constitution requires all county officers to be placed upon a salary basis and prohibits them from receiving any other fees or emoluments of office. James v. Board of Comm'rs, 24 N.M. 509, 174 P. 1001 (1918).

Midterm salary increases unconstitutional. — Salary increases granted by county commissions under 4-44-12.3 NMSA 1978, for elected officials who were in midterm on

the date the increases took effect, violated Article IV, § 27 of the New Mexico Constitution. State ex rel. Haragan v. Harris, 1998-NMSC-043, 126 N.M. 310, 968 P.2d 1173.

Salary law required. — Under this section, the compensation of a county officer is dependent upon enactment of a salary law, and he cannot recover for his services until such a law is passed, and then only as provided by said act. No law had been heretofore enacted fixing the compensation of county clerk or tax assessor. Herbert v. Board of County Comm'rs, 18 N.M. 129, 134 P. 204 (1913); State ex rel. Delgado v. Romero, 17 N.M. 81, 124 P. 649 (1912); 1955-1956 Op. Att'y Gen. 6291; 1915-16 Op. Att'y Gen. No. 236.

Services deemed gratuitous without law. — Services of a public officer are deemed gratuitous unless a compensation is fixed therefor by statute. State ex rel. Baca v. Montoya, 20 N.M. 104, 146 P. 956 (1915).

Reimbursement proper where sheriff has paid out sums for employment of deputies. State ex rel. Garcia v. Board of Comm'rs, 21 N.M. 632, 157 P. 656 (1916).

But no reimbursement when deputy county official was not entitled to compensation. State ex rel. Baca v. Montoya, 20 N.M. 104, 146 P. 956 (1915).

III. NO OTHER FEES TO OWN USE.

The last clause relating to fees is self-executing. State ex rel. Delgado v. Romero, 17 N.M. 81, 124 P. 649 (1912).

Cut-off date and consequences. — The fee system for county officers having been abolished on January 6, 1912, a treasurer whose term expired on January 15, 1912, could collect a percentage on his tax collection only for six days. The percentage for collections from January 6 to January 15 could not be based on his fees for the previous year, but he would have to look to the legislature for relief. 1912-13 Op. Att'y Gen. 314.

Constitution prohibits any emoluments additional to the "salary" fixed by law; a county clerk who fails to appoint a deputy to serve as clerk of district court is not entitled to compensation additional to statutory salary when he personally serves in that capacity. Nye v. Board of Comm'rs, 36 N.M. 169, 9 P.2d 1023 (1932).

Judge prohibited from accepting gratuity for marriage ceremony. — Except for municipal judges, a judge may not accept a gratuity in connection with the performance of a marriage ceremony without violating the New Mexico Constitution. 1991 Op. Att'y Gen. No. 91-09.

Probate judge may perform marriage ceremony but cannot charge fee for such service for himself or the county. 1931-32 Op. Att'y Gen. 31.

District attorney cannot collect and retain to his own use any fees or emoluments of office under this section or under N.M. Const., art. XX, § 9. State ex rel. Ward v. Romero, 17 N.M. 88, 125 P. 617 (1912).

County clerk can only charge and accept statutory fee for issuing marriage license, regardless of the hour it is issued, and no sums in the form of an additional charge or gratuity can be accepted. 1953-54 Op. Att'y Gen. No. 5665.

Irrelevant that services performed for another jurisdiction. — County sheriff was not entitled to fees received by him for services performed in a city or town court where he had made arrests and fines had been assessed against, and paid by, defendants. 1915-16 Op. Att'y Gen. No. 342.

Sheriff is chargeable with fee paid for the execution of the death penalty even though it does come from the state and not the county. 1917-18 Op. Att'y Gen. 67.

But county clerk may serve as deputy game warden. — This inhibition applies only to county officers, and there is no objection to a county clerk receiving, as deputy game warden, fees for issuing and reporting licenses and the receipts thereof. 1923-24 Op. Att'y Gen. 41.

And county treasurer may be paid for services as physician. — County treasurer may, as a physician, examine insane persons, attend prisoners at the county jail, and exhume a body by order of the district court, and receive compensation therefor. 1912-13 Op. Att'y Gen. 322.

But school superintendent cannot act as teacher. — The county superintendent of schools cannot draw a salary therefor and at the same time act as school teacher. 1919-20 Op. Att'y Gen. 179.

Service as both county commissioner and teacher consistent with section. — This section which provides in part that no county officer shall receive to his own use any fees or emoluments other than the annual salary provided by law applies only to those situations where extra compensation is received for performing duties prescribed by law to a particular office and for which a fixed compensation is provided. Clearly, the services performed by a school teacher do not fall within the duties prescribed by statute for the office of county commissioner. Therefore, an individual who has been elected to the office of county commissioner may legally accept a salary from a teaching position in an institution of higher learning in this state, as well as the salary provided by law for acting as a county commissioner. 1957-58 Op. Att'y Gen. No. 58-238.

Fees to be paid into county treasury. — Fees collected by county officers cannot be used for their compensation, even though no other compensation has been provided by the legislature, but must be turned into the county treasury. 1912-13 Op. Att'y Gen. 50.

Sec. 2. [Terms of county officers.] (1997)

A. In every county all elected officials shall serve four-year terms, subject to the provisions of Subsection B of this section.

B. In those counties that prior to 1992 have not had four-year terms for elected officials, the assessor, sheriff and probate judge shall be elected to four-year terms and the treasurer and clerk shall be elected to two-year terms in the first election following the adoption of this amendment. In subsequent elections, the treasurer and clerk shall be elected to four-year terms.

C. To provide for staggered county commission terms, in counties with three county commissioners, the terms of no more than two commissioners shall expire in the same year; and in counties with five county commissioners, the terms of no more than three commissioners shall expire in the same year.

D. All county officers, after having served two consecutive four-year terms, shall be ineligible to hold any county office for two years thereafter. (As amended, November 3, 1914; November 3, 1993; November 3, 1998.)

ANNOTATIONS

Cross references. — For tenure of office, see N.M. Const., art. XX, § 2.

As to date terms of office begin, see N.M. Const., art XX, § 3.

For provisions regarding vacancies, see N.M. Const., art XX, §§ 4 and 5.

The 1914 amendment, which was proposed by J.R. No. 9 (Laws 1913) and adopted at the general election held on November 3, 1914, with a vote of 20,293 for and 12,125 against, completely rewrote this section which formerly read: "All county officers shall be elected for a term of four years and no county officer, except the county clerk and probate judge, shall, after having served one full term be eligible to hold any county office for four years thereafter."

The 1992 amendment, which was proposed by S.J.R. No. 15 (Laws 1992) and adopted at the general election held on November 3, 1992, by a vote of 317,887 for and 151,625 against, rewrote this section, which formerly read: "All county officers shall be elected to a term of two years, and after having served two consecutive terms, shall be ineligible to hold any county office for two years thereafter".

The 1998 amendment, which was proposed by S.J.R. No. 12, § 2 (Laws 1997), and adopted at the general election held November 3, 1998, by a vote of 288,419 for and 136,010 against, substituted "county office" for "public office" near the end of Subsection D.

Compiler's notes. — An amendment to this section proposed by H.J.R. No. 9 (Laws 1957), which would have increased the term of office to four years and removed the

limitation of the number of terms the county officers may serve, was submitted to the people at the general election held on November 4, 1958. It was defeated by a vote of 41,443 for and 44,442 against.

An amendment to this section proposed by S.J.R. No. 13 (Laws 1961), which would have increased the term of office to four years and provided a four-year ineligibility period after each term, was submitted to the people at the special election held on September 19, 1961. It was defeated by a vote of 22,377 for and 29,483 against.

House Joint Memorial 21 (Laws 1969) referred to the constitutional convention an amendment to this section to remove the limitations on terms for county officers. The proposed amendment was rejected by the voters on December 9, 1969.

An amendment to this section proposed by S.J.R. No. 5 (Laws 1973), which would have rewritten this section to provide a two-year term of office and an age limitation for county officers, was submitted to the people at a special election held on November 6, 1973. It was defeated by a vote of 18,825 for and 23,121 against.

An amendment to this section proposed by H.J.R. No. 2 (Laws 1975), which would have allowed county officers to serve unlimited terms of two years except as otherwise provided in the constitution, was submitted to the people at the general election held on November 2, 1976. It was defeated by a vote of 91,755 for and 190,645 against.

An amendment to this section, proposed by S.J.R. No. 2 (Laws 1982), which would have inserted "except sheriffs" following "officers" in the first sentence and would have added a second sentence which would have read "Sheriffs shall be eligible to hold the office of sheriff for an unlimited number of consecutive two-year terms," was submitted to the people at the general election held on November 2, 1982. It was defeated by a vote of 109,611 for and 142,871 against.

An amendment to this section, proposed by H.J.R. No. 6 (Laws 1986), which would have allowed four consecutive terms, was submitted to the people at the general election held on November 4, 1986. It was defeated by a vote of 119,504 for and 156,177 against.

An amendment to this section, proposed by S.J.R. No. 9 (Laws 1999), which would have amended Subsection D to allow county officials to serve an unlimited number of terms was submitted to the people at the general election held on November 7, 2000. It was defeated by a vote of 134,319 for and 376,706 against.

Effect of N.M. Const., art. X, § 7. — When N.M. Const., art. X, § 7 was added by constitutional amendment, this section ceased to apply to counties having a population greater than 100,000 and an assessed valuation greater than $75,000,000. Under N.M. Const., art. X, § 7, the offices of county commissioner for two-year terms in affected counties were in effect abolished and new offices of county commissioner with four-year terms were created, notwithstanding that the new provision does not expressly state

that the old offices were abolished and new ones created. Morris v. Gonzales, 91 N.M. 495, 576 P.2d 755 (1978).

A county commissioner who has previously served a two-year term as county commissioner under this section and one four-year term under N.M. Const., art. X, § 7, may serve an additional four-year term under N.M. Const., art. X, § 7. Morris v. Gonzales, 91 N.M. 495, 576 P.2d 755 (1978).

A county commissioner who has served one term in office under this section and one term of office under N.M. Const., art. X, § 7, may not seek a third consecutive term. 1978 Op. Att'y Gen. No. 78-1. But see Morris v. Gonzales, 91 N.M. 495, 576 P.2d 755 (1978).

This section does limit the legislature's power to create the term of office of judge of small claims court. When the legislature chose to create a county officer of the small claims judge, this section limited the length of term of such officer. 1955-56 Op. Att'y Gen. No. 6358.

Meaning of section. — This section prohibits a person from serving three consecutive, four-year terms as a county officer in any capacity. There must be an interim period of two years before any person who, having served two terms consecutively, is eligible for another county office. 1959-60 Op. Att'y Gen. No. 59-115.

Ineligibility extends to all county offices. — A county officer who has served a full term as county commissioner, and a subsequent term as sheriff in the same county, is not eligible to appointment to a county office in a newly created county. 1921-22 Op. Att'y Gen. 31.

Where a county official has just completed two terms of service by election, that county official is ineligible to be appointed to the office of the county treasurer. 1955-56 Op. Att'y Gen. No. 6240.

But not to state offices. — A county assessor who is now completing his second term can legally file and hold the office of state representative, since a state representative is a state officer. 1953-54 Op. Att'y Gen. No. 5938.

Nor to district offices. — The magistrate court established under 35-1-1 NMSA 1978 is a district, not a county, office and is not within the restrictions of this section. 1968 Op. Att'y Gen. No. 68-71.

Appointees filling vacancies treated differently. — This section does not affect the eligibility of a candidate for county office who has been appointed to fill a vacancy in a county office for the unexpired term. 1914 Op. Att'y Gen. 111.

A county officer who served by appointment for less than two years and has served one full term by election is eligible to serve for one more term before becoming ineligible to run under this section. 1949-50 Op. Att'y Gen. No. 5286.

Incumbent of two consecutive terms ineligible for appointment. — A vacancy in a county office occurs where the successor fails to qualify; the board of county commissioners must appoint a person to fill the vacancy and an incumbent who has already served two consecutive terms is ineligible for that appointment. 1979 Op. Att'y Gen. No. 79-19.

Effect of service during first years of statehood. — A county officer who served the first five years of statehood, and succeeded himself during the present term of office, has served two consecutive terms and is ineligible under this section. 1917-18 Op. Att'y Gen. 55.

1916 election. — On account of 1914 amendment (changing term from four to two years and providing for ineligibility after two consecutive terms), incumbents of both state and county offices were eligible to reelection in 1916. 1915-16 Op. Att'y Gen. 91.

Election to two terms bars third consecutive term. — Where a county sheriff was elected to two consecutive terms, but during the first term resigned for only eight minutes to clear up a technicality in his qualification for office, the sheriff is not eligible to seek election for a third consecutive term. Stephens v. Myers, 102 N.M. 1, 690 P.2d 444 (1984).

Resignation before end of second term does not change ineligibility. — Irrespective of whether or not he resigns prior to the completion of his second term, a county officer is nevertheless ineligible to seek election for a third consecutive time. To apply any other meaning to this section would make a mockery of the intent of those who framed this section. 1959-60 Op. Att'y Gen. No. 59-115.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 63A Am. Jur. 2d Public Officers and Employees §§ 155, 156.

Power to abolish or discontinue office, 4 A.L.R. 205, 172 A.L.R. 1366.

Power of board to appoint officer or make contract extending beyond its own term, 70 A.L.R. 794, 149 A.L.R. 336.

Power of legislature to extend term of public office, 97 A.L.R. 1428.

Legislative power to prescribe qualifications for or conditions of eligibility to constitutional office, 34 A.L.R.2d 155.

20 C.J.S. Counties §§ 101, 102.

Sec. 3. [Removal of county seats.]

No county seat, where there are county buildings, shall be removed unless three-fifths of the votes cast by qualified electors on the question of removal at an election called and held as now or hereafter provided by law, be in favor of such removal. The proposition of removal shall not be submitted in the same county oftener than once in eight years.

ANNOTATIONS

Statute properly authorizes election. — Under this section, an election was properly authorized by 4-34-3 NMSA 1978. Orchard v. Board of Comm'rs, 42 N.M. 172, 76 P.2d 41 (1938).

Suit will lie to enjoin removal of county seat, since other legal remedies would not apply, and injunction would not interfere with the political department of government; but plaintiff in injunction proceeding would have burden of proving that city to which removal was proposed was not selected by a requisite number of voters. Orchard v. Board of Comm'rs, 42 N.M. 172, 76 P.2d 41 (1938).

Comparable provisions. — Idaho Const., art. XVIII, § 2.

Montana Const., art. XI, § 2.

Utah Const., art. XI, § 2.

Wyoming Const., art. XII, § 3.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 56 Am. Jur. 2d Municipal Corporations, Counties, and Other Political Subdivisions § 54.

Legislative power to raise constitutional minimum of favorable votes imposed upon adoption of proposition to change county seat submitted to voters, 91 A.L.R. 1021.

Nonregistration as affecting one's qualification as signer of petition for change of county seat, 100 A.L.R. 1308.

Prohibition to restrain action of administrative officers as to relocation of county seat, 115 A.L.R. 33, 159 A.L.R. 627.

Withdrawal of name from petition, for change of county seat, or revocation of withdrawal, and time therefor, 126 A.L.R. 1031, 27 A.L.R.2d 604.

20 C.J.S. Counties §§ 49 to 62.

Sec. 4. [Combined city and county corporations.]

A. The legislature shall, by general law, provide for the formation of combined city and county municipal corporations, and for the manner of determining the territorial limits thereof, each of which shall be known as a "city and county," and, when organized, shall contain a population of at least fifty thousand (50,000) inhabitants. No such city and county shall be formed except by a majority vote of the qualified electors of the area proposed to be included therein, and if the proposed area includes any area not within the existing limits of a city, a majority of those electors living outside the city, voting separately shall be required. Any such city and county shall be permitted to frame a charter for its own government, and amend the same, in the manner provided by the legislature by general law for the formation and organization of such corporations.

B. Every such charter shall designate the respective officers of such city and county who shall perform the duties imposed by law upon county officers and shall make provisions for the payment of existing city and county indebtedness as hereinafter required. The officers of a city and county, their compensation, qualifications, term of office and manner of election or appointment, shall be as provided for in its charter, subject to general laws and applicable constitutional provisions. The salary of any elective or appointive officer of a city and county shall not be changed after his election or appointment or during his term of office; nor shall the term of any such officer be extended beyond the period for which he is elected or appointed. Every such city and county shall have and enjoy all rights, powers and privileges asserted in its charter not inconsistent with its general laws, and, in addition thereto, such rights, powers and privileges as may be granted to it, or possessed and enjoyed by cities and counties of like population separately organized.

C. No city or county government existing outside the territorial limits of such city and county shall exercise any police, taxation or other powers within the territorial limits of such city and county, but all such powers shall be exercised by the city and county and the officers thereof, subject to such constitutional provisions and general laws as apply to either cities or counties.

D. In case an existing county is divided in the formation of city and county government, such city and county shall be liable for a just proportion of the existing debts or liabilities of the former county and shall account for and pay the county remaining a just proportion of the value of any real estate or other property owned by the former county and taken over by the city and county government, the method of determining such proportion shall be prescribed by general law, but such division shall not affect the rights of creditors.

E. Nothing herein contained shall be construed to alter or amend the existing constitutional provisions regarding apportionment of representation in the legislature or in the boundaries of legislative districts or judicial districts, nor the jurisdiction or organization of the district or probate courts. (As added September 20, 1949.)

ANNOTATIONS

The 1949 amendment to Article X, which was proposed by H.J.R. No. 13 (Laws 1949) and adopted at a special election held on September 20, 1949, by a vote of 15,140 for and 11,974 against, added this section to the article.

Section allows merger of class A county and city. — Sections 3-16-1 to 3-16-18 NMSA 1978 and this section allow a class A county and city to merge. 1971 Op. Att'y Gen. No. 71-124. For classification of counties, see 4-44-1 NMSA 1978.

No charter until population reaches 50,000. — Los Alamos county may not adopt a charter providing for a combined city-county government until the population within the proposed territorial limits is 50,000 or more. 1961-62 Op. Att'y Gen. No. 62-96.

Section supersedes general vacancies provision. — The charter of a combined city and county may provide for filling vacancies in its commission contrary to the provisions of N.M. Const., art. XX, § 4, which specifies vacancy procedures. Where certain restrictions on the combined corporation are enumerated, as in Subsection E of this section, the omitted restrictions are intended to be overruleable. The latter date of this section further supports this conclusion, which leaves both constitutional provisions operative in the area covered by each. 1957-58 Op. Att'y Gen. No. 57-204.

Proper subjects of general laws. — The state may authorize by legislation abolition of county officers existing and the transfer of their functions to other offices, and provide for the appointment rather than election of officials to carry on the duty of these officers. 1957-58 Op. Att'y Gen. No. 57-24.

"Appointive officer" construed. — An appointive officer is an officer so designated in the city-county charter. 1957-58 Op. Att'y Gen. No. 57-24.

"Term of office" construed. — A term of office is that designated by the city-county charter, or in the absence thereof, as provided by existing law for city and county offices. 1957-58 Op. Att'y Gen. No. 57-24.

Municipal code prevails over existing city charter. — Where the Municipal Code (Laws 1965, ch. 300, presently compiled as 3-1-1 et seq. NMSA 1978) was adopted after and in conflict with the city charter of Gallup, the code prevails under this section and also because the code's savings clause (Laws 1965, ch. 300, § 592) said that all ordinances in effect should continue except as modified by the code. 1967 Op. Att'y Gen. No. 67-35.

Law reviews. — For note, "County Regulation of Land Use and Development," see 9 Nat. Resources J. 266 (1969).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 20 C.J.S. Counties § 44; 62 C.J.S. Municipal Corporations §§ 188, 196; 82 C.J.S. Statutes § 188.

Sec. 5. [Incorporated counties.]

Any county at the time of the adoption of this amendment, which is less than one hundred forty-four square miles in area and has a population of ten thousand or more may become an incorporated county by the following procedure:

A. upon the filing of a petition containing the signatures of at least ten percent of the registered voters in the county, the board of county commissioners shall appoint a charter commission consisting of not less than three persons to draft an incorporated county charter; or

B. the board of county commissioners may, upon its own initiative, appoint a charter commission consisting of not less than three persons to draft an incorporated county charter; and

C. the proposed charter drafted by the charter commission shall be submitted to the qualified voters of the county within one year after the appointment of the commission and if adopted by a majority of the qualified voters voting in the election the county shall become an incorporated county.

The charter of an incorporated county shall provide for the form and organization of the incorporated county government and shall designate those officers which shall be elected, and those officers and employees which shall perform the duties assigned by law to county officers.

An incorporated county may exercise all powers and shall be subject to all limitations granted to municipalities by Article 9, Section 12 of the constitution of New Mexico and all powers granted to municipalities by statute.

A charter of an incorporated county shall be amended in accordance with the provisions of the charter.

Nothing herein contained shall be construed to alter or amend the existing constitutional provisions regarding apportionment of representation in the legislature or in the boundaries of legislative districts or judicial districts, nor the jurisdiction or organization of the district or probate courts.

The provisions of this amendment shall be self-executing. (As added November 3, 1964.)

ANNOTATIONS

The 1964 amendment to Article X, which was proposed by H.J.R. No. 12 (Laws 1963) and adopted at the general election held on November 3, 1964, by a vote of 82,163 for and 34,663 against, added this section to the article.

Extraterritorial land use regulation. — An incorporated county may exercise the extraterritorial planning, platting, subdividing and zoning jurisdiction of a municipality. All

of the above, save zoning, may be concurrently exercised only with the adjacent county in which the land subject to extraterritorial jurisdiction may be situated. 1975 Op. Att'y Gen. No. 75-14.

Law reviews. — For note, "County Regulation of Land Use and Development," see 9 Nat. Resources J. 266 (1969).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 20 C.J.S. Counties § 4.

Sec. 6. [Municipal home rule.]

A. For the purpose of electing some or all of the members of the governing body of a municipality:

(1) the legislature may authorize a municipality by general law to be districted;

(2) if districts have not been established as authorized by law, the governing body of a municipality may, by resolution, authorize the districting of the municipality. The resolution shall not become effective in the municipality until approved by a majority vote in the municipality; and

(3) if districts have not been established as authorized by law or by resolution, the voters of a municipality, by a petition which is signed by not less than five percent of the registered qualified electors of the municipality and which specified the number of members of the governing body to be elected from districts, may require the governing body to submit to the registered qualified electors of the municipality, at the next regular municipal election held not less than sixty days after the petition is filed, a resolution requiring the districting of the municipality by its governing body. The resolution shall not become effective in the municipality until approved by a majority vote in the municipality. The signatures for a petition shall be collected within a six-months period.

B. Any member of the governing body of a municipality representing a district shall be a resident of, and elected by, the registered qualified electors of that district.

C. The registered qualified electors of a municipality may adopt, amend or repeal a charter in the manner provided by law. In the absence of law, the governing body of a municipality may appoint a charter commission upon its own initiative or shall appoint a charter commission upon the filing of a petition containing the signatures of at least five percent of the registered qualified electors of the municipality. The charter commission shall consist of not less than seven members who shall draft a proposed charter. The proposed charter shall be submitted to the registered qualified electors of the municipality within one year after the appointment of the charter commission. If the charter is approved by a majority vote in the municipality, it shall become effective at the time and in the manner provided in the charter.

D. A municipality which adopts a charter may exercise all legislative powers and perform all functions not expressly denied by general law or charter. This grant of powers shall not include the power to enact private or civil laws governing civil relationships except as incident to the exercise of an independent municipal power, nor shall it include the power to provide for a penalty greater than the penalty provided for a petty misdemeanor. No tax imposed by the governing body of a charter municipality, except a tax authorized by general law, shall become effective until approved by a majority vote in the charter municipality.

E. The purpose of this section is to provide for maximum local self-government. A liberal construction shall be given to the powers of municipalities. (As added November 3, 1970.)

ANNOTATIONS

Cross references. — For Municipal Charter Act, see 3-15-1 to 3-15-16 NMSA 1978.

As to municipal authority to issue franchises, see 3-42-1 NMSA 1978.

The 1970 amendment of Article X, which was proposed by committee substitute for H.J.R. No. 14 (Laws 1970) and adopted at the general election held on November 3, 1970, by a vote of 77,095 for and 60,867 against, added this section.

Compiler's notes. — Eight amendments to the constitution were proposed by the 1970 session of the legislature although the attorney general has stated that constitutional amendments may not be considered in even-numbered years. (1965-66 Op. Att'y Gen. No. 65-212 and 1969-70 Op. Att'y Gen. No. 69-151).

An amendment to this article by addition of a sixth section to allow home rule for municipalities was proposed by H.J.R. No. 7 (Laws 1969). 1969-70 Op. Att'y Gen. No. 69-151 stated that, since the proposed new constitution was rejected by the voters in 1969, the resolution may be submitted to the people for their approval or rejection at the next general election or at any special election prior to that date which may be called for that purpose. The opinion further stated that the resolution could not be amended by the 1970 legislature. Committee substitute for H.J.R. No. 14 (Laws 1970) withdrew the amendment to this article proposed in 1969 and substituted another proposed amendment on the same subject (which voters approved on November 3, 1970).

Section controls over N.M. Const., art. XI, § 7. City of Albuquerque v. New Mexico State Corp. Comm'n, 93 N.M. 719, 605 P.2d 227 (1979).

Legislature cannot draw district lines. — The legislature can only authorize municipal districting. The legislature itself cannot (and never intended that it would) "draw" the district lines. 1971 Op. Att'y Gen. No. 71-26.

Initial limited effect of Subsection B. — Sections 3-12-3 and 3-14-6 NMSA 1978, relating to candidate and elector qualifications, retain their validity despite Subsection B of this section so long as that section remains nonself-executing; that is, until a districting action provided for in Subsection A is taken. 1971 Op. Att'y Gen. No. 71-118.

Unconstitutional limitation on candidacy for Albuquerque mayor. — An Albuquerque city charter provision that no full-time elective official other than the mayor or the mayor pro tem can be a candidate for the office of mayor or the mayor pro tem can be candidate for the office of mayor is unconstitutional, because it violates article VII, section 2 of the New Mexico Constitution. 1985 Op. Att'y Gen. No. 85-4.

The charter provisions are self-executing in the sense that no further legislative act is necessary. A home rule municipality no longer has to look to the legislature for a grant of power to act, but looks only to legislative enactments to see if any express limitations have been placed on its power to act. Apodaca v. Wilson, 86 N.M. 516, 525 P.2d 876 (1974).

Approval of proposed charter by governing body of municipality necessary condition to submitting the proposed charter to the electorate for adoption. 1979 Op. Att'y Gen. No. 79-24.

Albuquerque is home rule municipality. City of Albuquerque v. Chavez, 91 N.M. 559, 577 P.2d 457 (Ct. App.), cert. denied, 91 N.M. 610, 577 P.2d 1256 (1978).

Santa Fe is a “home-rule” municipality. Qwest Corp. v. City of Santa Fe, 380 F.3d 1258 (10th Cir 2004).

Powers of municipalities determined by legislature. — Except for home rule municipalities, municipalities are established by the legislature and may only exercise those powers and duties as are specifically defined by law. 1979 Op. Att'y Gen. No. 79-28.

General law may operate to preempt certain governmental activity. 1989 Op. Att'y Gen. No. 89-04.

The legislature has preempted the area of governmental provision of public employee and retiree insurance, and therefore a municipality does not possess home rule authority to pay health insurance costs of public retirees where there is no applicable authorizing legislation. 1989 Op. Att'y Gen. No. 89-04.

Curfew ordinance preempted. — The Children's Code preempted a city from enacting a curfew ordinance because the ordinance established criminal sanctions of incarceration and fines for juvenile activity which is not unlawful when committed by adults. American Civil Liberties Union v. City of Albuquerque, 1999-NMSC-044, 128 N.M. 315, 992 P.2d 866.

Districting for municipalities with population over 10,000. — Section 3-12-1.1 NMSA 1978 sufficiently expresses the intent of the legislature to mandate that all municipalities with a population over 10,000 require their candidates for city council to reside in and be elected from single-member districts. Accordingly, it invalidates the City of Gallup's home rule election charter that allows at-large elections for city councilors. Casuse v. City of Gallup, 106 N.M. 571, 746 P.2d 1103 (1987).

Section not authority for condemnation. — This section merely grants the city general powers and clearly does not constitute express authority nor authority by necessary implication to condemn an existing public electric utility. City of Las Cruces v. El Paso Elec. Co., 904 F. Supp. 1238 (D.N.M. 1995).

Term limits not authorized in home rule municipalities. — The Home Rule Amendment to the constitution does not allow home rule municipalities to impose eligibility requirements for municipal elected office beyond those set forth in the Qualification Clause and elsewhere in the constitution; thus, the provision of the city charter adopting term limits was not authorized. Cottrell v. Santillanes, 120 N.M. 367, 901 P.2d 785 (Ct. App. 1995).

State law preemption test. — The test to determine whether a state law preempts a homerule municipality's ordinance is: 1. Is the state law at issue a general law, and 2. Does the state law at issue expressly deny the power of the home-rule munitipalities to regulate in that area? Qwest Corp. v. City of Santa Fe, 224 F. Supp. 2d 1305 (D.N.M. 2002).

Local enactment of Santa Fe can be preempted by state statute if a general state law denies a home-rule municipality the power to regulate a given subject. Qwest Corp. v. City of Santa Fe, 380 F.3d 1258 (10th Cir 2004).

Local ordinance not preempted by state law. — Reading the New Mexico Telecommunications Act, 63-9A-1 NMSA 1978 et seq., and N.M. Const., art. XI, § 2 in *pari materia* with New Mexico's Municipal Code, Chapter 3 NMSA 1978, and N.M. Const., art. X, § 6, the provisions of a Santa Fe telecommunications ordinance, regulating the power to contract with a service provider and to enforce provisions related to land use and rights of way held by the city, were not preempted by state law, inasmuch as they did not purport to usurp New Mexico's public regulation commission power to issue certificates of public convenience and necessity to providers of public telecommunications services or to regulate rates and quality of service for intrastate telecommunications services. Qwest Corp. v. City of Santa Fe, 224 F. Supp. 2d 1305 (D.N.M. 2002).

The City of Santa Fe ordinance which established procedures for telecommunications providers seeking access to city-owned rights-of-way is not preempted by state law. Quest Corp. v. City of Santa Fe, 380 F.3d 1258 (10th Cir 2004).

"General law" distinguished from municipal law. — "General law" means a law that applies generally throughout the state or is of statewide concern as contrasted to "local" or "municipal" law. The subject matter of the general legislative enactment must pertain to those things of general concern to the people of the state. A law general in form cannot, under the constitution, deprive cities of the right to legislate on purely local affairs germane to the purposes for which the city was incorporated. Apodaca v. Wilson, 86 N.M. 516, 525 P.2d 876 (1974).

The New Mexico Telecommunications Act, 63-9A-1 NMSA 1978 et seq., which regulates telecommunications rates, terms, and conditions of service at the statewide level, is a "general law" within the meaning of Subsection D. Qwest Corp. v. City of Santa Fe, 224 F. Supp. 2d 1305 (D.N.M. 2002).

Test to determine whether activity is of general concern or of local concern is whether it is proprietary or governmental in character. City of Albuquerque v. New Mexico State Corp. Comm'n, 93 N.M. 719, 605 P.2d 227 (1979).

Distinction between governmental and proprietary functions. — If the undertaking of the municipality is one in which only a governmental agency could engage, it is governmental in nature. It is proprietary and "private" when any corporation, individual or group of individuals could do the same thing. City of Albuquerque v. New Mexico State Corp. Comm'n, 93 N.M. 719, 605 P.2d 227 (1979).

Proprietary activities are incidental to home rule. — If an activity is carried on by the municipality as an agent of the state, it is of general or public concern. If it is exercised by the city in its proprietary capacity, it is a power incidental to home rule. Apodaca v. Wilson, 86 N.M. 516, 525 P.2d 876 (1974).

Operation of water and sewer system is a proprietary function and not a governmental function. Apodaca v. Wilson, 86 N.M. 516, 525 P.2d 876 (1974).

Limousine service is proprietary rather than governmental function. City of Albuquerque v. New Mexico State Corp. Comm'n, 93 N.M. 719, 605 P.2d 227 (1979).

"Not expressly denied" construed. — "Not expressly denied" in Subsection D means that some express statement of the authority or power denied must be contained in a general law or otherwise no limitation exists. Apodaca v. Wilson, 86 N.M. 516, 525 P.2d 876 (1974).

Example of specific denial of power. — Section 3-18-2 NMSA 1978 is an example of a specific denial of power whereby municipalities are prohibited from imposing an income tax or an ad valorem property tax, but are authorized to levy certain excise taxes if the ordinance imposing such a tax is approved by a majority vote in the municipality. Apodaca v. Wilson, 86 N.M. 516, 525 P.2d 876 (1974).

Ordinance prohibiting local body from imposing any tax increase. — A home rule municipality cannot, pursuant to an initiative petition, enact an ordinance that would prohibit the local governing body from imposing any tax increase, whether property or gross receipts and compensating taxes, without first putting the question of the tax increase to a vote of the qualified electors of the municipality, if such ordinance alters the requirements of the statute imposing the tax. 1990 Op. Att'y Gen. No. 90-20.

Waiver of liquor establishment distance requirement must be uniform and contain definable standards. — Any action taken by a home rule municipality to condition its consent to waive the distance requirement, relating to the location of a liquor establishment, must have uniform application to all persons requesting the waiver and must contain definable standards for the imposition of those conditions. 1980 Op. Att'y Gen. No. 80-23.

Power to decide number of city commissioners. — Neither 3-10-1 A NMSA 1978 nor 3-14-6 A NMSA 1978 is applicable to a home rule municipality to deny it the power to provide for a different number of city commissioners than as prescribed by them because the composition of a municipal government is a matter of local, not statewide concern, and to construe otherwise would frustrate the purpose of this section. State ex rel. Haynes v. Bonem, 114 N.M. 627, 845 P.2d 150 (1992).

Salary increase for members of governing body. — Subject to the provisions of its charter, the governing body of a home-rule municipality may enact an ordinance to increase the salary of its members, but members serving during the term in which such an ordinance is enacted cannot benefit from the increase during that term. 1981 Op. Att'y Gen. No. 81-17.

Municipal authority not removed by general human rights law. — The passage of the Human Rights Act (Chapter 28, Article 1 NMSA 1978) did not remove the authority municipalities already possessed by virtue of the New Mexico constitution and 3-17-1 and 3-18-1 NMSA 1978. 1971 Op. Att'y Gen. No. 71-64.

But municipal ordinances cannot lower or be inconsistent with state standards. 1974 Op. Att'y Gen. No. 74-13; 1971 Op. Att'y Gen. No. 71-64.

Air Quality Control Act does not deny localities power to impose criminal penalties. — The Air Quality Control Act (74-2-1 to 74-2-17 NMSA 1978) does not expressly deny the power to impose criminal penalties for violations of the act to counties and municipalities. Chapman v. Luna, 101 N.M. 59, 678 P.2d 687 (1984), cert. denied, 474 U.S. 947, 106 S. Ct. 345, 88 L. Ed. 2d 292 (1985).

Rate charged for water or sewer service in excess of cost is not a tax or in the nature of a tax, regardless of how the fund derived therefrom is ultimately used. A municipality cannot impose taxes when acting in a proprietary capacity, but only when acting as an arm or agency of the state. A rate charged for a public utility service or product is not a tax, but a price at which and for which the public utility service or

product is sold, and ultimate use of surplus funds derived therefrom for the support of municipal government will not cause it to assume the nature of taxes. Apodaca v. Wilson, 86 N.M. 516, 525 P.2d 876 (1974).

Application of sewer or water system revenues not limited. — Sections 3-26-2 and 3-27-4 NMSA 1978 do not limit or prohibit the application of revenues from the sewer or water system operated by a home rule city to other municipal purposes. The only limitation, as in the case of any legislative action or function by the city, is that it exercise its authority in a reasonable manner and act pursuant to constitutional authority. Apodaca v. Wilson, 86 N.M. 516, 525 P.2d 876 (1974).

Imposition of motor vehicle inspection fee not valid exercise of localities' home rule power. Chapman v. Luna, 101 N.M. 59, 678 P.2d 687 (1984), cert. denied, 474 U.S. 947, 106 S. Ct. 345, 88 L. Ed. 2d 292 (1985).

Regulation of fireworks. — The Fireworks Licensing and Safety Act (60-2C-1 et seq. NMSA 1978) denies all municipalities, including those with home rule charters, from regulating fireworks other than as provided by the statute. 1990 Op. Att'y Gen. No. 90-11.

Ordinance invalid under NLRA. — Clovis City ordinance which prohibits employers within Clovis from requiring, as a condition of employment, membership in a labor organization or payment of any dues, assessments, or other charges to a labor organization, and further prohibits employers from requiring any person to be referred by a labor organization as a condition of employment or from deducting union dues, fees, assessments or other charges from wages, unless the employee's authorization for such deductions can be revoked at any time, is invalid under the National Labor Relations Act. New Mexico Fed. of Lab. v. City of Clovis, ___F.Supp.____(D.N.M. 1990).

Law reviews. — For article, "Survey of New Mexico Law, 1979-80: Administrative Law," see 11 N.M.L. Rev. 1 (1981).

For comment, "Contemplating the Dilemma Of Government as Speaker: Judicially Identified Limits On Government Speech In The Context Of Carter v. City of Las Cruces," see 27 N.M.L. Rev. 517 (1997).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 56 Am. Jur. 2d Municipal Corporations, Counties, and Other Political Subdivisions §§ 125 to 138, 147.

62 C.J.S. Municipal Corporations §§ 13, 108, 124, 390.

Sec. 7. [Five-member boards of county commissioners.] (1992)

The board of county commissioners by unanimous vote may adopt an ordinance to increase the size of the boards of county commissioners to five members. Upon

creation of a five-member board, the county shall be divided by the incumbent board of county commissioners into five county commission districts that shall be compact, contiguous and as nearly equal in population as practicable. One county commissioner shall reside within and be elected from each county commission district. Change of residence to a place outside the district from which a county commissioner was elected shall automatically terminate the service of that commissioner and the office shall be declared vacant. (As added November 3, 1992.)

ANNOTATIONS

Cross references. — As to terms of county officers, see N.M. Const., art. X, § 2.

As to terms of county officers in counties not covered by this section, see N.M. Const., art. X, § 2.

For tenure of office, see N.M. Const., art. XX, § 2.

For membership and quorum of three or five member boards, see 4-38-2 NMSA 1978.

As to election of county commissioners, see 4-38-6 NMSA 1978.

The 1973 amendment of Article X, proposed by H.J.R. No. 33 (Laws 1973) and adopted at the special election held on November 6, 1973, by a vote of 20,369 for and 19,865 against, added this section to the article.

The 1980 amendment, which was proposed by H.J.R. No. 4 (Laws 1979) and adopted at the general election held on November 4, 1980, by a vote of 132,542 for and 100,449 against, designated the three paragraphs of the former section as Subsection A and added Subsection B.

The 1988 amendment, which was proposed by S.J.R. No. 6, § 1 (Laws 1988) and adopted at the general election held on November 8, 1988, by a vote of 230,390 for and 123,799 against, added Subsections C and D.

The 1992 amendment, which was proposed by S.J.R. No. 15 (Laws 1992) and adopted at the general election held on November 3, 1992, by a vote of 317,887 for and 151,625 against, rewrote this section. For provisions of former section, see 1992 Replacement Pamphlet.

Compiler's notes. — An amendment to this section proposed by H.J.R. No. 4 (Laws 1975), which would have allowed voters in certain class B counties to provide for five-member boards of county commissioners to be elected from districts, was submitted to the people at the general election held on November 2, 1976. It was defeated by a vote of 110,893 for and 133,708 against.

Effect of section. — When this section was added by constitutional amendment, the old § 2 of article X ceased to apply to counties having a population greater than 100,000 and an assessed valuation greater than $75,000,000. Under this section the original offices of county commissioner for two-year terms in affected counties were in effect abolished and new offices of county commissioner with four-year terms were created, notwithstanding that this section does not expressly say that the old offices were abolished and new ones created. Morris v. Gonzales, 91 N.M. 495, 576 P.2d 755 (1978) (decided prior to 1992 amendment).

Third consecutive term. — A county commissioner who has previously served a two-year term as county commissioner under N.M. Const., art. X, § 2, and one four-year term under this section may serve an additional four-year term under this section. Morris v. Gonzales, 91 N.M. 495, 576 P.2d 755 (1978) (decided prior to 1992 amendment).

Reelection in counties increasing board to five members. — If a county increased its Board of County Commissioners to five members pursuant to former Subsections C and D, a county officer elected to a two-year term in 1988 could seek re-election for a four-year term in 1990 and a four-year term in 1994. 1989 Op. Att'y Gen. No. 89-28 (rendered prior to 1992 amendment).

A county commissioner who has served one term in office under N.M. Const., art. X, § 2, and one term of office under this section may not seek a third consecutive term. 1978 Op. Att'y Gen. No. 78-1. But see Morris v. Gonzales, 91 N.M. 495, 576 P.2d 755 (1978) (decided prior to 1992 amendment).

Section is not self-executing. — As counties are but political subdivisions of the state, created by the legislature for the purpose of aiding in the administration of the affairs of the state, they have only such powers as are granted them by the legislature. The board of county commissioners had no power to district; the section is not self-executing; and the power to district rests in the state legislature. State ex rel. Robinson v. King, 86 N.M. 231, 522 P.2d 83 (1974).

County commissioner candidates must be nominated at primary election. — As there is no legislative act in the primary election code that provides for the nomination of county commissioner candidates other than through the primary election, except for political parties not eligible to participate in the primary, the candidates for such offices in the general election must be nominated at the primary election. State ex rel. Robinson v. King, 86 N.M. 231, 522 P.2d 83 (1974).

Electoral proclamation to specify district boundaries and terms of office. — Mandamus was properly granted to compel the governor to specify in his proclamation the boundaries of the district making up the office of county commissioner and terms of that office. State ex rel. Robinson v. King, 86 N.M. 231, 522 P.2d 83 (1974).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 56 Am. Jur. 2d Municipal Corporations, Counties, and Other Political Subdivisions §§ 147, 148, 189.

20 C.J.S. Counties § 63 et seq.

Sec. 8. [New activity or service mandated by state rule or regulation.]

A state rule or regulation mandating any county or city to engage in any new activity, to provide any new service or to increase any current level of activity or to provide any service beyond that required by existing law, shall not have the force of law, unless, or until, the state provides sufficient new funding or a means of new funding to the county or city to pay the cost of performing the mandated activity or service for the period of time during which the activity or service is required to be performed. (As added November 6, 1984.)

ANNOTATIONS

The 1984 amendment to Article X, which was proposed by S.J.R. 7 (Laws 1984) and adopted at the general election held on November 6, 1984, by a vote of 220,101 for and 64,684 against, added this section.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 56 Am. Jur. 2d Municipal Corporations, Counties, and Other Political Subdivisions § 123.

20 C.J.S. Counties § 44; 62 C.J.S. Municipal Corporations §§ 193, 194.

Sec. 9. [Recall of elected county officials.] (1996)

A. An elected official of a county is subject to recall by the voters of the county. Subject to the provisions of Subsection B of this section, a petition for a recall election shall cite grounds of malfeasance or misfeasance in office or violation of the oath of office by the official concerned. The cited grounds shall be based upon acts or failures to act occurring during the current term of the official sought to be recalled. The recall petition shall be signed by registered voters:

(1) of the county if the official sought to be recalled was elected at-large; or

(2) of the district from which the official sought to be recalled was elected; and

(3) not less in number than thirty-three and one-third percent of the number of persons who voted in the election for the office in the last preceding general election at which the office was voted upon.

B. Prior to and as a condition of circulating a petition for recall pursuant to the provisions of Subsection A of this section, the factual allegations supporting the grounds of malfeasance or misfeasance in office or violation of the oath of office stated in the petition shall be presented to the district court for the county in which the recall is proposed to be conducted. The petition shall not be circulated unless, after a hearing in

which the proponents of the recall effort and the official sought to be recalled are given an opportunity to present evidence, the district court determines that probable cause exists for the grounds for recall.

C. After the requirements of Subsection B of this section are fulfilled, the petition shall be circulated and filed with the county clerk for verification of the signatures, as to both number and qualifications of the persons signing. If the county clerk verifies that the requisite number of signatures of registered voters appears on the petition, the question of recall of the official shall be placed on the ballot for a special election to be called and held within ninety days or the next occurring general election if that election is to be held within less than ninety days. If at the election a majority of the votes cast on the question of recall is in favor of recall, the official who is the subject of recall is recalled from the office, and a vacancy exists. That vacancy shall be filled in the manner provided by law for filling vacancies for that office.

D. A recall election shall not be conducted after May 1 in a calendar year in which an election is to be held for the office for which the recall is sought if the official sought to be recalled is a candidate for reelection to the office. No petition for recall of an elected county official shall be submitted more than once during the term for which the official is elected. (As added November 5, 1996.)

ANNOTATIONS

Compiler's notes. — This section, which was proposed by S.J.R. No. 21 (Laws 1996), was adopted at the general election held November 5, 1996, by a vote of 330,258 for and 132,969 against.

Sec. 10. [Urban counties.] (1999)

A. A county that is less than one thousand five hundred square miles in area and has, at the time of this amendment, a population of three hundred thousand or more may become an urban county by the following procedure:

(1) the board of county commissioners shall, by January 1, 2001, appoint a charter commission consisting of not less than three persons to draft a proposed urban county charter;

(2) the proposed charter shall provide for the form and organization of the urban county government and shall designate those officers that shall be elected and those officers and employees that shall perform the duties assigned by law to county officers; and

(3) within one year after the appointment of the charter commission, the proposed charter shall be submitted to the qualified voters of the county and, if adopted by a majority of those voters, the county shall become an urban county. If, at the election or any subsequent election, the proposed charter is not adopted, then, after at least one

year has elapsed after the election, pursuant to this section another charter commission may be appointed and another proposed charter may be submitted to the qualified voters for approval or disapproval.

B. An urban county may exercise all legislative powers and perform all governmental functions not expressly denied to municipalities, counties or urban counties by general law or charter and may exercise all powers and shall be subject to all limitations granted to municipalities by Article 9, Section 12 of the constitution of New Mexico. This grant of powers shall not include the power to enact private or civil laws except as incident to the exercise of an independent municipal power, nor shall it include the power to provide for a penalty greater than the penalty provided for a misdemeanor. No tax imposed by the governing body of an urban county, except a tax authorized by general law, shall become effective until approved by a majority vote in the urban county.

C. A charter of an urban county shall only be amended in accordance with the provisions of the charter.

D. If the charter of an urban county provides for a governing body composed of members elected by districts, a member representing a district shall be a resident and elected by the registered qualified electors of that district.

E. The purpose of this section is to provide for maximum local self-government. A liberal construction shall be given to the powers of urban counties.

F. The provisions of this section shall be self-executing. (As added November 7, 2000.)

ANNOTATIONS

Compiler's notes. — This section, which was proposed by S.J.R. No. 26 (Laws 1999), was adopted at the general election held November 7, 2000, by a vote of 261,323 for and 134,319 against.

Sec. 11. [Single urban governments.] (1999)

A. A county that is less than one thousand five hundred square miles in area and has, at the time of this amendment, a population of three hundred thousand or more, and whether or not it is an urban county pursuant to Section 1 of this amendment, may provide for a single urban government by the following procedure:

(1) by January 1, 2003, a charter commission, composed of eleven members, shall be appointed to draft a proposed charter. Five members shall be appointed by the governing body of the county, five members shall be appointed by the municipality with a population greater than three hundred thousand and one member shall be appointed by the other ten members;

(2) the proposed charter shall:

(a) provide for the form and organization of the single urban government;

(b) designate those officers that shall be elected and those officers and employees that shall perform the duties assigned by law to county officers;

(c) provide for a transition period for elected county and city officials whose terms have not expired on the effective date of the charter; and

(d) provide for a transition period, no less than one year, to ensure the continuation of government services; and

(3) within one year after the appointment of the charter commission, the proposed charter shall be submitted to the qualified voters and, if adopted by a majority of those voters, the municipalities in that county with a population greater than ten thousand shall be disincorporated and the county shall be governed by a single urban government. If the proposed charter is not adopted by a majority of the qualified voters, then another charter commission shall be appointed and another election, within twelve months of the previous election, shall be held. If the proposed charter is not adopted by a majority of the qualified voters at the second or any subsequent election, then after at least two years have elapsed after the election, pursuant to this section another charter commission may be appointed and another proposed charter may be submitted to the qualified voters for approval or disapproval. As used in this paragraph, "qualified voter" means a registered voter of the county.

B. Upon the adoption of a charter pursuant to Subsection A of this section, any municipality within the county with a population greater than ten thousand is disincorporated and no future municipalities shall be incorporated. A county that adopts a charter pursuant to this section may exercise those powers granted to urban counties by Section 1 of this amendment and is subject to the limitations imposed upon urban counties by that section. A county that adopts a charter pursuant to this section has the same power to enact taxes as any other county and as any municipality had before being disincorporated pursuant to this section.

C. A municipality, with a population of ten thousand or less, in a county that has adopted a charter pursuant to this section may become a part of the single urban government by a vote of a majority of the qualified voters within the municipality voting in an election held upon the filing of a petition containing the signatures of ten percent of the registered voters of that municipality. If a majority of the voters elect to become a part of the single urban government, then the municipality is disincorporated.

D. All property, debts, employees, records and contracts of a municipality disincorporated pursuant to this section shall be transferred to the county and become the property, debts, employees, records and contracts of the county. The rights of a municipality, disincorporated pursuant to this section, to receive taxes, fees,

distributions or any other thing of value shall be transferred to the county. Any law granting any power or authorizing any distribution to a municipality disincorporated pursuant to this section shall be interpreted as granting the power or authorizing the distribution to the county.

E. The provisions of this section shall be self-executing. (As added November 7, 2000.)

ANNOTATIONS

Compiler's notes. — This section, which was proposed by S.J.R. No. 26 (Laws 1999), was adopted at the general election held November 7, 2000, by a vote of 261,323 for and 134,319 against.

ARTICLE XI
Corporations Other Than Municipal

Section 1. [Creation and composition of public regulation commission.] (1996)

The "public regulation commission" is created. The commission shall consist of five members elected from districts provided by law for staggered four-year terms beginning on January 1 of the year following their election; provided that those chosen at the first general election after the adoption of this section shall immediately classify themselves by lot, so that two of them shall hold office for two years and three of them for four years; and further provided that, after serving two terms, members shall be ineligible to hold office as a commission member until one full term has intervened. No commissioner or candidate for the commission shall accept anything of value from a person or entity whose charges for services to the public are regulated by the commission. (As added November 5, 1996.)

ANNOTATIONS

Effective dates. — Section 4 of H.J.R. No. 16 (Laws 1996) provides that this section is effective January 1, 1999.

Compiler's notes. — The repeal of Sections 1 through 12 and 15 through 17 of Article XI, effective January 1, 1999, proposed by H.J.R. No. 16 (Laws 1996) was adopted at the general election held November 5, 1996, by a vote of 232,788 for and 221,693 against. At that general election, new Sections 1 and 2 were adopted within this article.

In general. — The functions of the corporation commission (now public regulation commission) are not confined to any of the three departments of government named in N.M. Const., art. III, § 1, but its duties and powers pervade them all. In re Atchison, T. & S.F. Ry., 37 N.M. 194, 20 P.2d 918 (1933).

Legislative intent. — Section 8-7-4(A) NMSA 1978 is constitutional and a safe guide to the legislative intent behind this section. Block v. Vigil-Giron, 2004-NMSC-003, 135 N.M. 24, 84 P.3d 72.

Language following "provided that" is read as an exception to the general rule that precedes it. Therefore, there is no right under the New Mexico Constitution to serve two four-year terms before being subjected to term limits. Block v. Vigil-Giron, 2004-NMSC-003, 135 N.M. 24, 84 P.3d 72.

Word "term", as used in this section, includes both a full four-year term and a shortened two-year term. Block v. Vigil-Giron, 2004-NMSC-003, 135 N.M. 24, 84 P.3d 72.

Consecutive terms. — A public regulation commission commissioner elected to serve consecutive two-year and four-year terms may not run again for another four-year term until one full term has intervened. 2003 Op. Att'y Gen. No. 03-05.

Amendment not "act of legislature". — The 1996 amendment of N.M. Const., art. XI, was not an "act of the legislature" within the meaning of N.M. Const., art. IV, § 34. U.S. West Communications, Inc. v. New Mexico Pub. Regulation Comm'n, 1999-NMSC-024, 127 N.M. 375, 981 P.2d 789.

Law reviews. — For comment on State ex rel. State Corp. Comm'n v. Zinn, 72 N.M. 29, 380 P.2d 182 (1963), see 3 Nat. Resources J. 356 (1963).

For article, "Constitutional Limitations on the Exercise of Judicial Functions by Administrative Agencies," see 7 Nat. Resources J. 599 (1967).

For article, "An Administrative Procedure Act For New Mexico," see 8 Nat. Resources J. 114 (1968).

For student symposium, "Constitutional Revision - The Executive Branch - Long or Short Ballot?," see 9 Nat. Resources J. 430 (1969).

For article, "Cost of Service Indexing: An Analysis of New Mexico's Experiment in Public Utility Regulation," see 9 N.M.L. Rev. 287 (1979).

For article, "Survey of New Mexico Law, 1979-80: Administrative Law," see 11 N.M.L. Rev. 1 (1981).

For article, "Survey of New Mexico Law, 1982-83: Administrative Law," see 14 N.M.L. Rev. 1 (1984).

For 1984-88 survey of New Mexico administrative law, 19 N.M.L. Rev. 575 (1990).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 18 Am. Jur. 2d Corporations §§ 7 to 16.

Prohibition to control action of commission, 115 A.L.R. 34, 159 A.L.R. 627.

Sec. 2. [Responsibilities of public regulation commission.] (1996)

The public regulation commission shall have responsibility for chartering and regulating business corporations in such manner as the legislature shall provide. The commission shall have responsibility for regulating public utilities, including electric, natural gas and water companies; transportation companies, including common and contract carriers; transmission and pipeline companies, including telephone, telegraph and information transmission companies; insurance companies and others engaged in risk assumption; and other public service companies in such manner as the legislature shall provide. (As added November 5, 1996.)

ANNOTATIONS

Compiler's notes. — The repeal of Sections 1 through 12 and 15 through 17 of Article XI, effective January 1, 1999, proposed by H.J.R. No. 16 (Laws 1996) was adopted at the general election held November 5, 1996, by a vote of 232,788 for and 221,693 against. At that general election, new Sections 1 and 2 were adopted within this article.

Effective dates. — Section 4 of H.J.R. No. 16 (Laws 1996) provides that this section is effective January 1, 1999.

Local ordinance not preempted by state law. — Reading the New Mexico Telecommunications Act, 63-9A-1 NMSA 1978 et seq., and N.M. Const., art. XI, § 2 in *pari materia* with New Mexico's Municipal Code, Chapter 3 NMSA 1978, and N.M. Const., art. X, § 6, the provisions of a Santa Fe telecommunications ordinance, regulating the power to contract with a service provider and to enforce provisions related to land use and rights of way held by the city, were not preempted by state law, inasmuch as they did not purport to usurp New Mexico's public regulation commission power to issue certificates of public convenience and necessity to providers of public telecommunications services or to regulate rates and quality of service for intrastate telecommunications services. Qwest Corp. v. City of Santa Fe, 224 F. Supp. 2d 1305 (D.N.M. 2002).

Law reviews. — For comment on State ex rel. State Corp. Comm'n v. Zinn, 72 N.M. 29, 380 P.2d 182 (1963), see 3 Nat. Resources J. 356 (1963).

For comment on State ex rel. Palmer v. Miller, 74 N.M. 129, 391 P.2d 416 (1964), see 4 Nat. Resources J. 606 (1964).

Sec. 3. to 12. Repealed. (1998)

ANNOTATIONS

Repeals. — The repeal of Sections 1 through 12 and 15 through 17 of Article XI, effective January 1, 1999, proposed by H.J.R. No. 16 (Laws 1996) was adopted at the general election held November 5, 1996, by a vote of 232,788 for and 221,693 against.

Sec. 13. [General corporation laws.]

The legislature shall provide for the organization of corporations by general law. All laws relating to corporations may be altered, amended or repealed by the legislature, at any time, when necessary for the public good and general welfare, and all corporations, doing business in this state, may, as to such business, be regulated, limited or restrained by laws not in conflict with the constitution of the United States or of this constitution.

ANNOTATIONS

Corporate form recognized prior to constitution. — Corporate form of business entity was recognized in New Mexico law even before adoption of the constitution. Shillinglaw v. Owen Shillinglaw Fuel Co., 70 N.M. 65, 370 P.2d 502 (1962).

Proper for legislature to change measure of bank stockholder's liability. — This section authorizes legislature to change measure of bank stockholder's liability when bank was organized after adoption of constitution. Laws 1915, ch. 67, § 40 (since repealed), as amended by Laws 1923, ch. 140, § 8 (since repealed), dealing with such liability, did not impair contract obligations. Melaven v. Schmidt, 34 N.M. 443, 283 P. 900 (1929).

And to provide for convertibility of types of corporations. — A state through its police power may make reasonable regulations of corporations, including alteration or amendment of corporate charters if that power has been duly reserved by the state, as in New Mexico. Thus, statute (49-2-18 NMSA 1978) which authorizes change in character of legal entity from corporation for management of community land grant to domestic stock corporation does not violate due process. Westland Dev. Co. v. Saavedra, 80 N.M. 615, 459 P.2d 141 (1969).

And to assign bank chartering investigations to office outside commission. — Legislature was not powerless under this section or N.M. Const., art. XI, § 6 (now repealed), to designate state bank examiner (now director of the financial institutions division of the commerce and industry department), rather than corporation commission (now public regulation commission), the body to make determinative findings preliminary to issuing charters to state banks. First Thrift & Loan Ass'n v. State ex rel. Robinson, 62 N.M. 61, 304 P.2d 582 (1956).

But power to regulate railway facilities reposes in commission. — This section applies to all corporations. But the power to regulate reserved to the legislature must relate to some phase of railroad business not pertaining to power to require railway companies to provide and maintain adequate agents and facilities, which power of

regulation is reposed in the corporation commission (now public regulation commission) by N.M. Const., art. XI, § 7 (now repealed). In re Atchison, T. & S.F. Ry., 37 N.M. 194, 20 P.2d 918 (1933).

Constitutionality of employers mutual company. — Under existing New Mexico case law, the legislation creating the employers mutual company appears to be an unconstitutional special law chartering or licensing an insurance company. Because the company is intended to be operated as a private entity, it is not clear that the exemption from the prohibition against special laws created by other states' courts for public corporations would save the legislation. 1990 Op. Att'y Gen. No. 90-25.

Jurisdictional consent statute constitutional. — Although this section may restrict the application of substantive law to a foreign corporation, it does not limit the forums in which controversies are to be decided. It does not prohibit the enactment of a jurisdictional consent statute extending jurisdiction to registered foreign corporations. Werner v. Wal-Mart Stores, Inc., 116 N.M. 229, 861 P.2d 270 (Ct. App. 1993).

Comparable provisions. — Utah Const., art. XII, § 1.

Wyoming Const., art. X, § 1.

Law reviews. — For comment on State ex rel. State Corp. Comm'n v. Zinn, 72 N.M. 29, 380 P.2d 182 (1963), see 3 Nat. Resources J. 356 (1963).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 18 Am. Jur. 2d Corporations § 13; 18A Am. Jur. 2d Corporations §§ 186 to 188.

18 C.J.S. Corporations §§ 20, 21.

Sec. 14. [Corporations subject to police power.]

The police power of this state is supreme over all corporations as well as individuals.

ANNOTATIONS

Police power prevails over property rights. — Fact that improvements were especially built for and adapted to business of importing and selling high-grade livestock and that plaintiffs would suffer financial loss if prevented from using them was not alone grounds for holding ordinance which prohibited keeping such livestock in designated part of city, void under federal or state constitution, as all property rights are held subject to fair exercise of police power, and reasonable regulation for benefit of public health, convenience, safety or general welfare is not an unconstitutional taking of property in violation of contract, due process or equal protection clauses of federal constitution. Mitchell v. City of Roswell, 45 N.M. 92, 111 P.2d 41 (1941).

Comparable provisions. — Wyoming Const., art. X, § 2.

Law reviews. — For comment on State ex rel. State Corp. Comm'n v. Zinn, 72 N.M. 29, 380 P.2d 182 (1963), see 3 Nat. Resources J. 356 (1963).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Fine or penalty, power to impose for benefit of private individual or corporation, 13 A.L.R. 828, 19 A.L.R. 205.

Constitutional provision fixing liability of stockholders as limitation on power of legislature in that regard, 63 A.L.R. 870.

Validity of municipal regulation of solicitation of magazine subscriptions, 9 A.L.R.2d 728.

Sec. 15. to 17. Repealed.

ANNOTATIONS

Repeals. — The repeal of Sections 1 through 12 and 15 through 17 of Article XI, effective January 1, 1999, proposed by H.J.R. No. 16 (Laws 1996) was adopted at the general election held November 5, 1996, by a vote of 232,788 for and 221,693 against.

Sec. 18. [Eminent domain of corporate property.]

The right of eminent domain shall never be so abridged or construed as to prevent the legislature from taking the property and franchises of incorporated companies and subjecting them to the public use, the same as the property of individuals.

ANNOTATIONS

Compiler's notes. — An amendment to this article proposed by S.J.R. No. 2 (Laws 1955), which would have increased membership of corporation commission (now public regulation commission) and provided for effective regulation and control of public utilities, was submitted to the people at a special election held on September 20, 1955, and was defeated for lack of a majority. The defeat made ineffective amendments to public utility laws by Laws 1955, ch. 265, § 21, of which made the amendments dependent upon adoption of the constitutional amendment.

An amendment to this article proposed by S.J.R. No. 7 (Laws 1961) which would have provided for increase in membership of corporation commission (now public regulation commission) and effective regulation and control of public utilities, was submitted to the people at a special election held on September 19, 1961. It was defeated by a vote of 23,850 for and 25,521 against.

Comparable provisions. — Idaho Const., art. XI, § 8.

Utah Const., art. XII, § 11.

Wyoming Const., art. X, § 14.

Law reviews. — For comment on State ex rel. State Corp. Comm'n v. Zinn, 72 N.M. 29, 380 P.2d 182 (1963), see 3 Nat. Resources J. 356 (1963).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 26 Am. Jur. 2d Eminent Domain § 110.

Constitutionality of provisions as to tribunal which shall fix amount of compensation for property taken, 74 A.L.R. 582.

Construction and application of rule requiring public use for which property is condemned to be "more necessary" or "higher use" than public use to which property is already appropriated - state takings, 49 A.L.R. 5th 769.

ARTICLE XII
Education

Section 1. [Free public schools.]

A uniform system of free public schools sufficient for the education of, and open to, all the children of school age in the state shall be established and maintained.

ANNOTATIONS

Cross references. — For statute defining persons entitled to free public school education, see 22-1-4 NMSA 1978.

Section applicable only to residents. — This section has been interpreted as applicable only to those children who are residents of New Mexico. 1978 Op. Att'y Gen. No. 78-14.

No contractual right to education. — The right and privilege to a free public education does not give rise to a contractual relationship for which an individual may sue for breach of contract. Rubio ex rel. Rubio v. Carlsbad Mun. School Dist., 106 N.M. 446, 744 P.2d 919 (Ct. App. 1987).

Only courses "sufficient for the education" should be "free" in the sense of this provision. Courses required of every student shall be without charge to the student, but reasonable fees may be charged for "elective" courses. New Mexico board of education shall define what are "required" or "elective" courses. Norton v. Board of Educ., 89 N.M. 470, 553 P.2d 1277 (1976).

Activity fees may only be charged by express legislative authority, even if not prohibited by constitution. There is no authority in the statutes, and the charging of these fees, if required as a condition to attendance at public school, is prohibited. 1955-56 Op. Att'y Gen. No. 6272.

When school board may allocate attendance. — So long as the statutory and constitutional minimum educational standards are satisfied, the local school board may allocate attendance within the district. 1979 Op. Att'y Gen. No. 79-36.

Magnitude of school district constituting effective denial of free school. — If school districts are made so large that children are unable to make trip to school and back home each day, then they would be denied a free school just as effectively as if no school existed. Prince v. Board of Educ., 88 N.M. 548, 543 P.2d 1176 (1975); Strawn v. Russell, 54 N.M. 221, 219 P.2d 292 (1950).

State responsibility for education of Indians. — Indicative of congressional policy encouraging New Mexico to provide public education to all of its citizens, including Indians, is that part of state's enabling act which orders that provision be made for establishment and maintenance of system of public schools open to all children of the state and free from sectarian control, which order is picked up in this section and N.M. Const., art. XXI, § 1. Prince v. Board of Educ., 88 N.M. 548, 543 P.2d 1176 (1975). See June 20, 1910, 36 Stat. 557, ch. 310, §§ 6 to 9.

Federal government responsible too. — The federal government, in compliance with its treaty obligations to the Navajo tribe, also has a duty to provide for education and other services needed by Indians. Prince v. Board of Educ., 88 N.M. 548, 543 P.2d 1176 (1975).

Proper for district attorney to sue for admittance of black children. — Exclusion of colored children from public school because of race is of such matter of public interest that district attorney could, as a matter of public duty and on behalf of the public, institute proceedings in court in name of parent, to compel school board to receive the children. 1915-16 Op. Att'y Gen. 232.

Marriage not proper ground for exclusion. — Students of school age may not be excluded from public schools by reason of being married. 1957-58 Op. Att'y Gen. No. 57-258.

But removal for noncompliance with immunization statutes no constitutional deprivation. — "Disenrollment" of a student for noncompliance with immunization statutes (24-5-1 to 24-5-6 NMSA 1978) would not constitute deprivation of constitutional right to free public school education. 1975 Op. Att'y Gen. No. 75-70.

"Public school" for purposes of federal law. — Any school giving instruction up to and including the twelfth grade, supported in whole or in part by public funds of the state and managed by an elective or appointive body authorized by statutes of the state, is a public school for purposes of federal National Defense Education Act of 1958 (20 U.S.C. § 401 et seq.). 1959-60 Op. Att'y Gen. No. 59-150.

Vouchers for private school education. — This section does not preclude the state from providing tuition assistance in the form of vouchers for private education, as long

as it continues to maintain a uniform system of free public schools; however, a constitutional challenge could be supported if the voucher program diverted state funds from public schools so that it compromised the state's ability to establish and maintain a sufficient public school system. 1999 Op. Att'y Gen. No. 99-01.

Education for the handicapped. — The state is obligated by both federal and New Mexico law to provide all its pre-college age children with appropriate educations. Under federal law relating to state programs receiving federal financial assistance, the state is forbidden from discriminating against the handicapped in meeting this obligation. New Mexico Ass'n for Retarded Citizens v. New Mexico, 678 F.2d 847 (10th Cir. 1982).

Summer and after-school remediation programs. — Section 22-2-8.6C NMSA 1978, which requires nonindigent parents of children in grades nine through 12 to pay the cost of optional summer and after-school remediation programs, does not offend the "free school guaranty" of this section, as it is construed by the New Mexico Supreme Court. 1990 Op. Att'y Gen. No. 90-06.

Comparable provisions. — Idaho Const., art. IX, § 1.

Montana Const., art. X, § 1.

Utah Const., art. X, § 1.

Wyoming Const., art. VII, § 1.

Law reviews. — For note, "Serrano v. Priest and Its Impact on New Mexico," see 2 N.M. L. Rev. 266 (1972).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 68 Am. Jur. 2d Schools §§ 5 to 7.

Constitutionality and construction of statutes in relation to admission of nonresident pupils to school privileges, 72 A.L.R. 499, 113 A.L.R. 177.

What is common or public school within contemplation of constitutional or statutory provision, 113 A.L.R. 697.

Power of public school authorities to set minimum or maximum age requirements for pupils in absence of specific statutory authority, 78 A.L.R.2d 1021.

Determination of residence or nonresidence for purpose of fixing tuition fees or the like in public school or college, 83 A.L.R.2d 497, 56 A.L.R.3d 641.

Marriage or pregnancy of public school student as ground for expulsion or exclusion or restriction of activities, 11 A.L.R.3d 996.

AIDS infection as affecting right to attend public school, 60 A.L.R.4th 15.

78 C.J.S. Schools and School Districts § 4 et seq.; 78A C.J.S. Schools and School Districts §§ 697, 698.

Sec. 2. [Permanent school fund.] (1996)

The permanent school fund of the state shall consist of the proceeds of sales of Sections Two, Sixteen, Thirty-Two and Thirty-Six in each township of the state, or the lands selected in lieu thereof; the proceeds of sales of all lands that have been or may hereafter be granted to the state not otherwise appropriated by the terms and conditions of the grant; such portion of the proceeds of sales of land of the United States within the state as has been or may be granted by congress; all earnings, including interest, dividends and capital gains from investment of the permanent school fund; also all other grants, gifts and devises made to the state, the purpose of which is not otherwise specified. (As amended November 5, 1996.)

ANNOTATIONS

The 1996 amendment, which was proposed by S.J.R. No. 2 (Laws 1996) and adopted at the general election held November 5, 1996, by a vote of 307,442 for and 153,021 against, inserted "all earnings, including interest, dividends and capital gains from investment of the permanent school fund". Section 6 of S.J.R. No. 2 (Laws 1996) provides that this amendment shall not become effective without the consent of the United States congress. The United States Congress approved the amendment in P.L. 105-37, 111 Stat. 1113, the New Mexico Statehood and Enabling Act Amendments of 1997, approved August 7, 1997.

Compiler's notes. — An amendment proposed by H.J.R. No. 8 (Laws 1994), which would have inserted "all earnings, including interest, dividends and capital gains, from investment of the permanent school fund" following "congress" near the end of the section, was submitted to the people at the general election held on November 8, 1994. It was defeated by a vote of 187,216 for and 192,492 against.

Constitution confirms Enabling Act grants. — Provisions of constitution confirm grants made to state under Enabling Act (June 20, 1910, 36 Stat. 557, ch. 310, §§ 6 to 10, set out in Pamphlet 3). 1935-36 Op. Att'y Gen. 84.

Land exchanges with United States proper. — Under this section and the Enabling Act (set out in Pamphlet 3), the state may relinquish title to United States to school lands for other lands taken in lieu thereof. 1933-34 Op. Att'y Gen. 141.

Under Taylor Grazing Act (43 U.S.C. § 315 et seq.), state may exchange its lands where title is vested in it for other lands of federal government through secretary of the interior, who has power to exchange such lands in same manner as provided for exchange of privately-owned lands. 1935-36 Op. Att'y Gen. 84.

Rent for national forest lands applied to current fund. — Money received from United States from rental of school lands in the national forest, in accordance with Enabling Act (set out in Pamphlet 3), should be applied to state current school fund. 1912-13 Op. Att'y Gen. 140.

Comparable provisions. —

Am. Jur. 2d, A.L.R. and C.J.S. references. — 68 Am. Jur. 2d Schools § 87 et seq.

78 C.J.S. Schools and School Districts § 10.

Sec. 3. [Control of constitutional educational institutions; use of state land proceeds and other educational funds.]

The schools, colleges, universities and other educational institutions provided for by this constitution shall forever remain under the exclusive control of the state, and no part of the proceeds arising from the sale or disposal of any lands granted to the state by congress, or any other funds appropriated, levied or collected for educational purposes, shall be used for the support of any sectarian, denominational or private school, college or university.

ANNOTATIONS

I. GENERAL CONSIDERATION.

Cross references. — For provisions establishing freedom of religion, see N.M. Const., art. II, § 11, and art. XII, § 9.

For general prohibition of aid to charities, see N.M. Const., art. IV, § 31.

As to prohibition of aid to private enterprise, see N.M. Const., art. IX, § 14.

Purpose of this section is to insure exclusive control by state over public educational system and to insure that none of state's public schools ever become sectarian or denominational. Prince v. Board of Educ., 88 N.M. 548, 543 P.2d 1176 (1975).

Private schools not "rural school rooms". — Private or denominational schools are not "rural school rooms under the jurisdiction of the county school superintendent" for purposes of determining salary of county school superintendent under 73-5-1, 1953 Comp. (now repealed). Thomson v. Board of County Comm'rs, 66 N.M. 159, 344 P.2d 171 (1959).

Law reviews. — For note, “Indirect Funding of Sectarian Schools: A Discussion of the Constitutionality of State School Voucher Programs Under Federal and New Mexico Law After Zelman v. Simmons-Harris,” see 34 N.M.L. Rev.194 (2004).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 68 Am. Jur. 2d Schools §§ 96, 97, 349, 365, 366.

Religious meeting in schoolhouse, 5 A.L.R. 886, 141 A.L.R. 1153, 75 A.L.R.2d 742.

Schoolhouse as a "public building," 19 A.L.R. 545.

Pledge or mortgage of property or income therefrom, power as to, 71 A.L.R. 828.

Hiring or leasing schoolhouse to private persons for occasional use, 86 A.L.R. 1175.

Lease of school property, power of school or local authorities as to grant of, 111 A.L.R. 1051.

Sectarianism in schools, 141 A.L.R. 1144.

Inclusion of period of service in sectarian school in determining public schoolteachers' seniority, salary or retirement benefits, as violation of constitutional separation of church and state, 2 A.L.R.2d 1033.

Wearing of religious garb by public school teachers, 60 A.L.R.2d 300.

Use of public school premises for religious purposes during nonschool time, 79 A.L.R.2d 1148.

Public payment of tuition, scholarship or the like, to sectarian school, 81 A.L.R.2d 1309.

Furnishing free textbooks to sectarian school or student therein, 93 A.L.R.2d 986.

Use of school property for other than school or religious purposes, 94 A.L.R.2d 1274.

Lease or sublease of school property, power of municipal corporations as to, 47 A.L.R.3d 19.

Validity of local or state denial of public school courses or activities to private or parochial school students, 43 A.L.R.4th 776.

Constitutionality of regulation or policy governing prayer, meditation, or "moment of silence" in public schools, 110 A.L.R. Fed. 211.

Bible distribution or use in public schools - modern cases, 111 A.L.R. Fed. 121.

78 C.J.S. Schools and School Districts §§ 11, 809 et seq.

II. STATE CONTROL.

"Control" construed. — "Control" means control over curriculum, disciplinary control, financial control, administrative control and, in general, control over all affairs of the school. Prince v. Board of Educ., 88 N.M. 548, 543 P.2d 1176 (1975).

Leasing school lands from Navajos does not prevent state control. — Fact that some schools to be constructed from proceeds of bond issue would be located on reservation lands leased from Navajo tribe would not prevent state from exercising exclusive control over such schools. Prince v. Board of Educ., 88 N.M. 548, 543 P.2d 1176 (1975).

Nor contract for medical training in Colorado. — Contract entered into by university of New Mexico regents for medical training for limited number of students to be taught at university of Colorado would be valid and would not contravene constitution or laws of New Mexico if said contract would be so drawn as to withhold in New Mexico and the university such control as would not contravene this section. 1951-52 Op. Att'y Gen. No. 5334.

But city ordinances inapplicable to university land. — Ordinances of city of Albuquerque dealing with crimes do not apply to land under control of board of regents of university of New Mexico, except for traffic offenses as provided in 35-14-2 NMSA 1978. 1969 Op. Att'y Gen. No. 69-48.

Proper to regulate teachers who are members of religious orders. — Members of religious orders who are employed as public school teachers must refrain from teaching sectarian religion and doctrines and from disseminating religious literature during such time, and wearing of religious garb and insignia must be barred during time members of religious orders are on duty as public school teachers. Teachers must be under actual control and supervision of responsible school authorities. Zellers v. Huff, 55 N.M. 501, 236 P.2d 949 (1951).

And to bar disobedient from teaching in public schools. — Barring certain members of religious order from again teaching after they had knowingly taught sectarian religion in public schools during regular school hours was not improper. Zellers v. Huff, 55 N.M. 501, 236 P.2d 949 (1951).

But state may not bar prayers at university functions. — State educational institution may neither order nor ban prayers at university functions. To do either act would violate constitutional duty of strict neutrality in church-state relations. 1970 Op. Att'y Gen. No. 70-27.

III. NO SUPPORT OF PRIVATE SCHOOLS.

Section forbids disbursement of public money to nonpublic schools. — New Mexico Const., art. IV, § 31, art. IX, § 14 and this section would be violated if public money was disbursed to nonpublic schools in order to purchase secular education service. 1969 Op. Att'y Gen. No. 69-6.

But voucher system would aid children, not schools. — Under a voucher system for exceptional children, parents would apply for money already allocated to their children and would use that money to purchase educational services at a private school. The money, therefore, is used for children and not for schools. The "support," if any, of private schools is only an indirect consequence. The prohibition in this section is limited to direct support of private schools, and thus voucher system would not be in violation of that provision. 1976 Op. Att'y Gen. No. 76-6.

Vouchers for private school education. — Tuition assistance in the form of vouchers for private education may constitute the unconstitutional use of public money for the support of sectarian, denominational or private schools. 1999 Op. Att'y Gen. No. 99-01.

Public school trucks may not be used to transport pupils of private schools. 1921-22 Op. Att'y Gen. 92.

Driver of school bus can legally refuse to transport school children attending Catholic school, for county board of education is prohibited from using public school funds for benefit of sectarian schools. 1931-32 Op. Att'y Gen. 36.

But statute allowing transportation of students compelled to attend school proper. — Section 73-7-36, 1953 Comp. (now repealed), extending scope of school bus transportation by allowing transportation of all pupils attending school in compliance with compulsory school attendance laws under certain conditions does not violate constitution of New Mexico. 1951-52 Op. Att'y Gen. No. 5339.

Contracts for transportation of students to private schools. — While school districts may not provide transportation of students to private schools pursuant to this provision, a county may contract with a school district for such transportation pursuant to former 22-16-7 NMSA 1978 if the county is reimbursed for the cost of such transportation by the private schools or their students pursuant to an enforceable contract. 1989 Op. Att'y Gen. No. 89-02.

No religious instruction in public school buildings without payment. — In the absence of payment for such use, public school buildings may not be used for religious instruction. 1969 Op. Att'y Gen. No. 69-16.

But noninterfering use of gymnasium proper. — School board may permit students from parochial schools to use gymnasiums or other school facilities if such use does not interfere with regular school activities, but they may not use public school property and funds for support of parochial schools. 1937-38 Op. Att'y Gen. 36.

Salary to public school teacher not aid to religion. — Since salaries of members of religious orders who serve as teachers are the same as those of other teachers, this is not aid to religion or to the church denounced by federal and state constitutions. Zellers v. Huff, 55 N.M. 501, 236 P.2d 949 (1951).

Paying salary to teacher belonging to religious order not unconstitutional support. — Public money paid to members of a religious order teaching in the public schools, which would go to the religious order, is not support in violation of this section. 1979 Op. Att'y Gen. No. 79-7.

Indirect benefit may not invoke prohibition. — To the extent that proposed tuition grants for the purpose of defraying tuition costs at private colleges and universities are made to the students upon their application and not to private colleges, institutions and universities, the proposal did not authorize the direct support of private schools, and this distinction may be sufficient to avoid a violation of this section. 1979 Op. Att'y Gen. No. 79-7.

Conditions under which private group may use school. — A local board of education may permit a particular religious denomination or private group to use public school buildings or facilities after school hours where such use in the opinion of the school board will not interfere with normal school activities, but the board may not in any respect sanction or give endorsement to such religious denominational programs. 1963-64 Op. Att'y Gen. No. 63-106 (rendered under former law).

Include equal treatment of groups. — A local school board must, in exercising its discretion as to whether a particular religious denomination may use public school facilities after school hours, either make the use of school facilities available to all religious groups on an equal basis and without preference as to any particular group or not permit such use at all. 1963-64 Op. Att'y Gen. No. 63-106 (rendered under former law).

And reimbursement of school's actual expenses. — Since a school district may not in any manner lend its financial or other support to any private religious denominations, it is incumbent upon school authorities to obtain reimbursement for any actual expenses occasioned from a religious group's private use of public school facilities. 1963-64 Op. Att'y Gen. No. 63-106 (rendered under former law).

Sec. 4. [Current school fund.]

All forfeitures, unless otherwise provided by law, and all fines collected under general laws; the net proceeds of property that may come to the state by escheat; the rentals of all school lands and other lands granted to the state, the disposition of which is not otherwise provided for by the terms of the grant or by act of congress shall constitute the current school fund of the state. (As amended November 2, 1971, November 4, 1986 and November 5, 1996.)

ANNOTATIONS

The 1971 amendment, which was proposed by S.J.R. No. 30 (Laws 1971) and adopted at the special election held on November 2, 1971, by a vote of 43,139 for and 28,945

against, deleted everything after the first sentence. The deleted provisions related to the school tax, distribution of the current school fund and the minimum school year.

The 1986 amendment, which was proposed by S.J.R. No. 11 (Laws 1986) and adopted at the general election held on November 4, 1986, by a vote of 181,813 for and 93,731 against, deleted "fines and" before "forfeitures" and added "unless otherwise provided by law and all fines" after "forfeitures" at the beginning of the section.

The 1996 amendment, which was proposed by S.J.R. No. 2 (Laws 1996) and adopted at the general election held November 5, 1996, by a vote of 307,442 for and 153,021 against, deleted "and the income derived from the permanent school fund" following "act of congress" near the end and made a stylistic change. Section 6 of S.J.R. No. 2 (Laws 1996) provides that this amendment shall not become effective without the consent of the United States congress. The United States Congress approved the amendment in P.L. 105-37, 111 Stat. 1113, the New Mexico Statehood and Enabling Act Amendments of 1997, approved August 7, 1997.

Compiler's notes. — An amendment to this section proposed by S.J.R. No. 10 (Laws 1961), which would have provided for deduction of administrative costs from fines and forfeitures before transmission to current school fund, was submitted to the people at a special election held on September 19, 1961. It was defeated by a vote of 20,780 for and 28,202 against.

House J.R. No. 3 (Laws 1969) proposed the repeal of this section but provided that the proposal would not be submitted to the people if the constitutional convention submitted a new constitution or an amendment to repeal this section. A proposed constitution was submitted to the voters and rejected on December 9, 1969.

House J.R. No. 3 (Laws 1970), which proposed the repeal of this section, was submitted to the people at the general election held on November 3, 1970. It was defeated by a vote of 60,531 for and 68,720 against.

Special election. — Laws 1971, ch. 308, §§ 1 and 2, provides that all constitutional amendments proposed by the thirtieth legislature be voted upon at a special election on the first Tuesday of November, 1971, unless otherwise specified, and appropriates $171,000 for election expenses.

An amendment proposed by H.J.R. No. 8 (Laws 1994), which would have deleted "and the income derived from the permanent school fund" following "congress" near the end of the section, was submitted to the people at the general election held on November 8, 1994. It was defeated by a vote of 187,216 for and 192,492 against.

Amendments considered in even-numbered years. — Eight amendments to the constitution were proposed by 1970 session of legislature although attorney general has stated that constitutional amendments may not be considered in even-numbered years (1969-70 Op. Att'y Gen. No. 69-151; 1965-66 Op. Att'y Gen. No. 65-212).

"Common school current fund" appropriate name. — Although this section provides that school funds shall be kept in the "current school fund," the "common school income (now current) fund" created by 19-1-17 NMSA 1978 shall be carried in the treasurer's books and funds shall be transferred to the "common school (current) fund." 1912-13 Op. Att'y Gen. 104.

County taxes for school maintenance valid. — Taxes levied in county for school maintenance under Laws 1917, ch. 105 (now repealed), were county taxes levied for a public purpose and did not violate this section. Raynolds v. Swope, 28 N.M. 141, 207 P. 581 (1922).

Section does away with previous statutory provisions on disposition of fines. — All fines must go into state treasury to credit of current school fund. This section does away with all previous statutory provisions on the subject. 1912-13 Op. Att'y Gen. 112.

Disposition of fines under game and fish law unconstitutional. — Laws 1912, ch. 85, § 49 (now repealed), which provided that fines collected for violations of act for protection of game and fish should be sent to state treasurer and by him set aside to the "game protection fund," and § 50 (now repealed), which provided that one-half of fines collected should go to state treasurer and be credited by him as aforesaid and the other half should go to persons instituting prosecution were unconstitutional insofar as they related to disposition of fines, being in direct conflict with this section requiring all fines collected under general laws to be credited to current school fund. 1915-16 Op. Att'y Gen. 14.

Medical licensing fines go into current school fund. — Fines collected under Laws 1907, ch. 34 (superseded by 61-6-1 NMSA 1978 et seq., relating to licensing of doctors and surgeons), go into current school fund by virtue of this section. 1912-13 Op. Att'y Gen. 195.

Proper disposition of fines levied by justices of the peace. — Justices of the peace should collect their own fines and report them to board of county commissioners who should see that such fines are paid to state treasurer for current school fund. 1937-38 Op. Att'y Gen. 137.

Costs not part of fine. — Section 53-1-10, 1953 Comp. (now repealed), relating to state game commission, is constitutional as it imposes costs in criminal cases which are not part of fine. 1931-32 Op. Att'y Gen. 101.

Payment made upon forfeiture of bond properly sent to state treasury. — See 1915-16 Op. Att'y Gen. 251.

Fines exempt from referendum. — Under this section all fines collected by the state go to maintenance of public schools, thus falling within exemption from referendum provided in N.M. Const., art. IV, § 1. 1955-56 Op. Att'y Gen. No. 6268.

Proper disposition of escheated property. — Net proceeds of property that comes to state by escheat go into current school fund, and after expiration of a year, which is given to permit claims or administration of estate, such proceeds should be remitted to state treasurer. 1937-38 Op. Att'y Gen. 173 (decided prior to 1986 amendment, inserting "unless otherwise provided by law").

Rental income from school lands goes into fund. — State superintendent of schools may no longer use income from rental, sale or lease of common school lands, but such funds must go into current school fund. 1912-13 Op. Att'y Gen. 209.

Delinquent taxes provision subject to this section. — Section 72-7-32, 1953 Comp. (now repealed), providing for 10% of delinquent taxes to be paid into tax commission fund, cannot divest taxes from levies for state current school fund, which must be used as provided in this section. 1939-40 Op. Att'y Gen. 44.

Constitution does not require distribution of current school funds on any certain day. 1961-62 Op. Att'y Gen. No. 61-19 (opinion rendered prior to 1971 amendment).

Time for opening and closing schools. — County boards of education may set time for opening and closing of schools provided they comply with provisions of this section and 73-13-13, 1953 Comp. (now repealed), requiring that school be maintained for at least seven months each year. 1949-50 Op. Att'y Gen. No. 5318 (opinion rendered prior to 1971 amendment).

Comparable provisions. — Idaho Const., art. IX, § 4.

Montana Const., art. X, §§ 2, 3.

Utah Const., art. X, §§ 3, 7.

Wyoming Const., art. VII, §§ 3, 5.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 68 Am. Jur. 2d Schools §§ 44, 45, 87 et seq., 92 to 97.

Injunction against enforcement of illegal school tax, upon joinder of several affected thereby, 32 A.L.R. 1273, 156 A.L.R. 319.

Recovery of tax illegally exacted, judgment in favor of taxpayer for, as subject to provisions of statute regarding substance and form, manner of collection or enforcement of judgment against political unit, 101 A.L.R. 800.

Common or public school, what is, within contemplation of constitutional or statutory provisions as to taxation, 113 A.L.R. 715.

Right of other governmental unit, or officers thereof, to compensation for collecting or disbursing special school taxes levied by school district, 114 A.L.R. 1098.

Kinds or types of contractual obligations within general terms "contracts," "obligations," etc., or specific terms "bonds," "notes," etc., in statute validating or legalizing obligations of public bodies, 128 A.L.R. 1411.

Rescission of vote authorizing school district bond issue, expenditure or tax, 68 A.L.R.2d 1041.

Amount of property which may be condemned for public school, 71 A.L.R.2d 1071.

Determination of school attendance, enrollment or pupil population for purpose of apportionment of funds, 80 A.L.R.2d 953.

78 C.J.S. Schools and School Districts §§ 10, 13; 78A C.J.S. Schools and School Districts § 558 et seq.

Sec. 5. [Compulsory school attendance.]

Every child of school age and of sufficient physical and mental ability shall be required to attend a public or other school during such period and for such time as may be prescribed by law.

ANNOTATIONS

Cross references. — For statutory provisions regarding compulsory school attendance, see 22-12-1 to 22-12-8 NMSA 1978.

Excuse from school to attend religious exercises requires specific legislation. — In order to excuse children from school for certain period of time to attend religious exercises away from school property, this section and 22-12-2 NMSA 1978 require that specific legislation be adopted. 1969 Op. Att'y Gen. No. 69-16.

No contractual right to education. — The right and privilege to a free public education does not give rise to a contractual relationship for which an individual may sue for breach of contract. Rubio ex rel. Rubio v. Carlsbad Mun. School Dist., 106 N.M. 446, 744 P.2d 919 (Ct. App. 1987).

Duty to protect children. — Compulsory attendance laws in no way restrain a child's liberty so as to render the child and his parents unable to care for the child's basic needs. Thus, the state does not incur under the Due Process Clause an affirmative duty to protect school children who attend state-run schools from deprivations by private actors merely on the basis of compulsory attendance laws. Maldonado v. Josey, 975 F.2d 727 (10th Cir. 1992), cert. denied, 507 U.S. 914, 113 S. Ct. 1266, 122 L. Ed. 2d 662 (1993).

Law reviews. — For comment, "Compulsory School Attendance - Who Directs the Education of a Child? State v. Edgington," see 14 N.M.L. Rev. 453 (1984).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 68 Am. Jur. 2d Schools §§ 228 to 239.

Extent of legislative power with respect to attendance, 39 A.L.R. 477, 53 A.L.R. 832.

Releasing public school pupils from attendance for purpose of receiving religious instruction, 2 A.L.R.2d 1371.

Religious beliefs of parents as defense to prosecution for failure to comply with compulsory education law, 3 A.L.R.2d 1401.

Applicability of compulsory attendance law covering children of a specified age, with respect to a child who has passed the anniversary date of such age, 73 A.L.R.2d 874.

What constitutes "private school" within statute making attendance at such a school compliance with compulsory school attendance law, 65 A.L.R.3d 1222.

AIDS infection as affecting right to attend public school, 60 A.L.R.4th 15.

79 C.J.S. Schools and School Districts § 463.

Sec. 6. [Public education department; public education commission.] (2004 AARS)

A.There is hereby created a “public education department” and a “public education commission” that shall have such powers and duties as provided by law. The department shall be a cabinet department headed by a secretary of public education who is a qualified, experienced educator who shall be appointed by the governor and confirmed by the senate.

B.Ten members of the public education commission shall be elected for staggered terms of four years as provided by law. Commission members shall be residents of the public education commission district from which they are elected. Change of residence of a commission member to a place outside the district from which he was elected shall automatically terminate the term of that member.

C.The governor shall fill vacancies on the commission by appointment of a resident from the district in which the vacancy occurs until the next regular election for membership on the commission.

D.The secretary of public education shall have administrative and regulatory powers and duties, including all functions relating to the distribution of school funds and financial accounting for the public schools to be performed as provided by law.

E.The elected members of the 2003 state board of education shall constitute the public education commission, if this amendment is approved, until their terms expire and the districts from which the state board of education were elected shall constitute the state public education commission districts until changed by law. (As amended November 4, 1958, effective January 1, 1959, November 4, 1986, and September 23, 2003.)

ANNOTATIONS

I. GENERAL CONSIDERATION.

Cross references. — For 2001 Educational Redistricting Act, see 22-3-54.1 NMSA 1978.

The 1958 amendment, which was proposed by S.J.R. No. 3 (Laws 1957) and adopted at the general election held on November 4, 1958, with a vote of 48,884 for and 41,795 against, completely rewrote this section. Prior to amendment the section read: "A state board of education is hereby created, to consist of seven members. It shall have the control, management and direction of all public schools, under such regulations as may be provided by law. The governor and the state superintendent of public instruction shall be ex officio members of said board and the remaining five members shall be appointed by the governor, by and with the consent of the senate; and shall include the head of some state educational institution, a county superintendent of schools, and one other person actually connected with educational work. The legislature may provide for district or other school officers, subordinate to said board."

The 1986 amendment, which was proposed by H.J.R. No. 4 (Laws 1986) and adopted at the general election held on November 4, 1986, by a vote of 142,909 for and 126,928 against, repealed existing Section 6 relating to the state department of public education and the state board of education and adopted a new Section 6.

The 2003 amendment, which was proposed by S.J.R. Nos. 2, 5, 12, and 21 (Laws 2003) and adopted at the special election held September 23, 2003, by a vote of 101,542 for and 83,155 against, rewrote Subsection A, which had provided for the creation of a state department of public education and a state board of education and the appointment of a superintendent of public instruction by the board, substituted references to the public education commission for references to the state board of education throughout and deleted “who shall be state officers” preceding “shall be elected” in the first sentence of Subsection B, deleted former Subsection C, which had provided for the nomination by the senate and appointment by the governor of five members of the state board of education for staggered four-year terms, redesignated former Subsection D as present Subsection C and substituted “commission” for “board” twice in that subsection, deleted former Subsection E, which had provided for the transfer to the state department of public education of functions relating to distribution of funds and financial accounting for the public schools, and added present Subsections D and E.

Appropriations. — Laws 2003, ch. 154, § 3, June 20, 2003, provides that nine hundred thousand dollars ($900,000) is appropriated from the general fund to the secretary of state for expenditure in fiscal years 2003 and 2004 to pay the costs of the special election provided for in Section 1 of this act. Any unexpended or unencumbered balance remaining at the end of fiscal year 2004 shall revert to the general fund.

Compiler's notes. — An amendment to this section proposed by S.J.R. No. 20 (Laws 1975), which would have repealed this section and adopted a new Section 6 providing for a state board of education of nine members to be appointed by the governor with the consent of the senate, the members to be appointed so as to give geographic representation to all areas of the state, prescribing grounds and methods of removing members and granting the board specified powers and duties, to be exercised as provided by law, including the requirement that budgets and expenditures of funds by public schools be controlled by the board, was submitted to the people at the general election held on November 2, 1976. It was defeated by a vote of 94,258 for and 157,986 against.

For delayed repeals contingent on adoption of the September 23, 2003 amendment to Article 12, Section 6 of the constitution of New Mexico, see Articles 1, 2, 13, 13A and 15 of Chapter 22 NMSA 1978.

Implementation of Paragraph E. — The department of education may implement the provisions contained in Subsection E notwithstanding the lack of legislation transferring the powers now vested in the office of education to the department of education. 1987 Op. Att'y Gen. No. 87-36.

Proper meeting place. — Constitution (art. XXI, § 6) necessitates that state board of education maintain its permanent office, books, records and files in Santa Fe at the state capital, and the board must in most instances hold its regular meetings at the state capitol. Nonetheless, pursuant to its constitutional and statutory authority to supervise the public schools, the board may from time to time hold meetings in various parts of the state to study, consider and decide matters pertinent to schools in the area where the meeting is held. 1963-64 Op. Att'y Gen. No. 64-21 (opinion rendered under 73-1-1 and 73-1-7, 1953 Comp., now repealed).

Comparable provisions. — Idaho Const., art. IX, § 2.

Montana Const., art. X, § 9.

Utah Const., art. X, § 3.

Wyoming Const., art. VII, § 14.

Law reviews. — For article, "Constitutional Limitations on the Exercise of Judicial Functions by Administrative Agencies," see 7 Nat. Resources J. 599 (1967).

For article, "An Administrative Procedure Act for New Mexico," see 8 Nat. Resources J. 114 (1968).

For student symposium, "Constitutional Revision - The Executive Branch - Long or Short Ballot?," see 9 Nat. Resources J. 430 (1969).

For article, "Survey of New Mexico Law, 1979-80: Administrative Law," see 11 N.M.L. Rev. 1 (1981).

For annual survey of New Mexico law relating to administrative law, see 12 N.M.L. Rev. 1 (1982).

For 1984-88 survey of New Mexico administrative law, 19 N.M.L. Rev. 575 (1990).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 68 Am. Jur. 2d Schools §§ 52 to 59.

Extent of power of school district to provide for the comfort and convenience of teachers and pupils, 7 A.L.R. 791, 52 A.L.R. 249.

Dismissal or suspension of pupil, personal liability of school authorities for, 42 A.L.R. 763.

Power of school board to make appointment of, or contract of employment with, teacher or superintendent of school for period beyond its own term, 70 A.L.R. 802, 149 A.L.R. 343.

Invalid public money obligation, personal liability of public officers to holders of, 87 A.L.R. 273.

Power of public school authorities to set minimum or maximum age requirements for pupils in absence of specific statutory authority, 78 A.L.R.2d 1021.

Tort liability of public schools and institutions of higher learning, 86 A.L.R.2d 489, 33 A.L.R.3d 703, 34 A.L.R.3d 1166, 34 A.L.R.3d 1210, 35 A.L.R.3d 725, 35 A.L.R.3d 758, 36 A.L.R.3d 361, 37 A.L.R.3d 712, 37 A.L.R.3d 738, 38 A.L.R.3d 830, 23 A.L.R.5th 1.

Student's right to compel school officials to issue degree diploma, or the like, 11 A.L.R.4th 1182.

Applicability and application of § 2 of Voting Rights Act of 1965 (42 USCS § 1973) to members of school board, 105 A.L.R. Fed. 254.

78 C.J.S. Schools and School Districts §§ 7, 81 et seq.

II. POWERS OF BOARD.

Section not self-executing. — This section requiring state board of education to determine public school policy and to have control, management and direction of all public schools, pursuant to authority and powers provided by law, is not self-executing. Amador v. State Bd. of Educ., 80 N.M. 336, 455 P.2d 840 (1969).

Board has control, management and direction of public schools, but only as provided by law. Fort Sumner Mun. School Bd. v. Parsons, 82 N.M. 610, 485 P.2d 366 (Ct. App.), cert. denied, 82 N.M. 601, 485 P.2d 357 (1971).

Legislature determines scope of board's authority. — The authority granted the state board for "control, management and direction" of all public schools must be specifically defined by the legislature. It necessarily follows that legislature may also divest board of duties previously defined since the power and authority of board may be exercised only as "provided by law." Thus legislature may provide for repeal of 22-2-2 NMSA 1978, delegating duties of certification to the board. 1977 Op. Att'y Gen. No. 77-6.

But board has judicial powers. — It was within power of framers of constitution to confer upon state board of education such limited judicial powers as they deemed proper. McCormick v. Board of Educ., 58 N.M. 648, 274 P.2d 299 (1954).

Such judicial powers as have been conferred upon state board by legislature pursuant to 55-101, 1941 Comp. (now repealed), fall clearly within constitutional authority conferred upon state board for control, management and direction of public schools. McCormick v. Board of Educ., 58 N.M. 648, 274 P.2d 299 (1954).

And its decisions are conclusive. — Within limited area prescribed by this section decisions of board are final and conclusive as between the parties and are not subject to review. McCormick v. Board of Educ., 58 N.M. 648, 274 P.2d 299 (1954).

It is not province of appellate court to retry case brought before it on appeal from state board. Wickersham v. State Bd. of Educ., 81 N.M. 188, 464 P.2d 918 (Ct. App. 1970).

Courts should not inquire into policy or justness of legislation. — Procedure for deciding whether to reemploy tenured teacher is provided by statute (former 22-10-15, former 22-10-20, 22-10-21 NMSA 1978), and it is not the appellate court's function to inquire into policy or justness of acts of legislature. Wickersham v. State Bd. of Educ., 81 N.M. 188, 464 P.2d 918 (Ct. App. 1970).

Deciding whether or not an administrator is fit to perform his duties is a question of policy, and the appellate court will not alter the state board's decision unless the court is convinced it is unreasonable, not supported by substantial evidence or not in accordance with law. Board of Educ. v. Jennings, 98 N.M. 602, 651 P.2d 1037 (Ct. App. 1982).

But may evaluate board's action by standard of reasonableness. — Courts have jurisdiction of purely legal questions which may arise in connection with teacher tenure statutes (22-10-14, former 22-10-15 NMSA 1978), and other educational acts, such as question here presented as to whether or not appellee had tenure; and action of state board of education would be subject to review on ground that it was wholly arbitrary, unlawful, unreasonable or capricious. McCormick v. Board of Educ., 58 N.M. 648, 274 P.2d 299 (1954).

Appellate court review is limited to determination of whether constitutional body acted arbitrarily, unreasonably, unlawfully or capriciously. Wickersham v. State Bd. of Educ., 81 N.M. 188, 464 P.2d 918 (Ct. App. 1970).

Duty of board to establish routes from rural districts to high schools. — If necessity exists for establishment of routes from rural districts to high schools in municipal or independent school district, which would serve only rural district, county board of education, with approval of state board, would have right to establish such routes. Efficiency and convenience may require that such routes be established to serve both local districts and municipal or independent school district, and in such case boards of county and municipal or independent district to be served have right to establish them with approval of state board. But if boards could not agree, state board, under its authority and responsibility created by constitution, must establish routes when satisfactory ones are not proposed by August 15 of each year. 1939-40 Op. Att'y Gen. 109.

And to approve proper high school budget estimates. — It is mandatory on state board of education and superintendent of public instruction to approve proper budget estimates for high schools. 1931-32 Op. Att'y Gen. 158 (decided prior to 1986 amendment, adding Subsection E).

But power to hire and fire in municipal boards. — Power to employ and discharge teachers and other school employees was reposed in municipal boards of education. Bourne v. Board of Educ., 46 N.M. 310, 128 P.2d 733 (1942).

State board only has jurisdiction over teacher where teacher appeals to board from adverse ruling by local board of education. Amador v. State Bd. of Educ., 80 N.M. 336, 455 P.2d 840 (1969).

Affair may be found insufficient cause for firing. — It is within the province of the state board to decide that a private affair between consenting adults, an assistant principal and a school secretary is not "good and just cause" to fire an employee. Board of Educ. v. Jennings, 98 N.M. 602, 651 P.2d 1037 (Ct. App. 1982).

Board can ban smoking. — The state board of education can choose to ban smoking for both adults and minors in public school buildings and campuses since the New Mexico Constitution grants the board broad authority to determine public school policy. 1994 Op. Att'y Gen. No. 94-03.

Board without authority to manage private schools. — Legislature has constitutional authority to invest state board with power to approve courses of instruction in private schools, but 22-12-2 NMSA 1978 does not extend to board authority to supervise or exercise control or management over private schools. Santa Fe Community School v. State Bd. of Educ., 85 N.M. 783, 518 P.2d 272 (1974).

Board lacks exclusive power to remove district board members. — State board did not have exclusive power to remove member of district board of education. State ex rel. Hannah v. Armijo, 37 N.M. 423, 24 P.2d 274 (1933).

Board action not within purpose of its authority. — Suspension of teacher for incompatibility with membership on the state board of education does not fall within purpose of insuring high quality of public instruction. Amador v. State Bd. of Educ., 80 N.M. 336, 455 P.2d 840 (1969).

Teacher's salary cannot be based upon residence within district. — No school board may lawfully increase or decrease a teacher's salary solely upon basis of residence or nonresidence within school district. 1963-64 Op. Att'y Gen. No. 64-85.

III. MEMBERSHIP OF BOARD.

Members of state board of education are state officers and not local officers. State ex rel. Apodaca v. State Bd. of Educ., 82 N.M. 558, 484 P.2d 1268 (1971).

Eligibility of school personnel. — An assistant superintendent employed by the Santa Fe school district may also serve as an elected member of the state board of education so long as the duties of membership on the State Board do not physically interfere with the duties of the assistant superintendent during the ordinary working hours of that position and the two positions are not otherwise incompatible. 1992 Op. Att'y Gen. No. 92-04.

No right to elect board members from district where child attends school. — Although nothing in constitution or statutes prohibits school district from crossing either county or judicial district boundaries, and there is no requirement that children attend public schools within judicial district where they reside, yet there is nothing in N.M. Const., art. VII, §§ 1 and 3, which suggests that there is conferred on a qualified elector the right to cast his vote for a candidate for state board of education from judicial district in which elector's child attends public school. Rather, his right is to vote for the candidate of his choice, to be elected from the judicial district in which he has voting residence. State ex rel. Apodaca v. State Bd. of Educ., 82 N.M. 558, 484 P.2d 1268 (1971).

State board member appealing from local board action. — If teacher who is also member of state board should appeal from action of local board, the teacher would simply refrain from acting as member of the board in his case, just as would a member

of any other trade or profession who appealed to board of which he was member. Amador v. State Bd. of Educ., 80 N.M. 336, 455 P.2d 840 (1969).

Board member's right to vote. — Ex-officio officers and members of state boards have right to vote unless that right is specifically denied them by constitution or statute. 1951-52 Op. Att'y Gen. No. 5408.

Sec. 7. [Investment of permanent school fund.] (2004 AARS)

A.As used in this section, “fund” means the permanent school fund described in Section 2 of this article and all other permanent funds derived from lands granted or confirmed to the state by the act of congress of June 20, 1910, entitled “An act to enable the people of New Mexico to form a constitution and state government and be admitted into the union on an equal footing with the original states.”

B.The fund shall be invested by the state investment officer in accordance with policy regulations promulgated by the state investment council.

C.In making investments, the state investment officer, under the supervision of the state investment council, shall exercise the judgment and care under the circumstances then prevailing that businessmen of ordinary prudence, discretion and intelligence exercise in the management of their own affairs not in regard to speculation but in regard to the permanent disposition of their funds, considering the probable income as well as the probable safety of their capital.

D.The legislature may establish criteria for investing the fund if the criteria are enacted by a three-fourths vote of the members elected to each house, but investment of the fund is subject to the following restrictions:

(1)not more than sixty-five percent of the book value of the fund shall be invested at any given time in corporate stocks;

(2)not more than ten percent of the voting stock of a corporation shall be held;

(3)stocks eligible for purchase shall be restricted to those stocks of businesses listed upon a national stock exchange or included in a nationally recognized list of stocks; and

(4)not more than fifteen percent of the book value of the fund may be invested in international securities at any single time.

E.All additions to the fund and all earnings, including interest, dividends and capital gains from investment of the fund shall be credited to the fund.

F.Except as provided in Subsection G of this section, the annual distributions from the fund shall be five percent of the average of the year-end market values of the fund for the immediately preceding five calendar years.

G.In addition to the annual distribution made pursuant to Subsection F of this section, unless suspended pursuant to Subsection H of this section, an additional annual distribution shall be made pursuant to the following schedule; provided that no distribution shall be made pursuant to the provisions of this subsection in any fiscal year if the average of the year-end market values of the fund for the immediately preceding five calendar years is less than five billion eight hundred million dollars ($5,800,000,000):

(1)in fiscal years 2005 through 2012, an amount equal to eight-tenths percent of the average of the year-end market values of the fund for the immediately preceding five calendar years; provided that any additional distribution from the permanent school fund pursuant to this paragraph shall be used to implement and maintain educational reforms as provided by law; and

(2)in fiscal years 2013 through 2016, an amount equal to one-half percent of the average of the year-end market values of the fund for the immediately preceding five calendar years; provided that any additional distribution from the permanent school fund pursuant to this paragraph shall be used to implement and maintain educational reforms as provided by law.

H.The legislature, by a three-fifths' vote of the members elected to each house, may suspend any additional distribution provided for in Subsection G of this section. (As amended November 4, 1958, September 23, 1965, November 6, 1990, November 5, 1996, and September 23, 2003.)

ANNOTATIONS

I. GENERAL CONSIDERATION.

Cross references. — For statutes establishing state investment council, see 6-8-1 to 6-8-16 NMSA 1978.

For powers and duties of state investment officer, see 6-8-7 NMSA 1978.

For classes of securities and investments allowed for money made available for investment in excess of one year, see 6-8-9 NMSA 1978.

The 1958 amendment, which was proposed by S.J.R. No. 12 (Laws 1957) and adopted at the general election held on November 4, 1958, with a vote of 56,877 for and 26,332 against, completely rewrote the section, which prior to amendment had read: "The principal of the permanent school fund shall be invested in the bonds of the state or territory of New Mexico, or of any county, city, town, board of education or school district therein. The legislature may by three-fourths vote of the members elected to each house provide that said funds may be invested in other interest-bearing securities. All bonds or other securities in which any portion of the school fund shall be invested must

be first approved by the governor, attorney general and secretary of state. All losses from such funds, however occurring, shall be reimbursed by the state."

The 1965 amendment, which was proposed by H.J.R. No. 12 (Laws 1965) and adopted at a special election held on September 28, 1965, by a vote of 27,687 for and 22,502 against, designated the former second paragraph as the present third paragraph, increased therein the maximum investment in corporate stocks and bonds from 25% to 50% and inserted the present second paragraph.

The 1989 amendment, which was proposed by S.J.R. 12 (Laws 1989) and adopted at the general election held on November 6, 1990, by a vote of 189,456 for and 125,779 against, deleted the former last sentence of the first paragraph, which read "All losses from such interest-bearing notes or securities which have definite maturity dates shall be reimbursed by the state" and deleted the former second paragraph relating to sale of interest-bearing notes or securities by the state investment officer at less than their original acquisition cost under specified circumstances.

The 1996 amendment, which was proposed by S.J.R. No. 2 (Laws 1996) and adopted at the general election held November 5, 1996, by a vote of 307,442 for and 153,021 against, added Subsections A, D, E, and F and rewrote the remainder of the section. Section 6 of S.J.R. No. 2 (Laws 1996) provides that this amendment shall not become effective without the consent of the United States congress. The United States Congress approved the amendment in P.L. 105-37, 111 Stat. 1113, the New Mexico Statehood and Enabling Act Amendments of 1997, approved August 7, 1997.

The 2003 amendment, which was proposed by S.J.R. Nos. 6 (Laws 2003) and adopted at the special election held September 23, 2003, by a vote of 92,198 for and 92,003 against, rewrote Subsection F, which had provided that annual distributions from the fund were to increase by 2% per year until the annual distributions reached a maximum value of 4.7% of the average of the year-end market values of the fund for the preceding five calendar years, and added Subsections G and H.

Compiler's notes. — An amendment to this section, proposed by S.J.R. No. 11 (Laws 1990), which would have deleted from the end the proviso beginning "and provided further" was submitted to the people at the general election held on November 6, 1990. It was defeated by a vote of 137,565 for and 169,859 against.

An amendment proposed by H.J.R. No. 8 (Laws 1994), which would have rewritten this section to require earnings of the fund to be deposited to the credit of the fund and provide for limited distribution from the fund, was submitted to the people at the general election held on November 8, 1994. It was defeated by a vote of 187,216 for and 192,492 against.

Comparable provisions. — Idaho Const., art. IX, § 3.

Montana Const., art. X, § 3.

Utah Const., art. X, § 7.

Wyoming Const., art. VII, § 6.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 68 Am. Jur. 2d Schools § 89.

Particular purposes within contemplation of statute authorizing issuance of bonds or use of funds by school district for special purposes, 124 A.L.R. 883.

Stock of private corporation, constitutional or statutory provision prohibiting school districts from acquiring or subscribing to, 152 A.L.R. 495.

78 C.J.S. Schools and School Districts § 12.

II. INVESTMENTS GENERALLY.

Investment officer to exercise sovereign power. — Constitution contemplates that state investment officer, in determining investments to be made, will be exercising portion of sovereign power of state. 1957-58 Op. Att'y Gen. No. 58-10.

Constitution and statutes vary in concepts of investment council. — The entire concept of the activities of the investment council, as reflected in act establishing council (6-8-1 to 6-8-16 NMSA 1978) appears at variance with concept reflected in this section. The constitution apparently visualizes the independent exercise of delegated sovereign power by the investment council acting as public officers. The legislation apparently reduces the function of the council to that of an advisory group. 1957-58 Op. Att'y Gen. No. 58-10.

Investment officer may use service of investment counselor or other sources of advice to aid in making an investment policy recommendation to investment council. 1959-60 Op. Att'y Gen. No. 59-21.

Council regulations likely to restrict scope of investments. — This section provides that investment council may prescribe policy regulations with respect to investment of permanent funds. Such regulations, in prescribing classifications of permissible investment, will necessarily restrict scope of investment authority to extent that by silence they exclude investments which might otherwise be permissible under the constitution. 1957-58 Op. Att'y Gen. No. 58-10.

Fund not "permanent" as contemplated in investment of permanent school fund. — The severance tax permanent fund is not a permanent fund as contemplated by this section. The severance tax fund and the various land grant permanent funds are fundamentally different. 1977 Op. Att'y Gen. No. 77-10.

Debentures to anticipate proceeds of gasoline excise tax proper investment. — Debentures to anticipate proceeds of gasoline excise tax, authorized by Laws 1927, ch.

20 (now repealed), were eligible as an investment for permanent school fund, by virtue of 11-2-13, 1953 Comp. (now repealed), even though the provisions of Laws 1927, ch. 20, to render them so eligible failed of passage by vote of three-fourths of members elected to each house, as required by this section. State v. Graham, 32 N.M. 485, 259 P. 623 (1927).

Bank deposit not proper. — This provision expressly limits the class of securities in which permanent school fund might be invested, until the legislature should otherwise provide. Joint R. No. 14 (Laws 1913), insofar as it required deposit of those funds in banks, was beyond legislative power and void, for such deposits were investments. State v. Marron, 18 N.M. 426, 137 P. 845 (1913).

Investment in mutual funds or investment trusts. — Investment by the state treasurer in a mutual fund acting as an investment conduit (i.e., an open-end mutual fund or a unit investment trust meeting the requirements of Subsection O(1) of 6-10-10 NMSA 1978) is constitutional. 2000 Op. Att'y Gen. No. 00-03.

Businesses "incorporated within the United States" construed. — The term "incorporated" as used in Article XII, § 7 does not have the same meaning as the statutory clause, "organized and operating"; a company "organized and operating within the United States" is not also "incorporated within the United States", if it was incorporated outside of the United States. State ex rel. Udall v. Colonial Penn Ins. Co., 112 N.M. 123, 812 P.2d 777 (1991).

Purchase of stock in foreign corporation. — The purchase by the state investment officer of stock in a corporation formed and made a legal entity in the Netherlands Antilles violated this section. State ex rel. Udall v. Colonial Penn Ins. Co., 112 N.M. 123, 812 P.2d 777 (1991).

Duty of investment advisor. — A professional services contract, whereby an investment advisor would advise the state investment council and officer regarding investment of the equity portion of the state permanent fund and severance tax fund, obligated the investment advisor to provide advice consistent with this section and to recommend only stock of companies technically incorporated within the United States. To interpret the contract otherwise would not be reasonable and potentially would place the contract in jeopardy of being declared unenforceable as violative of public policy. State ex rel. Udall v. Colonial Penn Ins. Co., 112 N.M. 123, 812 P.2d 777 (1991).

III. REIMBURSEMENT OF LOSSES.

Purpose of loss reimbursement provision. — Loss provision of constitution and detailed statutory provisions under which council operates (6-8-1 to 6-8-16 NMSA 1978) were conceived out of jealous regard by constitutional framers and members of legislature for the safekeeping of permanent funds held in trust for school children. 1961-62 Op. Att'y Gen. No. 62-46.

Reimbursement requirement not self-executing. — This section is not self-executing insofar as loss requirement is concerned. 1961-62 Op. Att'y Gen. No. 62-46.

"Loss" in this section refers to entire sale or transaction rather than to individual securities or to securities of a corporation or to securities of a certain type. 1971 Op. Att'y Gen. No. 71-113.

Exchange is distinct from separate sale and purchase. — "Exchange" is a term of art of precise import, meaning the giving of one thing for another and excluding transactions into which money enters either as consideration or as a basis of measure. 1961-62 Op. Att'y Gen. No. 62-46.

Separate transactions will not be construed together. — Placing together two money transactions so as to create a fiction that no loss occurred from the sale and purchase would be opening the door to eventual nullification of the constitutional requirement of loss reimbursement. A subsequent transaction cannot affect the fact of loss in any single transaction. 1961-62 Op. Att'y Gen. No. 62-46.

Effect of 1965 amendment on offsetting gains and losses. — See same heading in notes under analysis line IV.

IV. SALE AT LOSS WITH REINVESTMENT.

"Capital loss" means the difference between the original acquisition cost of bonds to be sold and the proceeds of sale. 1968 Op. Att'y Gen. No. 68-3.

Loss determined by sale transaction alone. — Whether capital loss will be realized and amount of the loss must be determined by considering sale of the bonds alone, without reference to higher-yielding bonds which will subsequently be purchased. 1968 Op. Att'y Gen. No. 68-3.

"Increased interest income" means annual income rather than total income. 1968 Op. Att'y Gen. No. 68-62.

Loss must be restored from income accruing from new investment in insured loans, and that income accruing from investment of recoveries of principal cannot be used to restore capital loss. 1968 Op. Att'y Gen. No. 68-62.

Loss must be amortized from portion of the increased interest income only. 1968 Op. Att'y Gen. No. 68-62.

New investment must yield increase in income after capital loss is restored to corpus of permanent fund. 1968 Op. Att'y Gen. No. 68-62.

Effect of 1965 amendment on offsetting gains and losses. — Since 1965 amendment to this section, the investment council has not had power to sell common

stocks realizing a capital gain and to use such gain to offset loss taken on sale of fixed income security. 1968 Op. Att'y Gen. No. 68-116. But see notes under analysis line III.

Sec. 8. [Teachers to learn English and Spanish.]

The legislature shall provide for the training of teachers in the normal schools or otherwise so that they may become proficient in both the English and Spanish languages, to qualify them to teach Spanish-speaking pupils and students in the public schools and educational institutions of the state, and shall provide proper means and methods to facilitate the teaching of the English language and other branches of learning to such pupils and students.

ANNOTATIONS

Meaning of section. — This section does not require that all teachers in the state be proficient in both English and Spanish or that all teachers who teach Spanish-speaking pupils be proficient in both English and Spanish. The clear intent is to teach English to Spanish-speaking students and to assure that the Spanish and English languages will always be available to prospective teachers in the teachers' colleges and that Spanish-speaking pupils will be provided the means and methods to learn the English language as well as other subjects of learning. 1968 Op. Att'y Gen. No. 68-15.

This section is a mandate to the legislature to provide teachers proficient in both English and Spanish to teach Spanish-speaking pupils; it does not require all teachers to have this proficiency. 1971 Op. Att'y Gen. No. 71-102.

Law reviews. — For student symposium, "Constitutional Revision - Constitutional Amendment Process," see 9 Nat. Resources J. 422 (1969).

For comment, "Education and the Spanish-Speaking - An Attorney General's Opinion on Article XII, Section 8 of the New Mexico Constitution," see 3 N.M. L. Rev. 364 (1973).

For note, "Bilingual Education: Serna v. Portales Municipal Schools," see 5 N.M. L. Rev. 321 (1975).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 68 Am. Jur. 2d Schools §§ 298, 299.

78 C.J.S. Schools and School Districts § 264; 78A C.J.S. Schools and School Districts §§ 782, 783.

Sec. 9. [Religious tests in schools.]

No religious test shall ever be required as a condition of admission into the public schools or any educational institution of this state, either as a teacher or student, and no

teacher or student of such school or institution shall ever be required to attend or participate in any religious service whatsoever.

ANNOTATIONS

Cross references. — For provisions guaranteeing freedom of religion, see N.M. Const., art. II, § 11, and art. XXI, § 1.

As to excusing students from school for religious instruction, see 22-12-3 NMSA 1978.

Sister teaching in public school entitled to salary. — Under this section and N.M. Const., art. II, § 11, there can be nothing in the law prohibiting payment of Sisters who are qualified and employed to teach in public schools. Such a law would result in making their religious life or religious vows a test of their admission as teachers to our public schools contrary to the constitution. 1939-40 Op. Att'y Gen. 35.

There is no objection to reading portions of Bible without comment in public school assembly. 1921-22 Op. Att'y Gen. 150.

Court may properly enjoin dissemination of sectarian literature in schoolrooms. Miller v. Cooper, 56 N.M. 355, 244 P.2d 520 (1952).

Comparable provisions. — Idaho Const., art. IX, § 6.

Montana Const., art. X, § 7.

Utah Const., art. X, § 8.

Wyoming Const., art. VII, § 12.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 68 Am. Jur. 2d Schools §§ 298, 299, 337 to 339, 349 to 358.

Sectarianism in schools, 5 A.L.R. 866, 141 A.L.R. 1144, 45 A.L.R.2d 742.

Power of school authorities to provide course of Bible study, 70 A.L.R. 1314.

Inclusion of period of service in sectarian school in determining public schoolteachers' seniority, salary or retirement benefits, as violation of constitutional separation of church and state, 2 A.L.R.2d 1033.

Releasing public school pupils from attendance for purpose of receiving religious instruction, 2 A.L.R.2d 1371.

Wearing of religious garb by public schoolteachers, 60 A.L.R.2d 300.

Use of public school premises for religious purposes during nonschool time, 79 A.L.R.2d 1148.

Public payment of tuition, scholarship or the like, to sectarian school, 81 A.L.R.2d 1309.

Furnishing free textbooks to sectarian school or student therein, 93 A.L.R.2d 986.

Constitutionality of regulation or policy governing prayer, meditation, or "moment of silence" in public schools, 110 A.L.R. Fed. 211.

Bible distribution or use in public schools - modern cases, 111 A.L.R. Fed. 121.

79 C.J.S. Schools and School Districts § 447.

Sec. 10. [Educational rights of children of Spanish descent.]

Children of Spanish descent in the state of New Mexico shall never be denied the right and privilege of admission and attendance in the public schools or other public educational institutions of the state, and they shall never be classed in separate schools, but shall forever enjoy perfect equality with other children in all public schools and educational institutions of the state, and the legislature shall provide penalties for the violation of this section. This section shall never be amended except upon a vote of the people of this state, in an election at which at least three-fourths of the electors voting in the whole state and at least two-thirds of those voting in each county in the state shall vote for such amendment.

ANNOTATIONS

Two-thirds vote in each county required for amendment of section. — Like provisions in N.M. Const., art. VII, § 3, and art. XIX, § 1, were held to violate the "one man, one vote" requirement of the federal constitution, in State ex rel. Witt v. State Canvassing Bd., 78 N.M. 682, 437 P.2d 143 (1968). The court did not rule on the validity of the two-thirds requirement in this section.

"Electors voting" construed. — Provision in N.M. Const., art. VII, § 3, requiring favorable vote of "at least three-fourths of the electors voting in the whole state" means three-fourths of all those voting on that particular proposition, even though they might constitute less than three-fourths of all those actually voting at election. State ex rel. Witt v. State Canvassing Bd., 78 N.M. 682, 437 P.2d 143 (1968).

Law reviews. — For student symposium, "Constitutional Revision - Constitutional Amendment Process," see 9 Nat. Resources J. 422 (1969).

For comment, "Education and the Spanish-Speaking - An Attorney General's Opinion on Article XII, Section 8 of the New Mexico Constitution," see 3 N.M. L. Rev. 364 (1973).

For note, "Bilingual Education: Serna v. Portales Municipal Schools," see 5 N.M. L. Rev. 321 (1975).

For comment, "An Equal Protection Challenge to First Degree Depraved Mind Murder Under the New Mexico Constitution," see 19 N.M.L. Rev. 511 (1989).

For note, “Indirect Funding of Sectarian Schools: A Discussion of the Constitutionality of State School Voucher Programs Under Federal and New Mexico Law After Zelman v. Simmons-Harris,” see 34 N.M.L. Rev. 194 (2004).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 15 Am. Jur. 2d Civil Rights §§ 61 to 68, 79.

De facto segregation of races in public schools, 11 A.L.R.3d 780.

79 C.J.S. Schools and School Districts § 447.

Sec. 11. [State educational institutions.] (2004)

The university of New Mexico, at Albuquerque; the New Mexico state university, near Las Cruces, formerly known as New Mexico college of agriculture and mechanic arts; the New Mexico highlands university, at Las Vegas, formerly known as New Mexico normal university; the western New Mexico university, at Silver City, formerly known as New Mexico western college and New Mexico normal school; the eastern New Mexico university, at Portales, formerly known as eastern New Mexico normal school; the New Mexico institute of mining and technology, at Socorro, formerly known as New Mexico school of mines; the New Mexico military institute, at Roswell, formerly known as New Mexico military institute; the New Mexico school for the blind and visually impaired, at Alamogordo, formerly known as New Mexico school for the visually handicapped; the New Mexico school for the deaf, at Santa Fe, formerly known as New Mexico asylum for the deaf and dumb; the northern New Mexico state school, at El Rito, formerly known as Spanish-American school; are hereby confirmed as state educational institutions. All lands, together with the natural products thereof and the money proceeds of any of the lands and products, held in trust for the institutions, respectively, under their former names, and all properties heretofore granted to, or owned by, or which may hereafter be granted or conveyed to, the institutions respectively, under their former names, shall, in like manner as heretofore, be held in trust for, or owned by or be considered granted to, the institutions individually under their names as hereinabove adopted and confirmed. The appropriations made and which may hereafter be made to the state by the United States for agriculture and mechanical colleges and experiment stations in connection therewith shall be paid to the New Mexico state university, formerly known as New Mexico college of agriculture and mechanic arts. (As repealed and reenacted November 8, 1960; as amended November 3, 1964.)

ANNOTATIONS

Cross references. — As to severance tax bond acts for state educational institutions, see Appendix following ch. 7, art. 27 NMSA 1978, Severance Tax Bonding Act.

The 1960 amendment, which was proposed by H.J.R. No. 11 (Laws 1959) and adopted at the general election held on November 8, 1960, with a vote of 74,256 for and 44,823 against, repealed this section and enacted a new Section 11, which changed the names of several institutions and added the present second sentence.

The 1964 amendment, which was proposed by H.J.R. No. 11 (Laws 1963) and adopted at the general election held on November 3, 1964, by a vote of 89,084 for and 31,788 against, changed the name of New Mexico western college to western New Mexico university.

The 2004 amendment, which was proposed by H.J.R. 5 (Laws 2004) and adopted at a general election held November 2, 2004, by a vote of 462,144 for and 212,297 against, changed the name of the New Mexico school for the visually handicapped to the New Mexico school for the blind and visually impaired.

State owns state educational institutions. — By this section, state was made owner of state educational institutions. State v. Regents of Univ. of N.M., 32 N.M. 428, 258 P. 571 (1927) (decided before 1960 amendment).

Governmental immunity applies to state educational institutions. — Suit based upon tort against state agency (such as regents of state college), demanding judgment only to extent that such agency is protected by liability insurance, violates rule of governmental immunity from suit. Livingston v. Regents of N.M. College of Agrl. & Mechanic Arts, 64 N.M. 306, 328 P.2d 78 (1958).

State institution is not subject to action in damages for negligence of its employees. Livingston v. Regents of N.M. College of Agrl. & Mechanic Arts, 64 N.M. 306, 328 P.2d 78 (1958).

The university of New Mexico is a state agency, and, as such, the university, its regents and its admissions committee are entitled to Eleventh Amendment immunity, as are its employees acting in their official capacities. Buchwald v. University of N.M. Sch. of Medicine, 159 F.3d 487 (10th Cir. 1998).

Action against regents barred by eleventh amendment immunity. — A student at the New Mexico school of mines (now New Mexico institute of mining and technology) was barred from bringing an action in the United States district court for damages for personal injuries alleged to have resulted from the negligence of the school's board of regents in the operation of the school because the action was in effect against the state of New Mexico, and U.S. Const., amend. XI, barred federal jurisdiction. Korgich v. Regents of N.M. Sch. of Mines, 582 F.2d 549 (10th Cir. 1978).

State legislator prohibited from employment at state educational institution. — Member of state legislature is prohibited from accepting employment as administrative assistant in one of state educational institutions set forth in this section. 1957-58 Op. Att'y Gen. No. 57-40.

State educational institutions not public employers. — The New Mexico school for the deaf and other state educational institutions confirmed by this section are not public employers "other than the state" for purposes of the Public Employee Bargaining Act (10-7D-1 to 10-7D-26 NMSA 1918). The applicable statutory definitions indicate the legislature's intent that state educational institutions be included within the term "state," and neither any other statutory provisions nor constitutional principles require deviation from this intent. 1993 Op. Att'y Gen. No. 93-05.

University officials may regulate ice cream vendors. — New Mexico state university officials may preclude sale of ice cream by private individuals from mobile ice cream truck on university streets providing reasons for regulation directly concern health, safety, education and welfare of students and are not so unreasonable and arbitrary as to offend due process of law under fourteenth amendment to United States constitution. 1961-62 Op. Att'y Gen. No. 62-38.

Characterization of schools for purposes of federal law. — New Mexico military institute and northern New Mexico state school are "secondary schools" for purpose of National Defense Education Act (20 U.S.C. § 401 et seq.). 1959-60 Op. Att'y Gen. No. 59-150.

Students may not be forced to attend particular public school. Enrollment in another school within or without the local district would be subject to availability of accommodations and must be determined by the local board. 1979 Op. Att'y Gen. No. 79-36.

Valid intrusion by legislature of another governmental branch. — The failure to fund a branch campus does not put the university of New Mexico out of business, nor does it constitute an invalid intrusion of the legislature into another branch of government. 1980 Op. Att'y Gen. No. 80-3.

Comparable provisions. — Idaho Const., art. IX, § 10.

Utah Const., art. X, § 4.

Wyoming Const., art. VII, § 15.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 15A Am. Jur. 2d Colleges and Universities § 2.

Determination of residence or nonresidence for purpose of fixing tuition fees or the like in public school or college, 83 A.L.R.2d 497, 56 A.L.R.3d 641.

Validity and application of provisions governing determination of residency for purpose of fixing fee differential for out-of-state students in public college, 56 A.L.R.3d 641.

14A C.J.S. Colleges and Universities § 3.

Sec. 12. [Acceptance and use of Enabling Act educational grants.]

All lands granted under the provisions of the act of congress, entitled, "An act to enable the people of New Mexico to form a constitution and state government and be admitted into the union on an equal footing with the original states; and to enable the people of Arizona to form a constitution and state government and be admitted into the union on an equal footing with the original states," for the purposes of said several institutions are hereby accepted and confirmed to said institutions, and shall be exclusively used for the purposes for which they were granted; provided, that one hundred and seventy thousand acres of the land granted by said act for normal school purposes are hereby equally apportioned between said three normal institutions, and the remaining thirty thousand acres thereof is reserved for a normal school which shall be established by the legislature and located in one of the counties of Union, Quay, Curry, Roosevelt, Chaves or Eddy.

ANNOTATIONS

Cross references. — For establishment of normal school in Roosevelt county, see 21-3-29 NMSA 1978.

"Act of congress" is Enabling Act. — The statutory reference in this section is to the Enabling Act (June 20, 1910, 36 Stat. 557, ch. 310), which is set out in Pamphlet 3.

School ineligible to participate in grant made before its establishment. — Although normal schools at Las Vegas, Silver City and El Rito are confirmed as state institutions entitled to share in congressional grants of land, the school at El Rito may not participate in grant of 1898 (June 21, 1898, 30 Stat. 484, ch. 489) since the school was not established until 1909. 1917-18 Op. Att'y Gen. 48.

Bonds to anticipate income from institutional lands not state's obligations. — Building and improvement bonds issued under 21-7-13 to 21-7-25 NMSA 1978 to anticipate income from institutional lands, granted to the university of New Mexico by Enabling Act, and accepted and confirmed by this section for university purposes were not obligations of state, notwithstanding that constitution makes state owner of state educational institutions. State v. Regents of Univ. of N.M., 32 N.M. 428, 258 P. 571 (1927).

University money properly used for land purchase. — Any money received by state university can be used for purchase of lands. 1912-13 Op. Att'y Gen. 252, 253.

Comparable provisions. — Arizona Const., art. X, § 1.

Montana Const., art. X, § 11.

Utah Const., art. XX, § 1.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 63A Am. Jur. 2d Public Lands §§ 108, 112, 113, 115, 117, 121.

73A C.J.S. Public Lands §§ 66, 67, 76 to 101; 73B C.J.S. Public Lands, § 178 et seq.

Sec. 13. [Board of regents for educational institutions.] (1993)

The legislature shall provide for the control and management of each of said institutions, except the university of New Mexico, by a board of regents for each institution, consisting of five members, four of whom shall be qualified electors of the state of New Mexico, one of whom shall be a member of the student body of the institution and no more than three of whom at the time of their appointment shall be members of the same political party; provided, however, that the student body member provision in this section shall not apply to the New Mexico school for the deaf, the New Mexico military institute, the northern New Mexico state school or the New Mexico school for the visually handicapped, and for each of those four institutions all five members of the board of regents shall be qualified electors of the state of New Mexico. The governor shall nominate and by and with the consent of the senate shall appoint the members of each board of regents for each of said institutions. The terms of said nonstudent members shall be for six years, provided that of the five first appointed the terms of two shall be for two years, the terms for two shall be for four years, and the term of one shall be for six years. Following the approval by the voters of this amendment and upon the first vacancy of a position held by a nonstudent member on each eligible institution's board of regents, the governor shall nominate and by and with the consent of the senate shall appoint a student member to serve a two-year term. The governor shall select, with the advice and consent of the senate, a student member from a list provided by the president of the institution. In making the list, the president of the institution shall give due consideration to the recommendations of the student body president of the institution.

The legislature shall provide for the control and management of the university of New Mexico by a board of regents consisting of seven members, six of whom shall be qualified electors of the state of New Mexico, one of whom shall be a member of the student body of the university of New Mexico and no more than four of whom at the time of their appointment shall be members of the same political party. The governor shall nominate and by and with the consent of the senate shall appoint the members of the board of regents. The present five members shall serve out their present terms. The two additional members shall be appointed in 1987 for terms of six years. Following the approval by the voters of this amendment and upon the first vacancy of a position held by a nonstudent member on the university of New Mexico's board of regents, the governor shall nominate and by and with the consent of the senate shall appoint a student member to serve a two-year term. The governor shall select, with the advice

and consent of the senate, a student member from a list provided by the president of the university of New Mexico. In making the list, the president of the university of New Mexico shall give due consideration to the recommendations of the student body president of the university.

Members of the board shall not be removed except for incompetence, neglect of duty or malfeasance in office. Provided, however, no removal shall be made without notice of hearing and an opportunity to be heard having first been given such member. The supreme court of the state of New Mexico is hereby given exclusive original jurisdiction over proceedings to remove members of the board under such rules as it may promulgate, and its decision in connection with such matters shall be final. (As amended September 20, 1949, effective January 1, 1950, November 4, 1986, and November 8, 1994.)

ANNOTATIONS

I. GENERAL CONSIDERATION.

Cross references. — For statute granting regents power and duty to make rules and regulations for university government, see 21-7-7 NMSA 1978.

The 1949 amendment, which was proposed by S.J.R. No. 11 (Laws 1949), adopted by the people at a special election held on September 20, 1949, by a vote of 16,918 for and 10,596 against and took effect on January 1, 1950, inserted the requirement that regents be qualified electors, changed their term of office from four to six years with staggered terms and added the second paragraph.

The 1986 amendment, which was proposed by H.J.R. No. 5 (Laws 1986) and adopted at the general election held on November 4, 1986, by a vote of 164,385 for and 108,118 against, added "except the University of New Mexico" near the beginning of the first paragraph and added the present second paragraph.

The 1994 amendment, proposed by S.J.R. No. 18 (Laws 1993) and adopted at the general election held on November 8, 1994, by a vote of 238,458 for and 165,119 against, rewrote this section to provide for a student body member on the board of regents for certain institutions of higher education.

Compiler's notes. — An amendment to this section proposed by H.J.R. No. 13 (Laws 1970) which would have revised provisions relating to term of office and removal of members of board of regents, was submitted to the people at the general election held on November 3, 1970. It was defeated by a vote of 56,047 for and 74,927 against.

Amendments considered in even-numbered years. — Eight amendments to constitution were proposed by 1970 session of legislature although attorney general has stated that constitutional amendments may not be considered in even-numbered years. 1969-70 Op. Att'y Gen. No. 69-151; 1965-66 Op. Att'y Gen. No. 65-212.

Regent not to change political affiliation after appointment. — Member of board of regents of state educational institution may not change his political affiliation after his appointment to board in attempt to control political balance on board and appointive authority of governor under this section. 1971 Op. Att'y Gen. No. 71-30.

Applicability of provisions for interim appointments. — This section does not conflict with N.M. Const., art. XX, § 5, which provides for interim appointments. Denish v. Johnson, 1996-NMSC-005, 121 N.M. 280, 910 P.2d 914.

Individual appointed after legislative session. — If individual were appointed to board of regents of state educational institution after last legislative session, and such person has not been confirmed by state senate, governor would have authority to appoint someone else to office and submit latter's name for confirmation by senate. 1971 Op. Att'y Gen. No. 71-2.

Recess appointment of regent. — The failure of the legislature to act upon the governor's nomination of a person to the board of regents of an educational institution operates neither as "constructive consent" to, nor as rejection of, the nomination. A regent appointed by recess appointment may be replaced through a new gubernatorial nomination made during the next session of the legislature. 1991 Op. Att'y Gen. No. 91-04.

Term of appointee filling vacancy while senate not in session. — Appointee named to fill vacancy while senate is not in session may retain office until senate acts adversely upon his nomination. 1949-50 Op. Att'y Gen. No. 5324.

Replacement of regents appointed to fill vacancies. — Even though the terms of regents who were appointed to fill vacancies had expired at the end of the terms of their predecessors, they were authorized to remain in office until their successors were appointed by the governor by and with the consent of the senate and they could not be summarily removed. Denish v. Johnson, 1996-NMSC-005, 121 N.M. 280, 910 P.2d 914.

Taxpayer lacks standing to enforce duty of regents. — University of New Mexico is a creature of the constitution, augmented by 21-7-3 NMSA 1978, and the respondent regents owe their duties to the state, not to a private person. Thus relator, though a taxpayer, has no standing to enforce by mandamus a duty owing to the public. Womack v. Regents of Univ. of N.M., 82 N.M. 460, 483 P.2d 934 (1971).

Staggered terms. — This section creates a formal system of staggered terms for the board of regents of New Mexico Tech under which no more than two regents are replaced in any given year. Denish v. Johnson, 1996-NMSC-005, 121 N.M. 280, 910 P.2d 914.

Comparable provisions. — Idaho Const., art. IX, § 10.

Montana Const., art. X, § 9.

Wyoming Const., art. VII, § 17.

Law reviews. — For article, "Constitutional Limitations on the Exercise of Judicial Functions by Administrative Agencies," see 7 Nat. Resources J. 599 (1967).

For article, "An Administrative Procedure Act For New Mexico," see 8 Nat. Resources J. 114 (1968).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 15A Am. Jur. 2d Colleges and Universities §§ 5, 11, 15.

14A C.J.S. Colleges and Universities §§ 15 to 17.

II. CONTROL AND MANAGEMENT OF INSTITUTIONS.

Amendment does not require legislative action to implement board's control. — Legislature need not take any action to implement provisions for control and management of each institution by a board of regents, for that part of 1949 amendment is not in conflict with original constitutional provision, and the legislature has already provided for such control and management. 1951-52 Op. Att'y Gen. No. 5331. See 21-7-3 NMSA 1978.

Board has traffic control and campus security jurisdiction. — Board of regents of university of New Mexico is specifically given traffic control jurisdiction on its property and may employ and assign duties of campus security officers. 1969 Op. Att'y Gen. No. 69-48. See 29-5-1 and 29-5-2 NMSA 1978.

Also right to determine use of school as election site. — Buildings of the New Mexico school for the visually handicapped or a portion of such institution may, upon approval of its board of regents, be made available as an election site whenever the board may grant such permission. However, such use would be contingent upon board approval and board's determination that such use would not endanger the lives and safety of students of the school. 1961-62 Op. Att'y Gen. No. 61-130.

Proper to regulate ice cream vendors. — New Mexico state university officials may preclude sale of ice cream by private individuals from mobile ice cream truck on university streets, providing reasons for regulation directly concern health, safety, education and welfare of students and are not so unreasonable and arbitrary as to offend due process of law under fourteenth amendment to United States constitution. 1961-62 Op. Att'y Gen. No. 62-38.

And to restrict visitation by opposite sex in dorms. — Power to control, manage and govern New Mexico state university is vested in regents, and its proper exercise necessarily includes exercise of broad discretion. An inherent part of the power is requiring students to adhere to generally accepted standards of conduct, and regulation forbidding visitation by persons of the opposite sex in residence hall or dormitory

bedrooms is consistent with generally accepted standards of conduct. Regulation did not interfere appreciably, if at all, with intercommunication important to students of university; it was reasonable, served legitimate educational purposes and promoted welfare of students at university. Futrell v. Ahrens, 88 N.M. 284, 540 P.2d 214 (1975).

But regents cannot delegate right of final action. — It is not within power of regents to delegate right of final action to any other group or body within university. 1969 Op. Att'y Gen. No. 69-104.

Constitutionality of Public Employees Bargaining Act. — The Public Employees Bargaining Act, compiled in Chapter 10, Article 7D, does not violate the autonomy of the University's Board of Regents as granted by this section. Nollen v. Reynolds, 1998-NMCA-108, 125 N.M. 387, 962 P.2d 633.

Legislature cannot appropriate institution funds. — Legislature has expressly recognized authority of institutions of higher learning to receive benefits and donations from United States and private individuals and corporations, to buy, sell, lease or mortgage real estate and to do all things which, in the opinions of the respective boards of regents, will be for the best interests of the institutions in the accomplishment of their purposes or objects; therefore, legislature lacks authority to appropriate these funds or to control the use thereof through the power of appropriation. State ex rel. Sego v. Kirkpatrick, 86 N.M. 359, 524 P.2d 975 (1974). See 21-3-4, 21-7-3, 21-8-3 and 21-11-4 NMSA 1978.

City cannot enforce ordinances on campuses. — With certain exceptions jurisdiction of city of Albuquerque over university of New Mexico campus is limited to enforcement of state laws on campus. City ordinances dealing with crimes do not apply to land under control of board of regents of university of New Mexico except for traffic offenses as provided in 35-14-2 NMSA 1978. 1969 Op. Att'y Gen. No. 69-48.

Sec. 14. [Recall of local school board members.]

Any elected local school board member is subject to recall by the voters of the school district from which elected. A petition for a recall election must cite grounds of malfeasance or misfeasance in office or violation of the oath of office by the member concerned. The recall petition shall be signed by registered voters not less in number than thirty-three and one-third percent of those who voted for the office at the last preceding election at which the office was voted upon. Procedures for filing petitions and for determining validity of signatures shall be as provided by law. If at the special election a majority of the votes cast on the question of recall are in favor thereof, the local school board member is recalled from office and the vacancy shall be filled as provided by law. (As added November 6, 1973 and as amended November 4, 1986.)

ANNOTATIONS

The 1973 amendment to Article XII, which was proposed by H.J.R. No. 21 (Laws 1973) and adopted at the special election held on November 6, 1973, by a vote of 22,227 for and 19,929 against, added this section.

The 1986 amendment, which was proposed by S.J.R. No. 1 (Laws 1985) and adopted at the general election held on November 4, 1986, by a vote of 178,149 for and 103,483 against, substituted the present fourth sentence for the existing one and deleted the former last sentence.

Compiler's notes. — An amendment proposed by S.J.R. No. 15 (Laws 1993), which would have repealed this section in its entirety, was submitted to the people at the general election held on November 8, 1994. It was defeated by a vote of 115,411 for and 281,588 against.

Recall for cause. — Constitution provides for recall for cause, and not recall at will. CAPS v. Board Members, 113 N.M. 729, 832 P.2d 790 (1992).

Legislature may not require individuals initiating recall to be responsible for cost of recall. 1976 Op. Att'y Gen. No. 76-40.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 63A Am. Jur. 2d Public Officers and Employees §§ 187 to 210; 68 Am. Jur. 2d Schools § 57.

67 C.J.S. Officers and Public Employees §§ 182 to 185; 78 C.J.S. Schools and School Districts § 134 et seq.

Sec. 15. [Local school boards having seven single-member districts.]

In those local school districts having a population of more than two hundred thousand, as shown by the most recent decennial census, the qualified electors of the districts may choose to have a local school board composed of seven members, residents of and elected from single member districts.

If a majority of the qualified electors voting in such a district election vote to have a seven-member board, the school district shall be divided into seven local school board member districts which shall be compact, contiguous and as nearly equal in population as possible. One school board member shall reside within, and be elected from each local school board member district. Change of residence to a place outside the district from which a school board member was elected shall automatically terminate the service of that school board member and the office shall be declared vacant.

The school board member districts shall be established by resolution of the local school board with the approval of the state legislature, and may be changed once after each federal decennial census by the local school board with the approval of the state legislature.

The elections required under this amendment shall be called and conducted as provided by law for other local school board elections. The state board of education shall, by resolution, establish the terms of the first board elected after the creation of such a seven-member board. (As added November 4, 1980.)

ANNOTATIONS

Cross references. — As to school district elections, see 1-22-3 NMSA 1978 et seq.

As to local school boards generally, see 22-5-1 NMSA 1978 et seq.

As to local school board member recall, see 22-7-1 NMSA 1978 et seq.

The 1980 amendment to Article XII, which was proposed by H.J.R. Nos. 5 and 7 (Laws 1979) and adopted at the general election held on November 4, 1980, by a vote of 147,035 for and 95,385 against, added this section.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 68 Am. Jur. 2d Schools §§ 10, 11, 53, 54.

78 C.J.S. Schools and School Districts § 93 et seq.

ARTICLE XIII
Public Lands

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; provided, that such of school Sections Two, Thirty-Two, Sixteen and Thirty-Six as are not contiguous to other state lands shall not be sold within the period of ten years next after the admission of New Mexico as a state for less than ten dollars [($10.00)] per acre.

ANNOTATIONS

Cross references. — For consent to provisions of Enabling Act, see N.M. Const., art. XXI, § 9.

For provision regarding leases reserving royalty to state, see N.M. Const., art. XXIV, § 1.

Phrase appearing in this section, "all lands . . . hereafter acquired" is not all-inclusive. 1980 Op. Att'y Gen. No. 80-10.

Land granted to state for use of miners' hospital is public land under this section. 1964 Op. Att'y Gen. No. 64-130.

But not land vesting in state through tax proceedings. — If lands, title to which vests temporarily in name of New Mexico through tax proceedings, are "public lands," they become such by that portion of this section which reads, "and all lands hereafter acquired." However, the framers of the constitution and the people that adopted it intended that the term "public lands" be limited to lands acquired in a proprietary capacity. In the tax situation, title is taken in the name of the state so that lands may be sold and the money they represent be promptly remitted to agencies for which the taxes were assessed and the lands be restored to tax rolls as speedily as possible. Greene v. Esquibel, 58 N.M. 429, 272 P.2d 330 (1954).

Allowable investments of funds from public lands. — Investment authority of state investment officer is limited to funds derived from lands granted state and its institutions, including any increase in permanent fund by virtue of investment of these funds by the officer. But there is no restriction as to period of time for which funds may be invested, therefore they are all subject to being invested for periods in excess of one year. Hence, these funds are all "moneys available for investment for a period in excess of one (1) year" within meaning of 6-8-9 NMSA 1978, relating to allowable investments. 1961-62 Op. Att'y Gen. No. 62-76.

United States as grantor of public lands can impose conditions on their use and has right to exact performance of such conditions. Ervien v. United States, 251 U.S. 41, 40 S. Ct. 75, 64 L. Ed. 128 (1919).

Legislation required to expend funds of congressional grant institutions. — In majority of cases, funds credited to institutions established under congressional land grants could be expended only by legislative enactment. 1912-13 Op. Att'y Gen. 298, 304, 308.

Doctrine of acquiescence. — Title to state land cannot be obtained pursuant to the doctrine of acquiescence. This rule also applies to municipalities. Stone v. Rhodes, 107 N.M. 96, 752 P.2d 1112 (Ct. App. 1988).

Comparable provisions. — Idaho Const., art. IX, § 8.

Montana Const., art. X, § 11.

Utah Const., art. XX, § 1.

Wyoming Const., art. XVIII, § 1.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 63A Am. Jur. 2d Public Lands §§ 113, 115, 117, 121.

Improvements placed on land by adverse claimant, right of grantee to, 6 A.L.R. 95.

Escheat of land granted to alien, necessity of judicial proceeding, 23 A.L.R. 1247, 79 A.L.R. 1364.

Crops grown by trespasser, right to, as against purchaser of the land, 39 A.L.R. 961, 57 A.L.R. 584.

Estoppel of one not party to sale or mortgage of public land by failure to disclose his interest in the property, 50 A.L.R. 790.

Prohibition to control action of land officers, 115 A.L.R. 31, 159 A.L.R. 627.

Constitutionality of reforestation or forest conservation legislation, 13 A.L.R.2d 1095.

Implied acceptance, by public use, of dedication of beach or shoreline adjoining public waters, 24 A.L.R.4th 294.

73B C.J.S. Public Lands §§ 178 to 197.

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.

ANNOTATIONS

I. GENERAL CONSIDERATION.

Cross references. — For provision regarding leases reserving royalty to state, see N.M. Const., art. XXIV, § 1.

For statutes providing for office of commissioner of public lands, see 19-1-1 to 19-1-24 NMSA 1978.

Enabling Act. — Many notes refer to the Enabling Act, whereby congress established terms for the future admission of New Mexico into the Union. The Enabling Act (June 20, 1910, 36 Stat. 557, ch. 310) is set out in Pamphlet 3.

No specific time within which land should be classified. — Although it is constitutional duty of commissioner to classify the public land, no specific limitation of

time is stated as to when classification should be made. State ex rel. Otto v. Field, 31 N.M. 120, 241 P. 1027 (1925).

Allowable investments of funds from public lands. — See same catchline in notes to N.M. Const., art. XIII, § 1.

Limited appropriation not invalid under Enabling Act. — Phrase "and such regulations as may be provided by law" does not render invalid an appropriation of not to exceed $10,000 on theory that if commissioner is limited to this expenditure, he would be prevented from properly classifying and intelligently administering public lands trust imposed by Enabling Act, especially since it does not appear that legislature intended to limit commissioner, in all things, to above sum. 1939-40 Op. Att'y Gen. 77.

Personnel Act of 1959 (5-4-19 to 5-4-27, 1953 Comp., now repealed) applies to all state executive agencies. State land office (created by 19-1-1 NMSA 1978) is an executive agency and comes under the act. 1959-60 Op. Att'y Gen. No. 59-195.

State may exchange lands with federal government. — Under federal Taylor Grazing Act (43 U.S.C. § 315 et seq.) state may exchange its lands where title is vested in it for other lands of federal government through secretary of the interior who has power to exchange such lands in same manner as that provided for exchange of privately-owned lands. 1935-36 Op. Att'y Gen. 86.

"Under provisions of the acts of congress" construed. — This section limiting control of commissioner to disposition of public lands "under provisions of the acts of congress" relates only to those lands New Mexico has received in trust from federal government for institutional purposes. 1953-54 Op. Att'y Gen. No. 5831.

State necessary party in suit concerning its reservation of mineral rights. — Quiet title suit brought by one holding contract of purchase of state lands against lessees of land from state for oil and gas exploration, seeking to set aside reservation of minerals included in such contract, was action against state as lessor, and state was a necessary party defendant. American Trust & Sav. Bank v. Scobee, 29 N.M. 436, 224 P. 788 (1924).

No mandamus against commissioner where action really against state. — Mandamus will not lie against commissioner of public lands to compel him to issue deed conveying public lands free from reservation of minerals therein, which reservation was contained in contract of sale, because it is, in effect, an action against the state. State ex rel. Evans v. Field, 27 N.M. 384, 201 P. 1059 (1921).

Trespassing railroad could not urge cancellation of contract to purchase. — Railroad, which was not party to case before commissioner initiated by order to show cause why contract to purchase realty on which such railroad as trespasser had made improvements should not be canceled, was not in position to urge that supreme court direct cancellation of contract. In re Dasburg, 45 N.M. 184, 113 P.2d 569 (1941).

Comparable provisions. — Idaho Const., art. IX, § 7.

Montana Const., art. X, § 4.

Wyoming Const., art. XVIII, § 3.

Law reviews. — For note, "Administration of Grazing Lands in New Mexico: A Breach of Trust," see 15 Nat. Resources J. 581 (1975).

For article, "Survey of New Mexico Law, 1979-80: Administrative Law," see 11 N.M.L. Rev. 1 (1981).

For 1984-88 survey of New Mexico administrative law, 19 N.M.L. Rev. 575 (1990).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Prohibition to control actions of land officers, 115 A.L.R. 31, 159 A.L.R. 627.

73B C.J.S. Public Lands §§ 178 to 183, 197.

II. EXTENT OF COMMISSIONER'S AUTHORITY.

Constitutional commission not limited to express powers. — Administrative commission created by constitution is not limited to powers expressly granted by constitution but may exercise all powers which may be necessary or essential in connection with performance of its duties. 1953-54 Op. Att'y Gen. No. 5831.

Commissioner has power to alienate school trust lands. — Under this section and Laws 1929, §§ 132 to 162 (now repealed), state land commissioner had power to alienate public lands held in trust for public schools, within limits and under terms of Enabling Act. In re Dasburg, 45 N.M. 184, 113 P.2d 569 (1941).

And to deed railroad right-of-way. — Commissioner may grant right-of-way of railroad company and execute deed without advertising and offering same at public auction. 1931-32 Op. Att'y Gen. 98.

And to reserve mineral rights. — State, through commissioner of public lands, properly reserved minerals and mineral rights in selling and issuing its patent to school and asylum lands granted to state, and patentee was not entitled to ejectment against state's lessee of oil and gas rights. Terry v. Midwest Ref. Co., 64 F.2d 428 (10th Cir.), cert. denied, 290 U.S. 660, 54 S. Ct. 74, 78 L. Ed. 571 (1933).

And to cancel contract of sale. — Cancellation of contract of sale of state lands is within sound discretion of commissioner and does not violate this section. Vesely v. Ranch Realty Co., 38 N.M. 480, 35 P.2d 297 (1934).

And to remove land from restricted districts. — By necessary implication land commissioner has authority to rescind orders promulgated by him adding lands to restricted districts for oil and gas leasing, and procedure to be followed in withdrawing any lands from a restricted district is substantially the same as set out in 19-10-15 NMSA 1978, relating to rental districting. 1951-52 Op. Att'y Gen. No. 5604.

Institution to which land allocated cannot prevent sale by commissioner. — Except for certain transactions with United States, nothing in Enabling Act, constitution or statutes gives institution to which public land has been allocated either right or power to prevent commissioner from selling the land where he is acting procedurally according to the law. 1964 Op. Att'y Gen. No. 64-130.

Legislature without power to restrict expenditure of funds. — Commissioner of public lands is sole person entrusted with administration of funds of which he is trustee, subject to expenditure being reasonable, and legislature is not empowered, nor is governor under grant of legislative power, to restrict commissioner in expenditure of these funds. 1953-54 Op. Att'y Gen. No. 5781.

Rulemaking authority of commissioner limited. — The commissioner of public lands has no authority to promulgate rules or regulations inconsistent with legislative enactments governing mineral leases on public lands. Harvey E. Yates Co. v. Powell, 98 F.3d 1222 (10th Cir. 1996).

The commissioner exceeded his authority and usurped a legislative function in promulgating the definition of "proceeds" in a rule so that it would require state lessees to pay royalties even when gas was not extracted from the leased premises. Harvey E. Yates Co. v. Powell, 98 F.3d 1222 (10th Cir. 1996).

Commissioner is limited to powers conferred by law. — Commissioner of public lands as agent of state has only such powers as are conferred upon him by constitution and statutes and as limited by Enabling Act. State ex rel. Del Curto v. District Court, 51 N.M. 297, 183 P.2d 607 (1947).

In selling lands belonging to state and issuing patents therefor commissioner is merely an agent of state and has those powers, and only those powers, given by law, and there is no specific authority given him to issue patent to portion of tract of land sold under contract when only that part covered by patent has been paid for and balance due under said contract has not been paid at time patent is issued. Zinn v. Hampson, 61 N.M. 407, 301 P.2d 518 (1956). But see N.M. Const., art. XIII, § 3, relating to restrictions on patents under Enabling Act.

And lacks power to sell lands of highway commission. — Neither by constitution nor by statute has commissioner been given power to sell lands held by highway commission and acquired for its purposes. 1953-54 Op. Att'y Gen. No. 5831.

Exchange of state trust lands. — The commissioner of public lands may exchange state trust lands for other public or private lands of equal or greater value provided that the exchange transaction is in substantial conformity with the requirements of the federal Enabling Act, ch. 310, 36 stat. 557. As a consequence of this conclusion, 1988 Op. Att'y Gen. No. 88-35 is hereby overruled. 1991 Op. Att'y Gen. No. 91-15.

Commissioner's discretion limited by express provisions. — While commissioner has a great deal of discretionary authority in managing the public lands of state, his discretion is limited by express provisions in the law. 1969 Op. Att'y Gen. No. 69-67.

Commissioner not authorized to issue all oil and gas leases. — Section 19-10-1 NMSA 1978 does not grant the commissioner of public lands the exclusive authority to issue all oil and gas leases on any lands owned by the state. 1980 Op. Att'y Gen. No. 80-10.

Special requirements for leases with terms longer than five years. — Leases of state lands for longer term than five years are required to be sold to highest bidder at public sale after published advertisement of sale. State ex rel. McElroy v. Vesely, 40 N.M. 19, 52 P.2d 1090 (1935); Hart v. Walker, 40 N.M. 1, 52 P.2d 123 (1935).

Which commissioner may not circumvent. — Allowing the relinquishment of an existing lease on grazing or agricultural lands subject to Enabling Act, and application for new consolidated lease, having net result of a lease of more than five years' duration without opportunity for competitive bidding or adverse applications, is beyond discretion of commissioner. 1969 Op. Att'y Gen. No. 69-67.

Circumvention generally invalid. — No rights in public lands may be given or acquired contrary to law by circumvention, indirection or otherwise, no matter how valid or well-intentioned the underlying reason may be. 1969 Op. Att'y Gen. No. 69-67.

No rights can be acquired by circumvention; commissioner had no power to cancel a contract to purchase when purchaser failed to show in his application improvements made by a railroad which was in the position of a trespasser. In re Dasburg, 45 N.M. 184, 113 P.2d 569 (1941).

Invalid to postpone obligation to pay. — Effect of 19-7-12 NMSA 1978, relating to cancellation and granting of contracts, is to postpone obligation to pay for public lands; the statute offends constitution and is void. 1931-32 Op. Att'y Gen. 111.

Sec. 3. [Patents for public lands.]

The provisions of the Enabling Act (36 Stat. 557, 563) which prohibit the granting of a patent for a portion of a tract of public lands under sales contract because the full consideration for the entire tract is not or was not paid, are waived with respect to the following sales:

A. sale of a portion of a tract under sales contract, if the patent to that portion was issued on or before September 4, 1956;

B. sale of a portion of a tract under sales contract, if the right to purchase the portion is derived from an assignment made on or before September 4, 1956; or

C. sale of a portion of a tract under sales contract, or under a contract entered into in substitution of such contract, if the right to purchase all other portions of the tract were assigned or relinquished on or before September 4, 1956 by the person holding the contract.

The legislature may enact laws to carry out the purposes of this amendment. (As added November 3, 1964.)

ANNOTATIONS

The 1963 amendment to Article XIII, which was proposed by S.J.R. No. 3 (Laws 1963) and adopted at the general election held on November 3, 1964, by a vote of 72,258 for and 49,758 against, added this section.

Enabling Act. — The Enabling Act (June 20, 1910, 36 Stat. 557, ch. 310), which authorized New Mexico to prepare for statehood, is set out in Pamphlet 3.

Congressional waiver of Enabling Act provisions. — Restrictions of Section 10 of Enabling Act as to issuance of patent to portion of tract sold under contract when only that part covered by patent had been paid for and balance due under contract had not been paid at time patent was issued were waived as to patents issued prior to September 4, 1956. See act of May 27, 1961, 74 Stat. 85, P.L. 87-40.

Commissioner did not have authority to issue patent to portion of tract sold under contract when only that part covered by patent had been paid for and balance due under said contract had not been paid at the time patent was issued. Zinn v. Hampson, 61 N.M. 407, 301 P.2d 518 (1956) (decided prior to amendment adding this section).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 63A Am. Jur. 2d Public Lands §§ 58, 113, 115, 117.

73B C.J.S. Public Lands §§ 178, 180, 184, 188 to 191.

ARTICLE XIV
Public Institutions

Section 1. [State institutions.]

The penitentiary at Santa Fe, the miners' hospital at Raton, the New Mexico state hospital at Las Vegas, the New Mexico boys' school at Springer, the girls' welfare home at Albuquerque, the Carrie Tingley crippled children's hospital at Truth or Consequences and the Los Lunas mental hospital at Los Lunas are hereby confirmed as state institutions. (As amended September 20, 1955 and November 8, 1960.)

ANNOTATIONS

Cross references. — For confirmation of state educational institutions, see N.M. Const., art XII, § 11.

As to creation of Las Vagas medical center and Los Lunas medical center, see 23-1-13 NMSA 1978.

The 1955 amendment, which was proposed by H.J.R. No. 15 (Laws 1955) and adopted at a special election held on September 20, 1955, by a vote of 18,702 for and 12,036 against, changed the names of the insane asylum and the reform school, respectively, to the state hospital and the boys' school.

The 1960 amendment, which was proposed by H.J.R. No. 14 (Laws 1959) and adopted at the general election held on November 8, 1960, with a vote of 75,987 for and 47,724 against, added the institutions following "boys' school at Springer."

Compiler's notes. — An amendment proposed by H.J.R. No. 10 (Laws 1993), which would have substituted "the New Mexico center for gerontology and psychiatry at Las Vegas" for "the New Mexico state hospital at Las Vegas" near the middle of the section, was submitted to the people at the general election held on November 8, 1994. It was defeated by a vote of 166,636 for and 231,931 against.

No amendment necessary should land grant beneficiary move. — So long as the seven institutions named in this section remain named as the land grant beneficiaries, no amendment of this section is necessary should one of the institutions move to another location. 1980 Op. Att'y Gen. No. 80-16.

And hospital entitled to funds if remains essentially as defined. — If the Carrie Tingley crippled children's hospital should move from Truth or Consequences to another location, but, nevertheless, remain essentially the institution defined in this section, it would retain its entitlement to the funds derived from lands granted under the Enabling Act. 1980 Op. Att'y Gen. No. 80-16.

Authority to move penitentiary out of Santa Fe. — "The penitentiary at Santa Fe" is merely descriptive and not mandatory language. Under the broad powers granted by 33-2-2 and 33-2-5 NMSA 1978 to sell real, personal or mixed property, penitentiary commissioners have authority to move penitentiary out of county of Santa Fe if in their judgment they deem it necessary and proper for the operation and management of the penitentiary. 1953-54 Op. Att'y Gen. No. 5628.

Miners' hospital. — In its constitution New Mexico expressly accepted conditions imposed on land grant trusts for miners' hospitals for disabled miners, confirmed the miners' hospital at Raton as a state institution, accepted all of the trust lands and stated that they would be "exclusively used for the purpose" for which they were granted. United States v. New Mexico, 536 F.2d 1324 (10th Cir. 1976).

No right to sue penitentiary in tort. — 42-1-1, 1953 Comp. (now repealed), creating state penitentiary as public corporation with power to sue and be sued, did not grant right to sue it in tort inasmuch as such suit was in fact a suit against the state. Vigil v. Penitentiary of N.M., 52 N.M. 224, 195 P.2d 1014 (1948). But see Tort Claims Act, 41-4-1 to 41-4-27 NMSA 1978.

Nor boys' school absent specific legislation. — The New Mexico boys' school is a state institution and therefore a governmental agency, which cannot be sued in absence of specific legislative permission. 1963-64 Op. Att'y Gen. No. 64-79. But see Tort Claims Act, 41-4-1 to 41-4-27 NMSA 1978.

Comparable provisions. — Idaho Const., art. X, § 1.

Montana Const., art. XII, § 3.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 40 Am. Jur. 2d Hospitals and Asylums § 2; 60 Am. Jur. 2d Penal and Correctional Institutions § 2.

State's immunity from tort liability as dependent on governmental or proprietary nature of function, 40 A.L.R. 927.

Immunity from liability for damages in tort of state or governmental unit or agency in operating hospital, 25 A.L.R.2d 203, 18 A.L.R.4th 858.

Right of state or its political subdivision to maintain action in another state for support and maintenance of defendant's child, parent or dependent in plaintiff's institution, 67 A.L.R.2d 771.

Liability or indemnity insurance carried by governmental unit as affecting immunity from tort liability, 68 A.L.R.2d 1437.

Liability of hospital, physician, or other individual medical practitioner for injury or death resulting from blood transfusion, 20 A.L.R.4th 136.

Liability of blood supplier or donor for injury or death resulting from blood transfusion, 24 A.L.R.4th 508.

7 C.J.S. Asylums § 4; 41 C.J.S. Hospitals § 6; 72 C.J.S. Prisons § 2.

Sec. 2. [Federal land grants and donations.]

All lands which have been or which may be granted to the state by congress for the purpose of said several institutions are hereby accepted for said several institutions with all other grants, donations or devices for the benefit of the same and shall be exclusively used for the purpose for which they were or may be granted, donated or devised.

ANNOTATIONS

No amendment necessary should land grant beneficiary move. — So long as the seven institutions named in N.M. Const., art. XIV, § 1, remain named as the land grant beneficiaries, no amendment of that section is necessary should one of the institutions move to another location. 1980 Op. Att'y Gen. No. 80-16.

And hospital entitled to funds if remains essentially as defined. — If the Carrie Tingley crippled children's hospital should move from Truth or Consequences to another location, but, nevertheless, remain essentially the institution defined in N.M. Const., art. XIV, § 1, it would retain its entitlement to the funds derived from lands granted under the Enabling Act. 1980 Op. Att'y Gen. No. 80-16.

Miners' hospital. — See same catchline in notes to N.M. Const., art XIV, § 1.

Sec. 3. [Control and management.]

Each of said institutions shall be under such control and management as may be provided by law. (As amended September 20, 1955.)

ANNOTATIONS

The 1955 amendment, which was proposed by S.J.R. No. 20 (Laws 1955) and adopted at a special election held on September 20, 1955, by a vote of 18,407 for and 12,344 against, completely rewrote this section. Prior to amendment, this section read: "Each of said institutions shall be under the control and management of a board whose title, duties and powers shall be as may be provided by law. Each of said boards shall be composed of five members who shall hold office for the term of four years, and shall be appointed by the governor by and with the consent of the senate, and not more than three of whom shall belong to the same political party at the time of their appointment."

Extent legislature can alter control and management. — Legislature may alter control and management of institutions except that it cannot change number of members on board nor power of appointment which is in the governor, nor could it provide that all board members may be of same political party. 1959-60 Op. Att'y Gen. No. 60-26 (opinion construes section as it read before 1955 amendment).

No amendment necessary should land grant beneficiary move. — So long as the seven institutions named in N.M. Const., art. XIV, § 1, remain named as the land grant

beneficiaries, no amendment of that section is necessary should one of the institutions move to another location. 1980 Op. Att'y Gen. No. 80-16.

And hospital entitled to funds if remains essentially as defined. — If the Carrie Tingley crippled children's hospital should move from Truth or Consequences to another location, but, nevertheless, remain essentially the institution defined in N.M. Const., art. XIV, § 1, it would retain its entitlement to the funds derived from lands granted under the Enabling Act. 1980 Op. Att'y Gen. No. 80-16.

Authority to move penitentiary out of Santa Fe. — See same catchline in notes to N.M. Const., art. XIV, § 1.

Comparable provisions. — Idaho Const., art. X, §§ 1, 5.

ARTICLE XV
Agriculture and Conservation

Section 1. [Department of agriculture.]

There shall be a department of agriculture which shall be under the control of the board of regents of the college of agriculture and mechanic arts; and the legislature shall provide lands and funds necessary for experimental farming and demonstrating by said department.

ANNOTATIONS

Compiler's notes. — The name of the New Mexico college of agriculture and mechanic arts was changed to New Mexico state university by N.M. Const., art XII, § 11, as repealed and reenacted on November 8, 1960.

Department entitled to file criminal charges in magistrate court. — This section establishes state department of agriculture as political subdivision of the state, thereby entitled, in cases within its jurisdiction, to file criminal charges in magistrate courts. 1969 Op. Att'y Gen. No. 69-66.

Without fee in proper cases. — No docket fee need be paid by department for filing complaints in magistrate courts provided complaint is filed by full-time, salaried county or state law enforcement officer, campus security officer, Indian tribal or Pueblo law enforcement officer or municipal police officer. 1969 Op. Att'y Gen. No. 69-66.

Law reviews. — For article, "Constitutional Limitations on the Exercise of Judicial Functions by Administrative Agencies," see 7 Nat. Resources J. 599 (1967).

For article, "An Administrative Procedure Act For New Mexico," see 8 Nat. Resources J. 114 (1968).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 3 Am. Jur. 2d Agriculture §§ 20, 21.

Delegation of legislative power to board of health or other board, officer or group with regard to milk regulations, 18 A.L.R. 237, 42 A.L.R. 556, 58 A.L.R. 672, 80 A.L.R. 1225, 101 A.L.R. 64, 110 A.L.R. 644, 119 A.L.R. 243, 155 A.L.R. 1383.

Constitutionality of statutes relating to grading, packing or branding of farm products, 73 A.L.R. 1445.

Power, under statute for stabilization of market for agricultural crops, in respect of crop loans by public agency and the security therefor, 157 A.L.R. 338.

3 C.J.S. Agriculture § 6.

Sec. 2. [Forest fire prevention.]

The police power of the state shall extend to such control of private forest lands as shall be necessary for the prevention and suppression of forest fires.

ANNOTATIONS

Law reviews. — For note, "Forest Fire Protection on Public and Private Lands in New Mexico," see 4 Nat. Resources J. 374 (1964).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 35 Am. Jur. 2d Fires § 2.

Constitutionality of reforestation or forest conservation legislation, 13 A.L.R.2d 1095.

Constitutional rights of owner as against destruction of building by public authorities, 14 A.L.R.2d 73.

98 C.J.S. Woods and Forests § 7.

ARTICLE XVI
Irrigation and Water Rights

Section 1. [Existing water rights confirmed.]

All existing rights to the use of any waters in this state for any useful or beneficial purpose are hereby recognized and confirmed.

ANNOTATIONS

New Mexico has not recognized inchoate water rights granted by Mexico or Spain. State v. City of Las Vegas, 2004-NMSC-009, 135 N.M. 375, 89 P.3d 47.

"Water" construed. — Waters of underground streams, channels, artesian basins, reservoirs and lakes, the boundaries of which may be reasonably ascertained, are included within the term "water" as used in this section. State ex rel. Reynolds v. Mears, 86 N.M. 510, 525 P.2d 870 (1974); McBee v. Reynolds, 74 N.M. 783, 399 P.2d 110 (1965).

Water rights law extends to all parties. — New Mexico constitution and statutory law and case law of federal, territorial and New Mexico courts govern acquisition of water rights of all parties, including United States, state game commission of New Mexico and individual defendants. United States v. Ballard, 184 F. Supp. 1 (D.N.M. 1960).

Except Pueblo Indians. — Water uses by Pueblo Indians in New Mexico are not controlled by state water law or prior appropriation. New Mexico v. Aamodt, 537 F.2d 1102 (10th Cir. 1976), cert. denied, New Mexico v. United States, 429 U.S. 1121, 97 S. Ct. 1157, 51 L. Ed. 2d 572 (1977).

Expanding nature of pueblo right is not an existing right within the meaning of this section. State v. City of Las Vegas, 2004-NMSC-009, 135 N.M. 375, 89 P.3d 47.

Limited riparian rights in New Mexico. — Riparian rights cannot be said to exist in such country as New Mexico to full extent of their recognition and existence at common law. 1915-16 Op. Att'y Gen. 366.

But subsequent appropriations may not diminish riparian owner's supply. — Riparian owner, so far as he has any use for water flowing in his stream, must not have that right impaired by appropriations of water made subsequent to his beginning use of the water so that what he acquires will be materially diminished. 1915-16 Op. Att'y Gen. 366.

And consent prerequisite to taking sand from river. — If state or its contractor takes sand from sand bar in middle of Chama river near highway project, it should obtain consent of abutting property-owners. 1937-38 Op. Att'y Gen. 217.

Rights prior to water code protected. — Landowner was entitled to take water for irrigation where water right relied upon was initiated in 1903 by filing of affidavit with county clerk, prior to enactment of the water code (72-9-1 NMSA 1978), which carried a savings clause for prior existing rights. State ex rel. Bliss v. Davis, 63 N.M. 322, 319 P.2d 207 (1957).

Trial court erred in dismissing for failure to exhaust administrative remedies suit in which parties sought adjudication of claimed rights to use of waters of a draw. Fact that neither party had secured permit from state did not necessarily prevent acquisition by either or both of rights to beneficial use of waters from the draw by appropriation nor prevent acquisition of rights to use of waters by either as against the other. If claimed rights were acquired pursuant to common-law appropriations by parties or their predecessors in interest prior to enactment of state's water code (72-9-1 NMSA 1978), those rights

were in no way dependent on existence of application to or permit from state engineer. May v. Torres, 86 N.M. 62, 519 P.2d 298 (1974).

State may regulate water rights. — State may in exercise of police power require license of any person drilling well in area determined by state engineer to be an underground source, the boundaries of which have been determined to be reasonably ascertainable. State v. Myers, 64 N.M. 186, 326 P.2d 1075 (1958).

Conservancy Act (Laws 1923, ch. 140, § 201, now repealed) was not repugnant to this section. In re Proposed Middle Rio Grande Conservancy Dist., 31 N.M. 188, 242 P. 683 (1925).

Eminent domain proper where water storage and conveyance for beneficial uses. — Beneficial use is of primary importance, not the particular purpose (ultimate use) to which water is put. Beneficial uses would be impossible to accomplish without means to transport or convey water from its source to place of utilization. Thus out of necessity the right of eminent domain is provided (42-1-31 and 72-1-5 NMSA 1978) for storage and conveyance of water for beneficial uses, not for irrigation or domestic purposes alone, but for all beneficial uses. Kaiser Steel Corp. v. W.S. Ranch Co., 81 N.M. 414, 467 P.2d 986 (1970).

Comparable provisions. — Idaho Const., art. XV, § 1.

Montana Const., art. IX, § 3.

Utah Const., art. XVII, § 1.

Wyoming Const., art. VIII, § 1.

Law reviews. — For comment, "Water Rights - Failure to Use - Forfeiture," see 6 Nat. Resources J. 127 (1966).

For student symposium, "Constitutional Revision - Water Rights," see 9 Nat. Resources J. 471 (1969).

For article, "Water Rights Problems in the Upper Rio Grande Watershed and Adjoining Areas," see 11 Nat. Resources J. 48 (1971).

For note, "New Mexico's National Forests and the Implied Reservation Doctrine," see 16 Nat. Resources J. 975 (1976).

For article, "Water Law Problems of Solar Hydrogen Production," see 18 Nat. Resources J. 521 (1978).

For article, "Economics and the Determination of Indian Reserved Water Rights," see 23 Nat. Resources J. 749 (1983).

For article, "Patterns of Cooperation in International Water Law: Principles and Institutions," see 25 Nat. Resources J. 563 (1985).

For article, "The Navajo Indian Irrigation Project and Quantification of Navajo *Winters* Rights," see 32 Nat. Resources J. 825 (1992).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 78 Am. Jur. 2d Waters §§ 230, 318.

Construction and application of rule requiring public use for which property is condemned to be "more necessary" or "higher use" than public use to which property is already appropriated - state takings, 49 A.L.R. 5th 769.

93 C.J.S. Waters § 157.

Sec. 2. [Appropriation of water.]

The unappropriated water of every natural stream, perennial or torrential, within the state of New Mexico, is hereby declared to belong to the public and to be subject to appropriation for beneficial use, in accordance with the laws of the state. Priority of appropriation shall give the better right.

ANNOTATIONS

I. GENERAL CONSIDERATION.

Cross references. — For beneficial use as basis, measure and limit of right to use water, see N.M. Const., art. XVI, § 3.

Water treated as natural resource for commerce clause analysis purposes. — For purposes of constitutional analysis under the commerce clause, water is to be treated the same as other natural resources. City of El Paso ex rel. Pub. Serv. Bd. v. Reynolds, 563 F. Supp. 379 (D.N.M. 1983).

And prohibition of out-of-state export of ground water unconstitutional. — New Mexico's prohibition of the out-of-state export of ground water, derived from N.M. Const., art. XVI, §§ 2 and 3, and former 72-12-19 NMSA 1978, which statute, with minor exceptions, expressly prohibited the transport of ground water from New Mexico for use in another state, is unconstitutional, as such an embargo violates the commerce clause of U.S. Const., art. I. City of El Paso ex rel. Pub. Serv. Bd. v. Reynolds, 563 F. Supp. 379 (D.N.M. 1983).

Section is merely declaratory of prior existing law. State ex rel. State Game Comm'n v. Red River Valley Co., 51 N.M. 207, 182 P.2d 421 (1945).

Likewise implementing statute. — Laws 1927, ch. 182, § 1 (now repealed), declaring waters of underground streams, artesian basins, reservoirs and lakes, the boundaries of

which may be reasonably ascertained, to belong to public and be subject to appropriation for beneficial use, was not subversive of vested rights of owners of land overlying such waters, since it was declaratory of existing law. Yeo v. Tweedy, 34 N.M. 611, 286 P. 970 (1929).

Water rights law extends to all parties. — See same catchline in notes to N.M. Const., art. XVI, § 1.

Except Pueblo Indians. — See same catchline in notes to N.M. Const., art. XVI, § 1.

State's control over public waters is plenary, subject probably only to governmental uses of United States. State ex rel. State Game Comm'n v. Red River Valley Co., 51 N.M. 207, 182 P.2d 421 (1945).

State may in exercise of police power require license of person drilling well in area determined by state engineer (now water resources division of natural resources department) to be an underground source, the boundaries of which have been determined to be reasonably ascertainable. State v. Myers, 64 N.M. 186, 326 P.2d 1075 (1958).

But prior confirmed title superior. — This section cannot operate to deprive a party of right of title derived from congressional act of confirmation and based upon early Mexican grant. State ex rel. State Game Comm'n v. Red River Valley Co., 51 N.M. 207, 182 P.2d 421 (1945). See N.M. Const., art. XVI, § 1.

Kinds of water within this provision. — Waters of underground streams, channels, artesian basins, reservoirs and lakes, the boundaries of which may be reasonably ascertained, are public and subject to appropriation for beneficial use. McBee v. Reynolds, 74 N.M. 783, 399 P.2d 110 (1965).

Do not include stream beds. — Right to flow of water is quite distinct from ownership of bed of stream, and state does not own bed of any stream, except as riparian owner. 1939-40 Op. Att'y Gen. 54.

Or artificial waters. — Artificial waters are not subject to appropriation under laws of New Mexico. Creator of an artificial flow of water is owner of the water so long as it is confined to his property, except possibly where it appears that artificial flow is created by agency which is of permanent nature and creator of flow has abandoned all claim to use of water. Hagerman Irrigation Co. v. East Grand Plains Drainage Dist., 25 N.M. 649, 187 P. 555 (1920); 1961-62 Op. Att'y Gen. No. 61-38.

No right to particular silt content. — An owner of surface water rights does not have a right to receive a particular silt content that has existed historically. Ensenada Land & Water Ass'n v. Sleeper, 107 N.M. 494, 760 P.2d 787 (Ct. App. 1988).

Law reviews. — For comment, "Water Rights - Failure to Use - Forfeiture," see 6 Nat. Resources J. 127 (1966).

For article, "Water Rights Problems in the Upper Rio Grande Watershed and Adjoining Areas," see 11 Nat. Resources J. 48 (1971).

For note, "Appropriation By the State of Minimum Flows in New Mexico Streams," see 15 Nat. Resources J. 809 (1975).

For note, "New Mexico's National Forests and the Implied Reservation Doctrine," see 16 Nat. Resources J. 975 (1976).

For comment, "Indian Pueblo Water Rights Not Subject to State Law Prior to Appropriation," see 17 Nat. Resources J. 341 (1977).

For article, "Water Law Problems of Solar Hydrogen Production," see 18 Nat. Resources J. 521 (1978).

For comment on geothermal energy and water law, see 19 Nat. Resources J. 445 (1979).

For note, "Brantley v. Carlsbad Irrigation District: Limits of the Templeton Doctrine Affirmed," see 19 Nat. Resources J. 669 (1979).

For comment, "Protection of the Means of Groundwater Diversion," see 20 Nat. Resources J. 625 (1980).

For comment, "New Mexico's Mine Dewatering Act: The Search for Rehoboth," see 20 Nat. Resources J. 653 (1980).

For article, "New Mexico Water Law: An Overview and Discussion of Current Issues," see 22 Nat. Resources J. 1045 (1982).

For article, "Legislation on Domestic and Industrial Uses of Water: A Comparative Review," see 24 Nat. Resources J. 143 (1984).

For note, "Commerce Clause Curbs State Control of Interstate Use of Ground Water: City of El Paso v. Reynolds," see 24 Nat. Resources J. 213 (1984).

For article, "Centralized Decisionmaking in the Administration of Groundwater Rights: The Experience of Arizona, California and New Mexico and Suggestions for the Future," see 24 Nat. Resources J. 641 (1984).

For comment, "Is There a Future for Proposed Water Uses in Equitable Apportionment Suits?," see 25 Nat. Resources J. 791 (1985).

For note, "Recent Developments in the El Paso/New Mexico Interstate Groundwater Controversy - The Constitutionality of New Mexico's New Municipality Water Planning State," see 29 Nat. Resources J. 223 (1989).

For note, "The Milagro Beanfield War Revisited in Ensenada Land & Water Ass'n v. Sleeper: Public Welfare Defies Transfer of Water Rights," see 29 Nat. Resources J. 861 (1989).

For article, “The Administration of the Middle Rio Grande Basin: 1956-2002,” see 42 Nat. Resources J. 939 (2002).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 78 Am. Jur. 2d Waters §§ 229, 316.

Appropriation of subterranean and percolating waters, springs and wells, 55 A.L.R. 1444, 109 A.L.R. 395.

Right of appropriator of water to recapture water which has escaped or is otherwise no longer within his immediate possession, 89 A.L.R. 210.

Methods or means of diversion, appropriation of water as creating right to continue, as against subsequent appropriator, 121 A.L.R. 1044.

Riparian owner's right to continuation of periodic and seasonal overflows from stream, 20 A.L.R.2d 656.

Riparian owner's right to construct dikes, embankments or other structures necessary to maintain or restore bank of stream or to prevent flood, 23 A.L.R.2d 750.

Liability for obstruction or diversion of subterranean waters in use of land, 29 A.L.R.2d 1354.

Relative riparian or littoral rights respecting the removal of water from a natural, private, nonnavigable lake, 54 A.L.R.2d 1450.

Apportionment and division of area of river as between riparian tracts fronting on same bank, in absence of agreement or specification, 65 A.L.R.2d 143.

Modern status of rules governing interference with drainage of surface waters, 93 A.L.R.3d 1193.

Public rights of recreational boating, fishing, wading, or the like in inland stream the bed of which is privately owned, 6 A.L.R.4th 1030.

Allocation of water space among lakefront owners, in absence of agreement or specification, 14 A.L.R.4th 1028.

Liability for diversion of surface water by raising surface level of land, 88 A.L.R.4th 891.

93 C.J.S. Waters § 157 et seq.

II. PUBLIC WATERS.

New Mexico does not recognize pueblo rights doctrine. State v. City of Las Vegas, 2004-NMSC-009, 135 N.M. 375, 89 P.3d 47.

And doctrine is incompatible with water law in New Mexico and violates public policy. State v. City of Las Vegas, 2004-NMSC-009, 135 N.M. 375, 89 P.3d 47.

And doctrine is inconsistent with New Mexico law and not protected by the Treaty of Guadalupe Hidalgo. State v. City of Las Vegas, 2004-NMSC-009, 135 N.M. 375, 89 P.3d 47.

Pueblo rights doctrine is inconsistent with New Mexico's system of prior appropriation. State v. City of Las Vegas, 2004-NMSC-009, 135 N.M. 375, 89 P.3d 47.

Water rights acquired by municipality under colonization grant from antecedent sovereigns is recognized in New Mexico in the same manner as other municipal water rights. State v. City of Las Vegas, 2004-NMSC-009, 135 N.M. 375, 89 P.3d 47.

State controls the use of water because it does not part with ownership; it only allows a usufructuary right to water. Jicarilla Apache Tribe v. United States, 657 F.2d 1126 (10th Cir. 1981).

Waters already reserved for public use. — Waters need not be appropriated for public use since they are already reserved for such use, subject to being specifically appropriated for private beneficial use. State ex rel. State Game Comm'n v. Red River Valley Co., 51 N.M. 207, 182 P.2d 421 (1945).

Alternative view nowhere expressed by state. — If it were intention that public waters should have been public only in sense that they could be diverted from natural channel through specific appropriation for irrigation, mining and other beneficial uses, apt language could have been used in the early statutes and constitution. State ex rel. State Game Comm'n v. Red River Valley Co., 51 N.M. 207, 182 P.2d 421 (1945).

And not by congress. — When congress confirmed title to lands in 1869 and when United States issued title thereto in 1873, federal government did not limit or destroy right of general public to use public waters. State ex rel. State Game Comm'n v. Red River Valley Co., 51 N.M. 207, 182 P.2d 421 (1945).

Sportsman may fish in public water so long as he does not trespass upon lands of another, and owner of underlying land cannot complain of fishing from boat upon public

waters above. State ex rel. State Game Comm'n v. Red River Valley Co., 51 N.M. 207, 182 P.2d 421 (1945).

Riparian owner lacks recreation rights distinct from general public's. — Riparian owner has no rights of recreation or fishery distinct from rights of general public where waters impounded are from natural streams which are public waters subject to jurisdiction of state game commission. State ex rel. State Game Comm'n v. Red River Valley Co., 51 N.M. 207, 182 P.2d 421 (1945).

Continuance of public nature. — Where two perennial streams were public waters prior to building of dam, they continued to be public after waters from two streams were artificially impounded. State ex rel. State Game Comm'n v. Red River Valley Co., 51 N.M. 207, 182 P.2d 421 (1945).

State engineer to protect instream flows. — Neither the New Mexico Constitution nor statutes governing appropriation and use of surface water prohibit the state engineer from affording legal protection for instream flows for recreational, fish or wildlife, or ecological purposes, by conditioning approval of a transfer of an existing water right to an instream use on the installation of gauging devices. 1998 Op. Att'y Gen. No. 98-01.

Despite failure of game commission so to provide. — Though at time state game commission negotiated for creation of reservoir by construction of dam, it did not press for recognition of public's right to fish in waters impounded, the public's right to use public waters in question was not thereby foreclosed. State ex rel. State Game Comm'n v. Red River Valley Co., 51 N.M. 207, 182 P.2d 421 (1945).

III. APPROPRIATION FOR BENEFICIAL USE.

New Mexico has adopted so-called appropriation doctrine of water use. Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92, 58 S. Ct. 803, 82 L. Ed. 1202 (1938).

Adjudication of rights is essential to operation of appropriation doctrine. New Mexico v. Aamodt, 537 F.2d 1102 (10th Cir. 1976), cert. denied, New Mexico v. United States, 429 U.S. 1121, 97 S. Ct. 1157, 51 L. Ed. 2d 572 (1977).

Service of decision denying protest on attorney rather than on protestant, where protestant's well was mentioned in application to change use of existing rights, did not adjudicate protestant's rights to the well. Garbagni v. Metropolitan Inv., Inc., 110 N.M. 436, 796 P.2d 1132 (Ct. App. 1990).

No right to specific water. — Appropriator does not acquire any right to specific water flowing in public stream, though he may take therefrom a given quantity of water for specific purpose. State ex rel. State Game Comm'n v. Red River Valley Co., 51 N.M. 207, 182 P.2d 421 (1945).

Municipal water rights must be determined by prior appropriation based on beneficial use regardless of a colonization grant from preceding sovereigns. State v. City of Las Vegas, 2004-NMSC-009, 135 N.M. 375, 89 P.3d 47.

Colonization grant from antecedent sovereigns establishes date of priority, but the priority date applies only to the quantity of water put to beneficial use within a reasonable time of the initial appropriation. State v. City of Las Vegas, 2004-NMSC-009, 135 N.M. 375, 89 P.3d 47.

Determination of beneficial use in a question of fact. Jicarilla Apache Tribe v. United States, 657 F.2d 1126 (10th Cir. 1981).

"Beneficial use" construed. — "Beneficial use" to which public waters may be placed includes fishing and recreation. State ex rel. State Game Comm'n v. Red River Valley Co., 51 N.M. 207, 182 P.2d 421 (1945).

Because water conservation and preservation is of utmost importance, maximum utilization is a fundamental requisite of "beneficial use." Jicarilla Apache Tribe v. United States, 657 F.2d 1126 (10th Cir. 1981).

The holding of Jicarilla Apache Tribe v. United States, 657 F.2d 1126 (10th Cir. 1981), does not broadly stand for the proposition that using San Juan-Chama Project water for recreation, fish and wildlife purposes is not “beneficial” under federal and state law. Rio Grande Silvery Minnow v. Keys, 333 F.3d 1109 (10th Cir. 2003).

Diverting San Juan-Chama Project water to prevent jeopardy to an endangered species of minnow is a “beneficial use” under New Mexico law. Rio Grande Silvery Minnow v. Keys, 333 F.3d 1109 (10th Cir. 2003).

Any water not put to beneficial use within a reasonable time cannot be reserved by a municipality for future expansion. State v. City of Las Vegas, 2004-NMSC-009, 135 N.M. 375, 89 P.3d 47.

Quantity of appropriation measured by amount applied to beneficial use. — Amount of water which has been applied to a beneficial use is a measure of quantity of appropriation. State ex rel. Erickson v. McLean, 62 N.M. 264, 308 P.2d 983 (1957).

Use must be reasonable. — Use of water must not only be beneficial to lands of appropriator, but it must also be reasonable in relation thereto. State ex rel. Erickson v. McLean, 62 N.M. 264, 308 P.2d 983 (1957).

No matter how early a person's priority of appropriation may be, he is not entitled to receive more water than is necessary for his actual use. Excessive diversion of water through waste cannot be regarded as diversion to beneficial use. State ex rel. Erickson v. McLean, 62 N.M. 264, 308 P.2d 983 (1957); Jicarilla Apache Tribe v. United States, 657 F.2d 1126 (10th Cir. 1981).

Prior actual appropriation gives better right than administratively approved application. — Prior actual appropriation of water to a beneficial use, open and visible, will give better right to water than could be obtained under approved application to state engineer for right to appropriate. 1914 Op. Att'y Gen. 131.

Interim administration of junior water uses of stream system constitutional. — In a suit to adjudicate rights to the surface and ground waters of an entire stream system, an order permitting the court to enjoin junior water users to show cause in individual proceedings why their uses should not be enjoined pursuant to this section, such injunctions being subject to the right of each user to contest inter se the rights adjudicated for use through and by means of a senior irrigation project, and also subject to the right of each user to establish that his use of the public waters of the stream system should not be terminated to satisfy the senior rights adjudicated for use through the project, and appointing the state engineer as an interim watermaster to administer such orders of injunction as may be entered by the court in the proceedings which will be held pursuant to the order, does not violate rights to due process. State ex rel. Reynolds v. Pecos Valley Artesian Conservancy Dist., 99 N.M. 699, 663 P.2d 358 (1983).

IV. EMINENT DOMAIN.

Interstate stream commission may condemn land in state's name. — Interstate stream commission is entitled to institute proceedings in name of state for condemnation of land for erecting dam and reservoir to impound and conserve water. State ex rel. Red River Valley Co. v. District Court, 39 N.M. 523, 51 P.2d 239 (1935).

Appropriator may also condemn. — Applicant for appropriation of waters for irrigation purposes may acquire, by condemnation proceedings, right to use of project and right-of-way through existing ditch or canal of another appropriator, by enlargement. 1915-16 Op. Att'y Gen. 92.

Eminent domain proper where water storage and conveyance for beneficial uses. — See same catchline in notes to N.M. Const., art. XVI, § 1.

Confiscation for private use exception to general rule. — Private property can be taken only for public use, and effect of New Mexico law is to carve out an exception to this constitutional mandate in recognition of overriding considerations borne of necessity in an arid land where water is the life-blood of the community. W.S. Ranch Co. v. Kaiser Steel Corp., 388 F.2d 257 (10th Cir. 1967), rev'd on ground that federal action should be stayed awaiting state decision, 391 U.S. 593, 88 S. Ct. 1753, 20 L. Ed. 2d 835 (1968).

Conservancy district does not have authority to barter away vested water rights of landowners who have applied them to beneficial use. Waters are appurtenant to land and district stores and delivers them to the users. Middle Rio Grande Water Users Ass'n v. Middle Rio Grande Conservancy Dist., 57 N.M. 287, 258 P.2d 391 (1953).

V. EQUITABLE APPORTIONMENT.

Equitable apportionment is the doctrine of federal common law that governs disputes between states concerning their rights to use the water of an interstate stream. When both states recognize the doctrine of prior appropriation, priority becomes the "guiding principle" in an allocation between competing states, but state law is not controlling. Colorado v. New Mexico, 459 U.S. 176, 103 S. Ct. 539, 74 L. Ed. 2d 348 (1982), reh'g denied, 459 U.S. 1229, 103 S. Ct. 1418, 75 L. Ed. 2d 471 (1983).

Rule of priority is not sole criterion. — In the determination of an equitable apportionment of the water of the Vermejo river between Colorado and New Mexico the rule of priority is not the sole criterion. While the equities supporting the protection of established, senior uses are substantial, it is also appropriate to consider additional factors relevant to a just apportionment, such as the conservation measures available to both states and the balance of harm and benefit that might result from a diversion sought by Colorado. Colorado v. New Mexico, 459 U.S. 176, 103 S. Ct. 539, 74 L. Ed. 2d 348 (1982), reh'g denied, 459 U.S. 1229, 103 S. Ct. 1418, 75 L. Ed. 2d 471 (1983).

Doctrine applies to claim for future uses. — The flexible doctrine of equitable apportionment clearly extends to a state's claim to divert water for future uses. Whether such a diversion should be permitted will turn on an examination of all factors relevant to a just apportionment. Colorado v. New Mexico, 459 U.S. 176, 103 S. Ct. 539, 74 L. Ed. 2d 348 (1982), reh'g denied, 459 U.S. 1229, 103 S. Ct. 1418, 75 L. Ed. 2d 471 (1983).

Water treated as natural resource for commerce clause analysis purposes. — For purposes of constitutional analysis under the commerce clause, water is to be treated the same as other natural resources. City of El Paso ex rel. Pub. Serv. Bd. v. Reynolds, 563 F. Supp. 379 (D.N.M. 1983).

And prohibition of out-of-state export of ground water unconstitutional. — New Mexico's prohibition of the out-of-state export of ground water, derived from N.M. Const., art. XVI, §§ 2 and 3, and former 72-12-19 NMSA 1978, which statute, with minor exceptions, expressly prohibited the transport of ground water from New Mexico for use in another state, is unconstitutional, as such an embargo violates the commerce clause of U.S. Const., art. I. City of El Paso ex rel. Pub. Serv. Bd. v. Reynolds, 563 F. Supp. 379 (D.N.M. 1983).

Sec. 3. [Beneficial use of water.]

Beneficial use shall be the basis, the measure and the limit of the right to the use of water.

ANNOTATIONS

Water treated as natural resource for commerce clause analysis purposes. — For purposes of constitutional analysis under the commerce clause, water is to be treated the same as other natural resources. City of El Paso ex rel. Pub. Serv. Bd. v. Reynolds, 563 F. Supp. 379 (D.N.M. 1983).

And prohibition of out-of-state export of ground water unconstitutional. — New Mexico's prohibition of the out-of-state export of ground water, derived from N.M. Const., art. XVI, §§ 2 and 3, and former 72-12-19 NMSA 1978, which statute, with minor exceptions, expressly prohibited the transport of ground water from New Mexico for use in another state, is unconstitutional, as such an embargo violates the commerce clause of U.S. Const., art. I. City of El Paso ex rel. Pub. Serv. Bd. v. Reynolds, 563 F. Supp. 379 (D.N.M. 1983).

Water rights law extends to all parties. — See same catchline in notes to N.M. Const., art. XVI, § 1.

"Water" construed. — See same catchline in notes to N.M. Const., art. XVI, § 1.

"Beneficial use" construed. — Beneficial use is the use of such water as may be necessary for some useful and beneficial purpose in connection with land from which it is taken. No one has right to use or divert water except for beneficial use. State ex rel. Erickson v. McLean, 62 N.M. 264, 308 P.2d 983 (1957).

Conservation is beneficial use. — Attainment of state conservation purposes by state game commission is such a purpose as to constitute a useful or beneficial application of waters. United States v. Ballard, 184 F. Supp. 1 (D.N.M. 1960).

So is lease of water by irrigation district. — Leasing or renting of water by irrigation district together with use thereof by lessee is beneficial use within requirement of this section. 1963-64 Op. Att'y Gen. No. 64-1.

Quantity of appropriation measured by amount applied to beneficial use. — See same catchline in notes to N.M. Const., art. XVI, § 2.

Appropriator can take only such water as he can beneficially use. Worley v. United States Borax & Chem. Corp., 78 N.M. 112, 428 P.2d 651 (1967).

Measure of right to appropriate water is actual beneficial use; that is, the amount of water necessary for effective use for purpose to which it is put under particular circumstances of soil conditions, method of conveyance, topography and climate. State ex rel. Reynolds v. Mears, 86 N.M. 510, 525 P.2d 870 (1974).

A city cannot take for storage a quantity of water greatly in excess of its current needs and sales to other water users on the strength of mere speculation as to the demands of possible sales in the future. Such storage for possible future exchange is unreasonable

and does not constitute a beneficial use. Jicarilla Apache Tribe v. United States, 657 F.2d 1126 (10th Cir. 1981).

No one is entitled to receive water for a use not recognized as beneficial. Jicarilla Apache Tribe v. United States, 657 F.2d 1126 (10th Cir. 1981).

Excessive diversion is not beneficial use. — No matter how early a person's priority of appropriation may be, he is not entitled to receive more water than is necessary for his actual use. An excessive diversion of water, through waste, cannot be regarded as a diversion to beneficial use. Jicarilla Apache Tribe v. United States, 657 F.2d 1126 (10th Cir. 1981).

Intended future use. — The concept of beneficial use requires actual use for some purpose that is socially accepted as beneficial. An intended future use is not sufficient to establish beneficial use if the water is not put to actual use within a reasonable span of time. State ex rel. Martinez v. McDermett, 120 N.M. 327, 901 P.2d 745 (Ct. App. 1995).

Diversion alone is not beneficial use. There must be an ultimate, actual beneficial use of the water resulting from the diversion. State ex rel. Martinez v. McDermett, 120 N.M. 327, 901 P.2d 745 (Ct. App. 1995).

Mere diversion of water into a canal or ditch, without applying water to irrigating a crop or other valid use, does not satisfy the requirement of a beneficial use. State ex rel. Martinez v. McDermett, 120 N.M. 327, 901 P.2d 745 (Ct. App. 1995).

Preparatory use. — Running water over land without growing crops or irrigating native grasses may constitute a preparatory use of the water for a period of time, but doing so for a number of years can only be characterized as waste. State ex rel. Martinez v. McDermett, 120 N.M. 327, 901 P.2d 745 (Ct. App. 1995).

Diversion for irrigation. — Diversion of water into irrigation ditches or flooding the land with the diverted water does not, by itself, constitute irrigation for the purpose of establishing beneficial use; diversion for the purpose of irrigation contemplates that something will be grown. State ex rel. Martinez v. McDermett, 120 N.M. 327, 901 P.2d 745 (Ct. App. 1995).

When water is diverted for agricultural purposes, the vesting of water rights occurs when crops are cultivated and not when preparatory steps are taken in anticipation of cultivation. State ex rel. Martinez v. McDermett, 120 N.M. 327, 901 P.2d 745 (Ct. App. 1995).

Remainder subject to further appropriation. — By limiting right to use of water to a "beneficial use," constitution grants to appropriator only that quantity of water which is so applied, the remainder being subject to further appropriation for like purposes. 1915-16 Op. Att'y Gen. 92.

Water right forfeited by nonuse. — There is no power under New Mexico water law to acquire a water right and hold it without using it. Water right is a usufructuary right which can be forfeited by nonuse. 1963-64 Op. Att'y Gen. No. 64-1.

Beneficial use is the basis, measure and limit of the right to use water in New Mexico, and unused water rights may be forfeited. United States ex rel. Acoma & Laguna Indian Pueblos v. Bluewater-Toltec Irrigation Dist., 580 F. Supp. 1434 (D.N.M. 1984), aff'd, 806 F.2d 986 (10th Cir. 1986).

Use must be reasonable. — See same catchline in notes to N.M. Const., art. XVI, § 2.

State engineer to protect instream flows. — Neither the New Mexico Constitution nor statutes governing appropriation and use of surface water prohibit the state engineer from affording legal protection for instream flows for recreational, fish or wildlife, or ecological purposes, by conditioning approval of a transfer of an existing water right to an instream use on the installation of gauging devices, 1998 Op. Att'y Gen. No. 98-01.

Generally regarding eminent domain. — In determining whether use would inure to benefit of general public or only a few individuals, the public use being furthered is not distribution of waters but the ultimate use of the water. The ultimate use of public waters in aid of coal mining is not a beneficial or public use so as to confer power of eminent domain for a right-of-way to divert such water. W.S. Ranch Co. v. Kaiser Steel Corp., 388 F.2d 257 (10th Cir. 1967), rev'd on ground that federal action should be stayed awaiting state decision, 391 U.S. 593, 88 S. Ct. 1753, 20 L. Ed. 2d 835 (1968). For statement of New Mexico supreme court contrary to federal court of appeals, see note under catchline "Eminent domain proper where water storage and conveyance for beneficial uses."

Eminent domain proper where water storage and conveyance for beneficial uses. — See same catchline in notes to N.M. Const., art. XVI, § 1.

Liability for negligent use of water. — Beneficial use is the basis, measure and limit of right to use of water under this section, and when waters are willfully and negligently allowed to run on lands of others, liability attaches. Holloway v. Evans, 55 N.M. 601, 238 P.2d 457 (1951).

Law reviews. — For comment, "Water Rights - Failure to Use - Forfeiture," see 6 Nat. Resources J. 127 (1966).

For article, "Water Rights Problems in the Upper Rio Grande Watershed and Adjoining Areas," see 11 Nat. Resources J. 48 (1971).

For note, "New Mexico's National Forests and the Implied Reservation Doctrine," see 16 Nat. Resources J. 975 (1976).

For article, "Water Law Problems of Solar Hydrogen Production," see 18 Nat. Resources J. 521 (1978).

For comment, "Protection of the Means of Groundwater Diversion," see 20 Nat. Resources J. 625 (1980).

For comment, "New Mexico's Mine Dewatering Act: The Search for Rehoboth," see 20 Nat. Resources J. 653 (1980).

For article, "Centralized Decisionmaking in the Administration of Groundwater Rights: The Experience of Arizona, California and New Mexico and Suggestions for the Future," see 24 Nat. Resources J. 641 (1984).

For article, "The Law of Prior Appropriation: Possible Lessons for Hawaii," see 25 Nat. Resources J., 911 (1985).

For note, "Recent Developments in the El Paso/New Mexico Interstate Groundwater Controversy - The Constitutionality of New Mexico's New Municipality Water Planning Statute," see 29 Nat. Resources J. 223 (1989).

For note, "The Milagro Beanfield War Revisited in Ensenada Land & Water Ass'n v. Sleeper: Public Welfare Defies Transfer of Water Rights," see 29 Nat. Resources J. 861 (1989).

For note, "Contract for Nonbeneficial Use: New Mexico Water Law Is Drowned Out by Contract," see 32 Nat. Resources J. 149 (1992).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 78 Am. Jur. 2d Waters §§ 330 to 332.

Liability for injury to property occasioned by oil, water or the like flowing from well, 19 A.L.R.2d 1025.

Pollution of subterranean waters, liability for, 38 A.L.R.2d 1265.

Pollution of stream, measure and elements of damages, 49 A.L.R.2d 253.

Measure and elements of damages for pollution of well or spring, 76 A.L.R.4th 629.

93 C.J.S. Waters § 172.

Sec. 4. [Drainage districts and systems.]

The legislature is authorized to provide by law for the organization and operation of drainage districts and systems.

ANNOTATIONS

Cross references. — For statutes implementing this section, see 73-6-1 to 73-6-44, 73-7-1 to 73-7-56, 73-8-1 to 73-8-60 NMSA 1978.

As to irrigation districts, see 73-9-1 to 73-9-62, 73-10-1 to 73-10-47, 73-11-1 to 73-11-55, 73-12-1 to 73-12-57, 73-13-1 to 73-13-46 NMSA 1978.

Water rights law extends to all parties. — See same catchline in notes to N.M. Const., art. XVI, § 1.

"Drainage district" not required designation. — Nothing in this provision requires legislation pertaining to removal of excess water from surface of an area to refer to or designate authority for such water control as a "drainage district." Albuquerque Metropolitan Arroyo Flood Control Auth. v. Swinburne, 74 N.M. 487, 394 P.2d 998 (1964).

Districts need not be corporations. — This provision does not necessarily contemplate that drainage districts shall be corporations. In re Dexter-Greenfield Drainage Dist., 21 N.M. 286, 154 P. 382 (1915).

Section apparently authorizes provisions for acequias. — The grant under this section seems to be plenary and to authorize the legislature to provide for drainage districts, in such form as it in its discretion may adopt, and one form of such districts is the community acequia. 1963-64 Op. Att'y Gen. No. 63-112.

Drainage act constitutional. — New Mexico Drainage Act (Laws 1912, ch. 84, presently compiled as 73-6-1 NMSA 1978 et seq.) does not violate this section. In re Dexter-Greenfield Drainage Dist., 21 N.M. 286, 154 P. 382 (1915).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 25 Am. Jur. 2d Drains and Drainage Districts § 3 et seq.

Scope and import of term "owner" in statute relating to formation of drainage district, 2 A.L.R. 791, 95 A.L.R. 1085.

Park property, use of, for construction of water supply system, 18 A.L.R. 1265, 63 A.L.R. 484, 144 A.L.R. 486.

State's power to exact fee or require license for taking water from stream, 19 A.L.R. 649, 29 A.L.R. 1478.

Liability of drainage district for personal injuries, 33 A.L.R. 77.

Personal liability of officers of drainage districts for negligence of subordinates or employees causing damage to person or property, 61 A.L.R. 300.

Constitutionality of statutes for formation or change of irrigation districts, 69 A.L.R. 285.

Liability of irrigation district for damages, 69 A.L.R. 1231, 160 A.L.R. 1165.

Constitutionality and construction of statute which leaves to determination of private individuals boundaries of territory to be erected into water district, 70 A.L.R. 1064.

Estoppel of riparian owner to complain of diversion of water by municipal corporation, 74 A.L.R. 1129.

Discrimination between property within and that outside municipality or other governmental district as to public service or utility rates, 4 A.L.R.2d 595.

Relocation of easements (other than those originally arising by necessity); rights as between private parties, 80 A.L.R.2d 743.

28 C.J.S. Drains § 4.

Sec. 5. [Appeals in matters relating to water rights.]

In any appeal to the district court from the decision, act or refusal to act of any state executive officer or body in matters relating to water rights, the proceeding upon appeal shall be de novo as cases originally docketed in the district court unless otherwise provided by law. (As added November 7, 1967.)

ANNOTATIONS

The 1967 amendment of Article XVI, which was proposed by S.J.R. No. 7 (Laws 1967) and was adopted at a special election held on November 7, 1967, by a vote of 31,494 for and 19,571 against, added this section.

Compiler's notes. — An amendment to Article XVI, which would have added a new section similar to this one, was proposed by H.J.R. No. 29 (Laws 1965) and submitted to the people at a special election held on September 28, 1965. It was defeated by a vote of 23,718 for and 35,924 against.

Original proceeding in district court unconstitutional. — Proviso added to 75-2-15, 1953 Comp. in 1967 (since deleted), stating that that section was to have no application to hearings relating to underground waters required to be held in district court, was unconstitutional as a violation of separation of powers doctrine of state constitution; statute was not validated by subsequent adoption of N.M. Const., art. XVI, § 1, since constitutional amendment concerned appeal to district court, whereas contemplated hearings were original proceedings in district court. Fellows v. Shultz, 81 N.M. 496, 469 P.2d 141 (1970).

1967 amendment to 75-11-2, 1953 Comp. (since deleted), providing for district court review of state engineer's decision, was unconstitutional as violating separation of powers doctrine of state constitution (except for portion relating to obtaining

acknowledged statement from landowner); statute was not validated by subsequent adoption of this section, since constitutional amendment concerned appeal to district court whereas statute contemplated original proceeding in district court without regard to prior decision, act or refusal to act by state engineer. Fellows v. Shultz, 81 N.M. 496, 469 P.2d 141 (1970).

1967 amendment to 75-11-7, 1953 Comp. (since deleted), providing for district court review of state engineer's decision, was unconstitutional in that it violated separation of powers doctrine of state constitution; statute was not validated by subsequent adoption of N.M. Const., art. XVI, § 5, since that amendment specifically referred to "appeal" to district court, whereas the statute contemplated an original proceeding in district court without the requirement of a prior decision, act or refusal to act by state engineer. Fellows v. Shultz, 81 N.M. 496, 469 P.2d 141 (1970).

Court should have recited substance of its judgment, rather than merely affirming findings and decision of state engineer. Fort Sumner Irrigation Dist. v. Carlsbad Irrigation Dist., 87 N.M. 149, 530 P.2d 943 (1974).

But trial de novo nonetheless afforded. — Where irrigation district appealed state engineer's findings and order approving transfer of certain water storage rights and at trial in district court evidence adduced at hearing before engineer was considered along with all additional relevant evidence desired by the parties, including witnesses, and no party was in any way foreclosed or limited in presentation of evidence it possessed and wished to present, the proceedings conformed to trial de novo mandated by this section, although court merely affirmed findings and order of state engineer. Fort Sumner Irrigation Dist. v. Carlsbad Irrigation Dist., 87 N.M. 149, 530 P.2d 943 (1974).

Law reviews. — For article, "Constitutional Limitations on the Exercise of Judicial Functions by Administrative Agencies," see 7 Nat. Resources J. 599 (1967).

For article, "Water Rights Problems in the Upper Rio Grande Watershed and Adjoining Areas," see 11 Nat. Resources J. 48 (1971).

For article, "Congressional Quantification of Indian Reserved Water Rights: A Definite Solution or a Mirage?," see 20 Nat. Resources J. 17 (1980).

For comment, "Protection of the Means of Groundwater Diversion," see 20 Nat. Resources J. 625 (1980).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 78 Am. Jur. 2d Waters §§ 256, 258.

93 C.J.S. Waters § 204.

ARTICLE XVII
Mines and Mining

Section 1. [Inspector of mines.]

There shall be a state mine inspector who shall be appointed by the governor, by and with the advice and consent of the senate, for a term of four years, and whose duties and salary shall be as prescribed by law. The legislature may pass laws prescribing reasonable qualifications for the state mine inspector and deputy mine inspectors, and current legislative enactments prescribing such qualifications are declared to be in full force and effect. (As amended September 19, 1961.)

ANNOTATIONS

Cross references. — For applicability of federal Mining Inspection Act (26 Stat. 1104) in New Mexico, see N.M. Const., art. XXII, § 3.

For legislation relating to state inspector of mines, see Chapter 69, Articles 5 and 8 NMSA 1978.

The 1961 amendment, which was proposed by S.J.R. No. 23 (Laws 1961) and adopted at a special election held on September 19, 1961, with a vote of 29,773 for and 20,745 against, substituted "a state mine inspector" for "an inspector of mines" in the first sentence and added the second sentence.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 53A Am. Jur. 2d Mines and Minerals § 274 et seq.

58 C.J.S. Mines and Minerals § 237.

Sec. 2. [Mining regulations; employment of children under fourteen.]

The legislature shall enact laws requiring the proper ventilation of mines, the construction and maintenance of escapement shafts or slopes, and the adoption and use of appliances necessary to protect the health and secure the safety of employees therein. No children under the age of fourteen years shall be employed in mines.

ANNOTATIONS

Cross references. — For prohibition of certain mining work by children under 18, see 50-6-5 NMSA 1978.

For Mining Safety Act, see 69-8-1 to 69-8-15 NMSA 1978.

As to safety regulations, see 69-15-1 to 69-15-16 NMSA 1978. See also Pamphlets 108 to 110 for related mining statutes.

Attempt to comply with constitutional mandate. — Laws 1912, ch. 80 (now repealed), was evidently an attempt to comply with this section's mandate. Melkusch v. Victor Am. Fuel Co., 21 N.M. 396, 155 P. 727 (1916).

Type of employment subject to age requirement. — It is apparent that the contemplated employment (separating mica near blasting area) is a mining operation as that term is defined in 69-4-1 NMSA 1978, and therefore falls within prohibition of this section as to age of employment. 1957-58 Op. Att'y Gen. No. 58-204.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 53A Am. Jur. 2d Mines and Minerals §§ 255, 256, 257, 260 et seq.; 61 Am. Jur. 2d Plant and Job Safety - OSHA and State Laws §§ 23, 24, 131, 137, 138.

Quarries, gravel pits and the like as nuisances, 47 A.L.R.2d 490.

Prohibiting or regulating removal or exploitation of oil and gas, minerals, soil or other natural products within municipal limits, 10 A.L.R.3d 1226.

30 C.J.S. Employers' Liability §§ 69, 70; 58 C.J.S. Mines and Minerals § 229.

ARTICLE XVIII
Militia

Section 1. [Composition, name and commander in chief of militia.]

The militia of this state shall consist of all able-bodied male citizens between the ages of eighteen and forty-five, except such as are exempt by laws of the United States or of this state. The organized militia shall be called the "national guard of New Mexico," of which the governor shall be the commander in chief.

ANNOTATIONS

Cross references. — For status of governor as commander in chief of state military forces, see N.M. Const., art. V, § 4.

Comparable provisions. — Idaho Const., art. XIV, § 1.

Iowa Const., art. VI, § 1.

Utah Const., art. XV, §§ 1, 2.

Wyoming Const., art. XVII, § 1.

Law reviews. — For article, "Survey of New Mexico Law, 1979-80: Administrative Law," see 11 N.M.L. Rev. 1 (1981).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 53 Am. Jur. 2d Military and Civil Defense §§ 3, 26, 34.

Incompatibility of offices of judge and national guard officer, 26 A.L.R. 143, 132 A.L.R. 254, 147 A.L.R. 1419, 148 A.L.R. 1399, 150 A.L.R. 1444.

Taxation for militia purposes as within constitutional prohibitions, 46 A.L.R. 723, 106 A.L.R. 906.

Validity of governmental requirement of oath of allegiance or loyalty, 18 A.L.R.2d 268.

6 C.J.S. Armed Services §§ 289, 291.

Sec. 2. [Organization, discipline and equipment of militia.]

The legislature shall provide for the organization, discipline and equipment of the militia, which shall conform as nearly as practicable to the organization, discipline and equipment of the regular army of the United States, and shall provide for the maintenance thereof.

ANNOTATIONS

Meaning of section. — Constitution-makers did not say that legislature should organize the militia but mandated them to provide for organization of militia, and legislature has declared its legislative policy of establishing a militia. State ex rel. Charlton v. French, 44 N.M. 169, 99 P.2d 715 (1940).

Court-martial for felony not authorized absent war or public danger. — Section does not authorize legislature to provide that militiaman can be tried for felony by court-martial or military court when no state of war or public danger exists. State ex rel. Sage v. Montoya, 65 N.M. 416, 338 P.2d 1051 (1959).

Provisions in pari materia. — Constitutional provisions concerning organization, discipline and equipment of militia, calling out of militia (N.M. Const., art. V, § 4) and contracting debts to provide for public defense (N.M. Const., art. IX, § 7) are in pari materia. State ex rel. Charlton v. French, 44 N.M. 169, 99 P.2d 715 (1940).

Salary of adjutant-general. — Adjutant-general of the state holds two offices, one a civil office and the other brigadier-general of the national guard of the state, and when ordered to duty as national guard officer, he is entitled to pay in both capacities. 1933-34 Op. Att'y Gen. 152.

Comparable provisions. — Idaho Const., art. XIV, § 2.

Iowa Const., art. VI, § 1.

Utah Const., art. XV, § 2.

Wyoming Const., art. XVI, § 2.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 53 Am. Jur. 2d Military and Civil Defense § 26.

Validity of governmental requirement of oath of allegiance or loyalty, 18 A.L.R.2d 268.

6 C.J.S. Armed Services § 288 et seq.

ARTICLE XIX
Amendments

Section 1. [Proposing and ratifying amendments.]

An amendment or amendments to this constitution may be proposed in either house of the legislature at a regular session; and if a majority of all members elected to each of the two houses voting separately votes in favor thereof, the proposed amendment or amendments shall be entered on their respective journals with the yeas and nays thereon.

An amendment or amendments may also be proposed by an independent commission established by law for that purpose, and the amendment or amendments shall be submitted to the legislature for its review in accordance with the provisions of this section.

The secretary of state shall cause any such amendment or amendments to be published in at least one newspaper in every county of the state, where a newspaper is published once each week, for four consecutive weeks, in English and Spanish when newspapers in both of said languages are published in such counties, the last publication to be not more than two weeks prior to the election at which time said amendment or amendments shall be submitted to the electors of the state for their approval or rejection; and shall further provide notice of the content and purpose of legislatively approved constitutional amendments in both English and Spanish to inform electors about the amendments in the time and manner provided by law. The secretary of state shall also make reasonable efforts to provide notice of the content and purpose of legislatively approved constitutional amendments in indigenous languages and to minority language groups to inform electors about the amendments. Amendments approved by the legislature shall be voted upon at the next regular election held after the adjournment of that legislature or at a special election to be held not less than six months after the adjournment of that legislature, at such time and in such manner as the legislature may by law provide. An amendment that is ratified by a majority of the electors voting on the amendment shall become part of this constitution.

If two or more amendments are initiated by the legislature, they shall be so submitted as to enable the electors to vote on each of them separately. Amendments initiated by an independent commission created by law for that purpose may be submitted to the legislature separately or as a single ballot question, and any such commission-initiated amendments that are not substantially altered by the legislature may be submitted to the electors in the separate or single ballot question form recommended by the commission. No amendment shall restrict the rights created by Sections One and Three of Article VII hereof, on elective franchise, and Sections Eight and Ten of Article XII hereof, on education, unless it be proposed by vote of three-fourths of the members elected to each house and be ratified by a vote of the people of this state in an election at which at least three-fourths of the electors voting on the amendment vote in favor of that amendment. (As amended November 7, 1911 and November 5, 1996.)

ANNOTATIONS

I. GENERAL CONSIDERATION.

Cross references. — For provision authorizing constitutional conventions, see N.M. Const., art. XIX, § 2.

For statutory provisions relating to constitutional amendments, see 1-16-1 to 1-16-13 NMSA 1978.

The 1911 amendment, which was proposed by congress as part of the required amendment of Article XIX, and was incorporated in the congressional resolution of August 21, 1911 (37 Stat. 39), which provided for admission of New Mexico as a state and stipulated that adoption of the amendment should be a prerequisite to admission, was adopted by the people at the first election of state officers on November 7, 1911, by a vote of 34,897 for and 22,831 against. The amendment added the requirement that notice of proposed amendments be published in both English and Spanish wherever possible, the provision for ratification at a special election and the three-fourths/two-thirds vote required for ratification of amendments to N.M. Const., art. VII, §§ 1 and 3, and art. XII, §§ 8 and 10. The amendment changed to a majority vote the former two-thirds vote of the legislature required to propose amendments for ratification and deleted a provision allowing a majority vote at limited times only. The amendment also deleted a requirement that amendments be ratified by vote of 40% of all votes cast at the election, statewide and in half of the counties, and a limitation on the number of amendments to be submitted per election (3).

The 1996 amendment, which was proposed by H.J.R. No. 2 (Laws 1996) and adopted at the general election held November 5, 1996, by a vote of 294,328 for and 166,415 against, added the second paragraph and divided the former last paragraph and rewrote those provisions.

Compiler's notes. — A proposal to amend this section, H.J.R. No. 16 (Laws 1965), was withdrawn by H.J.M. No. 15 (Laws 1966) due to defeat of proposed repeal of N.M. Const., art. XIX, § 5, at a special election held on September 28, 1965.

"Amendment" construed. — All proposals which would effect a change in constitution, add to or take away from it, are amendments thereof, and "amendment" includes repeal of part of constitution so that such a proposal must be adopted at a regular session of legislature. 1941-42 Op. Att'y Gen. No. 4111.

Amendment required to change purpose of Enabling Act land grants. — Enforcement of change in purpose of grants of land made by Enabling Act (June 20, 1910, 36 Stat. 557, ch. 310; see Pamphlet 3) is prohibited without a constitutional amendment. State v. State Bd. of Fin., 34 N.M. 394, 281 P. 456 (1929); Bryant v. Board of Loan Comm'rs, 28 N.M. 319, 211 P. 597 (1922).

Office created by constitution may be abolished by adoption of amendment to constitution wherein provision creating office is repealed or the office otherwise eliminated. In re Thaxton, 78 N.M. 668, 437 P.2d 129 (1968).

Office holder has no vested right in the office, nor does he hold by contract. In re Thaxton, 78 N.M. 668, 437 P.2d 129 (1968).

Amendment validating unconstitutional statute. — Where constitutional amendment expressly or impliedly ratifies or confirms unconstitutional statute, it validates statute provided validation does not impair contract obligations or vested rights. Fellows v. Shultz, 81 N.M. 496, 469 P.2d 141 (1970).

New Mexico Const., art. XIX, §§ 1 and 2 construed. — This section and N.M. Const., art. XIX, § 2, are of equal dignity. This section is not to be read as if Section 2 did not exist; neither is there reason to read into Section 2 the limitation of this section (relating to publication) not included within language of Section 2. Interpretation which gives complete effect to both sections is required. State ex rel. Constitutional Convention v. Evans, 80 N.M. 720, 460 P.2d 250 (1969).

This section applies where one or more amendments to present constitution are being considered, but does not apply where entirely new constitution is being weighed. State ex rel. Constitutional Convention v. Evans, 80 N.M. 720, 460 P.2d 250 (1969).

This section clearly applies to amendments proposed in legislature, and N.M. Const., art. XIX, § 2, applies to revisions or amendments made by a convention called for that purpose. State ex rel. Constitutional Convention v. Evans, 80 N.M. 720, 460 P.2d 250 (1969).

Amendments to be submitted separately. — Amendment entitled "Proposing to Amend Articles 6 and 20 of the Constitution of New Mexico to Provide for Judicial Reform", approved by the voters on November 8, 1988, was not adopted

unconstitutionally on the ground that it contained a number of independent proposals which should have been presented to the voters as separate amendments under this section. State ex rel. Chavez v. Vigil-Giron, 108 N.M. 45, 766 P.2d 305 (1988).

Although both prongs of the proposed amendment related to an overarching theme of gambling, more was required to demonstrate a single object; the requirement of a rational linchpin joining the various elements of an amendment serves to prevent the linking of independent propositions simply by the selection of a sufficiently broad overarching theme. State ex rel. Clark v. State Canvassing Bd., 119 N.M. 12, 888 P.2d 458 (1995).

The title of the proposed gambling amendment, while technically proper, exacerbated the problems inherent in the vice of logrolling, since the expression "and certain games of chance" did not alert the voter as to the nature or scope of the second prong of the amendment regarding video gaming; thus, the ballot language, while not defective in and of itself, reinforced the conclusion that the amendment logrolled together two independent objects by piggy-backing the passage of one on the popularity of the other. State ex rel. Clark v. State Canvassing Bd., 119 N.M. 12, 888 P.2d 458 (1995).

Subject of constitutional amendments. — When the legislature acts to put a proposed constitutional amendment before the people, it does so pursuant to Article XIX, not Article IV. Therefore, its authority to consider the subject of constitutional amendments is not affected by the list of legislative topics in N.M. Const., art. IV, § 5B. State ex rel. Chavez v. Vigil-Giron, 108 N.M. 45, 766 P.2d 305 (1988).

When legislature may introduce amendments. — The purpose and intent of the framers of the constitution was to limit introduction of amendments to regular as opposed to special sessions, rather than to limit amendments to odd-numbered rather than even-numbered years or to unrestricted rather than restricted regular sessions. State ex rel. Chavez v. Vigil-Giron, 108 N.M. 45, 766 P.2d 305 (1988).

Comparable provisions. — Idaho Const., art. XX, §§ 1, 2.

Iowa Const., art. X, §§ 1, 2; amendment 22.

Utah Const., art. XXIII, § 1.

Wyoming Const., art. XX, §§ 1, 2.

Law reviews. — For note, "Procedural Problems in Amending New Mexico's Constitution," see 4 Nat. Resources J. 151 (1964).

For student symposium, "Constitutional Revision - Constitutional Amendment Process," see 9 Nat. Resources J. 422 (1969).

For comment, "The Last Bastion Crumbles: All Property Restrictions on Franchise Are Unconstitutional," see 1 N.M. L. Rev. 403 (1971).

For 1984-88 survey of New Mexico administrative law, 19 N.M.L. Rev. 575 (1990).

For article, "The Citizen's Initiative Petition to Amend State Constitutions: A Concept Whose Time Has Passed, or a Vigorous Component of Participatory Democracy at the State Level?", see 28 N.M.L. Rev. 227 (1998).

For note, “Indirect Funding of Sectarian Schools: A Discussion of the Constitutionality of State School Voucher Programs Under Federal and New Mexico Law After Zelman v. Simmons-Harris,” see 34 N.M.L. Rev. 194 (2004).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 16 Am. Jur. 2d Constitutional Law §§ 29 to 57.

Construction of requirement that proposed constitutional amendment be entered in journal, 6 A.L.R. 1227, 41 A.L.R. 640.

Implied repeal of existing law by constitutional amendment, 36 A.L.R. 1456.

Proposition submitted as covering more than one amendment, 94 A.L.R. 1510.

Basis for computing majority essential to the adoption of a constitutional or other special proposition submitted to voters, 131 A.L.R. 1382.

Injunctive relief against submission of constitutional amendment, statute, municipal charter or municipal ordinance, on ground that proposed action would be unconstitutional, 19 A.L.R.2d 519.

16 C.J.S. Constitutional Law §§ 6 to 14.

II. PROPOSAL OF AMENDMENTS.

Amendments to be proposed at regular sessions. — Constitutional amendments may be proposed only at regular sessions of legislature convened pursuant to requirements of N.M. Const., art. IV, § 5. 1951-52 Op. Att'y Gen. No. 5398.

Framers of constitution meant for amendments to be proposed in regular sessions as they had defined that term in N.M. Const., art. IV, § 5; namely, during the year next after each general election. 1969 Op. Att'y Gen. No. 69-151.

Proposals during even-numbered years. — This section provides that any amendment may be proposed at any regular legislative session. On the other hand, N.M. Const., art. IV, § 5, provides that every regular session convening during even-numbered years shall consider only the three subjects enumerated therein. Limitation

contained in N.M. Const., art. IV, § 5, being the later amendment, must control. 1965 Op. Att'y Gen. No. 65-212.

Enrolled and engrossed resolution prevails over conflicting journal. — Where there is conflict between enrolled and engrossed resolution proposing constitutional amendment and the legislative journal, in that journal tends to show that resolution failed to receive number of votes required, the enrolled and engrossed resolution, properly authenticated, is to prevail over journal. Smith v. Lucero, 23 N.M. 411, 168 P. 709 (1917).

Amendment proposals not subject to referendum. — Authority reposed in legislature to initiate constitutional amendments is different than its power to legislate and is not subject to referendum. Hutcheson v. Gonzales, 41 N.M. 474, 71 P.2d 140 (1934).

III. PUBLICATION.

Publication requirements found only in this section. — When legislature stated in 1-16-4 NMSA 1978 that other questions to be ratified should have their full texts published "in accordance with the constitution of New Mexico," they referred necessarily to provision for publication in this section, as there is no other provision in constitution setting forth requirements for publication. State ex rel. Constitutional Convention v. Evans, 80 N.M. 720, 460 P.2d 250 (1969).

Meaning of "published". — In order to insure that material is "published" in the newspaper and not merely "distributed" therein, it should be published either as part of a regular section of newspaper or as a separate section containing running head of newspaper, date of publication and some designation to indicate that it is a section of that day's newspaper. 1969 Op. Att'y Gen. No. 69-125.

Insert not proper. — Publication of proposed constitution and proclamation in form of an insert would be subject to legal attacks. 1969 Op. Att'y Gen. No. 69-125.

Mandamus action in supreme court to compel publication. — Supreme court had original jurisdiction at instance of individual voter to mandate secretary of state to publish proposed amendments to constitution. Hutcheson v. Gonzales, 41 N.M. 474, 71 P.2d 140 (1934).

IV. RATIFICATION.

Enactment ordering special election to ratify amendment not subject to referendum. — Enactment calling for special election to approve or reject proposed amendments to constitution was not subject to referendum. Hutcheson v. Gonzales, 41 N.M. 474, 71 P.2d 140 (1934).

Amendments are to be submitted to electorate throughout the state. State v. Perrault, 34 N.M. 438, 283 P. 902 (1929).

Purpose of requirement that amendments be voted on separately. — Purpose of requirement that two or more amendments shall be so submitted as to enable electors to vote on each separately is to avoid vice commonly referred to as "logrolling" or "jockeying"; the particular vice in "logrolling" (presentation of double propositions to voters) lies in fact that such is inducive of fraud and it becomes uncertain whether either proposition could have been carried by vote had it been submitted singly. City of Raton v. Sproule, 78 N.M. 138, 429 P.2d 336 (1967).

Requirement should be liberally construed. — Such constitutional provisions should receive a liberal rather than narrow or technical construction, especially where legislature obviously considered problem carefully and the matter has been submitted to the people. City of Raton v. Sproule, 78 N.M. 138, 429 P.2d 336 (1967).

General submission valid if all changes germane to one object. — Constitutional amendment which embraces several subjects or items of change will be upheld as valid and may be submitted to electorate as one general proposition if all subjects or items of change contained in amendment are germane to one general object or purpose. City of Raton v. Sproule, 78 N.M. 138, 429 P.2d 336 (1967).

Oneness determination not readily overturned. — Courts should be reluctant to overturn legislative determination that proposed amendment will accomplish but one general object or purpose. City of Raton v. Sproule, 78 N.M. 138, 429 P.2d 336 (1967).

Dual submissions upheld. — Where there is but one portion of a single section affected and the object or purpose of amendment is confined to manner in which municipal indebtedness is incurred, fact that two points of change are involved, that either might have been presented to electorate separately and that there may be reasons why an elector might have desired one change and not the other are not in themselves sufficient to hold adoption of amendment invalid. City of Raton v. Sproule, 78 N.M. 138, 429 P.2d 336 (1967).

This section does not forbid submission to people by constitutional convention of an entire article on amendments as a single amendment. 1969 Op. Att'y Gen. No. 69-118.

No power to withdraw ratification. — State can repeal or amend a constitutional amendment in manner specified in this article, but where state has once ratified an amendment it has no power thereafter to withdraw such ratification. 1975 Op. Att'y Gen. No. 75-16.

V. PROVISO.

Proviso applied. — In order to carry, an absentee voter amendment to constitution must have at least three-fourths of electors in the whole state vote for it and at least

two-thirds of those voting in each county must vote for it, so that a majority of votes cast is insufficient. 1937-38 Op. Att'y Gen. 159.

"Electors voting in the whole state" construed. — To construe "electors voting in the whole state" to mean all electors voting at the election, as distinguished from those voting on the particular amendment, would have effect of making the "unamendable section" even more unamendable than would otherwise be true. To so hold would in effect attribute to the convention, the United States congress and the ratifying electorate the intention of incorporating provisions which ostensibly provide for amendment while in fact making it impossible. State ex rel. Witt v. State Canvassing Bd., 78 N.M. 682, 437 P.2d 143 (1968).

Requirement of two-thirds vote in every county violates "one person, one vote" rule. — Requirement of a two-thirds favorable vote in every county, when there is wide disparity in population among counties, must result in greatly disproportionate values to votes in different counties. Where, as here, a vote in one county outweighs 100 votes in another, the "one person, one vote" concept announced in Gray v. Sanders, 372 U.S. 368, 83 S. Ct. 801, 9 L. Ed. 2d 821 (1963), certainly is not met. State ex rel. Witt v. State Canvassing Bd., 78 N.M. 682, 437 P.2d 143 (1968).

To extent that a citizen's right to vote is debased, he is that much less a citizen. Fact that an individual lives here or there is not a legitimate reason for overweighting or diluting efficacy of his vote. The basic principle of representative government remains, and must remain, unchanged - the weight of a citizen's vote cannot be made to depend on where he lives. Reynolds v. Sims, 377 U.S. 533, 84 S. Ct. 1362, 12 L. Ed. 2d 506 (1964); State ex rel. Witt v. State Canvassing Bd., 78 N.M. 682, 437 P.2d 143 (1968).

Two-thirds vote requirement is invalid under fourteenth amendment. — There cannot be political equality under U.S. Const., amend. XIV, to exercise right of elective franchise provided in N.M. Const., art. VII, so long as N.M. Const., art. VII, § 3, and this section contain the restriction on amendment. State ex rel. Witt v. State Canvassing Bd., 78 N.M. 682, 437 P.2d 143 (1968).

Amendment ratified by three-fourths vote held adopted. — Requirement of two-thirds vote in each county being unconstitutional, and demand of ratification by "at least three-fourths of the electors voting in the whole state" having been met, adoption of constitutional amendment submitted as Amendment No. 7 at election held on November 7, 1967, was accomplished; it should be certified as having been ratified. State ex rel. Witt v. State Canvassing Bd., 78 N.M. 682, 437 P.2d 143 (1968).

Sec. 2. [Constitutional conventions.]

Whenever the legislature, by a two-thirds vote of the members elected to each house, deems it necessary to call a convention to revise or amend this constitution, they shall submit the question of calling such convention to the electors at the next general election, and if a majority of all the electors voting on such questions at said election in

the state votes in favor of calling a convention, the legislature shall, at the next session, provide by law for calling the same. Such convention shall consist of at least as many delegates as there are members of the house of representatives.

Revisions or amendments proposed by a constitutional convention shall be submitted to the voters of the state at an election held on a date set by the convention. The revisions or amendments proposed by the convention may be submitted in whole or in part, or with alternatives, as determined by the convention. If a majority vote favors a proposal or alternative, it is adopted and becomes effective thirty days after the certification of the election returns unless otherwise provided by the convention. (As amended November 7, 1911 and November 5, 1996.)

ANNOTATIONS

I. GENERAL CONSIDERATION.

Cross references. — For provision regarding constitutional amendments, see N.M. Const., art. XIX, § 1.

The 1911 amendment, which was proposed by congress as part of the required amendment of Article XIX and was incorporated in the congressional resolution of August 21, 1911 (37 Stat. 39) which provided for admission of New Mexico as a state and stipulated that adoption of the amendment should be a prerequisite to admission, was adopted by the people at the first election of state officers on November 7, 1911, by a vote of 34,897 for and 22,831 against. The amendment inserted "on such question" following "electors voting" near the end of the first sentence and deleted a requirement that the calling of a convention be approved by a majority of electors voting in at least half of the counties.

The 1996 amendment, which was proposed by H.J.R. No. 2 (Laws 1996) and adopted at the general election held November 5, 1996, by a vote of 294,328 for and 166,415 against, rewrote the existing language and added the second paragraph.

Compiler's notes. — Laws 1969, ch. 134, called a constitutional convention for the purpose of considering, revising or amending the constitution. The convention drafted a proposed new constitution which was submitted to the people at a special election held on December 9, 1969. It was defeated by a vote of 59, 695 for and 63,331 against.

New Mexico Const., art. XIX, §§ 1 and 2, construed. — See same heading in notes to N.M. Const., art. XIX, § 1, under analysis line I.

Question of holding convention must be submitted to electorate throughout state. State v. Perrault, 34 N.M. 438, 283 P. 902 (1929).

Provisions of existing constitution must be complied with in order for amendment or revision of that constitution to be effective. Thus, constitutional convention is bound

by procedural provisions of existing New Mexico constitution. 1969 Op. Att'y Gen. No. 69-105.

Publication requirements found in N.M. Const., art XIX, § 1. — Statement in 1-16-4 NMSA 1978 that questions to be ratified should have their full texts published "in accordance with the constitution of New Mexico" refers necessarily to provision for publication in N.M. Const., art. XIX, § 1, as there is no other provision in constitution setting forth requirements for publication. Therefore, compliance with publication provisions of N.M. Const., art. XIX, § 1, is required when question of adoption of new constitution is published. State ex rel. Constitutional Convention v. Evans, 80 N.M. 720, 460 P.2d 250 (1969).

Nature of constitutional convention. — Constitutional convention is constitutional entity created by people separate and apart from ordinary functions of state government. 1969 Op. Att'y Gen. No. 69-90.

Convention is responsible to people of state directly and not to legislature. 1969 Op. Att'y Gen. No. 69-82.

Legislative authority over convention is limited to providing "for calling the same." 1969 Op. Att'y Gen. No. 69-82.

No advance restrictions. — Legislature cannot, or ought not to be permitted to, restrict constitutional convention in advance. 1969 Op. Att'y Gen. No. 69-82.

Especially those people who have not ratified. — Since Laws 1969, ch. 134 (calling for a constitutional convention), was enacted pursuant to provisions of this section (that is, subsequent to vote of people in favor of convention), it cannot be argued that the people directly or indirectly ratified restrictions placed on convention by statute. 1969 Op. Att'y Gen. No. 69-82.

Convention has full control of all its proceedings. Thus, convention need not follow Laws 1969, ch. 134, § 17(A), providing that convention be called to order by governor and immediately proceed to elect a president and other officers. 1969 Op. Att'y Gen. No. 69-82.

Limitation on money sole restriction of time. — The only restriction of time placed on constitutional convention results from a limitation on money since a convention may not appropriate itself money. 1969 Op. Att'y Gen. No. 69-82.

Constitution and "call" of convention are binding on convention to extent they deal with questions being considered. 1969 Op. Att'y Gen. No. 69-105.

Convention cannot legislate. — Purpose of calling convention is to "revise or amend" existing constitution - not to legislate; neither is convention given powers beyond those incident to its own conduct and performance of its duties and function. Where legislature

has made necessary provision, appropriated money and provided for its expenditure, there is no area in which convention could properly exercise powers outside those mentioned in this section. State ex rel. Constitutional Convention v. Evans, 80 N.M. 720, 460 P.2d 250 (1969).

Convention may prescribe method of presenting product to voters. — Absent any constitutional or statutory directive on subject either at federal or state level, constitutional convention is free to prescribe method of presentation to voters as it sees fit. 1969 Op. Att'y Gen. No. 69-64.

Authors of New Mexico constitution and the United States congress concurred in not imposing restrictions on how convention "packages" its end product. 1969 Op. Att'y Gen. No. 69-64.

Convention may present new constitution in separate proposals. — Under this section, constitutional convention can submit new constitution to electorate in such a manner that voters will vote for or against separately presented proposals. 1969 Op. Att'y Gen. No. 69-105.

Convention may present both new constitution and amendments to old. — There are no legal obstacles to convention adopting and presenting to people an entire new constitution for acceptance or rejection and at same time presenting the article on amendments separately for acceptance or rejection as an amendment to present constitution. 1969 Op. Att'y Gen. No. 69-118.

Convention may present single proposition amending entire article. — Constitution does not forbid submission to people by convention of entire article on amendments as single amendment. 1969 Op. Att'y Gen. No. 69-118.

Legality of alternative contradictory provisions doubtful. — There is doubt as to legality of submitting constitution to electorate in such manner that voter will be allowed to approve either of two alternative contradictory provisions on certain issues. 1969 Op. Att'y Gen. No. 69-105.

Comparable provisions. — Idaho Const., art. XX, §§ 3, 4.

Iowa Const., art. X, amendment 22.

Utah Const., art. XXIII, §§ 2, 3.

Wyoming Const., art. XX, §§ 3, 4.

Law reviews. — For note, "Procedural Problems in Amending New Mexico's Constitution," see 4 Nat. Resources J. 151 (1964).

For student symposium, "Constitutional Revision - Constitutional Amendment Process," see 9 Nat. Resources J. 422 (1969).

For student symposium, "Constitutional Revision - Indians in the New Mexico Constitution," see 9 Nat. Resources J. 466 (1969).

For article, "The Citizen's Initiative Petition to Amend State Constitutions: A Concept Whose Time Has Passed, or a Vigorous Component of Participatory Democracy at the State Level?", see 28 N.M.L. Rev. 227 (1998).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 16 Am. Jur. 2d Constitutional Law §§ 35 to 37.

Repeal of constitutional provision or amendment, 36 A.L.R. 1456.

Power of state legislature to limit the powers of a state constitutional convention, 158 A.L.R. 512.

16 C.J.S. Constitutional Law §§ 8, 9.

II. CONVENTION DELEGATES.

Election for delegate required. — Even in county or legislative district where only one candidate filed for office of delegate to constitutional convention, election must be held. 1969 Op. Att'y Gen. No. 69-40.

No intent to disqualify public officers. — Legislature in calling constitutional convention intended that holding of public office not be, insofar as possible, a disqualification for position of delegate to convention. 1969 Op. Att'y Gen. No. 69-35.

Position of delegate is full-time, elective position for continuous period with specified duties which will presumably be carried out during both normal working and evening hours. 1969 Op. Att'y Gen. No. 69-35.

Unlawful for delegate to receive regular salary as elected official. — It would be unlawful for an elected official to continue to receive his salary while serving as delegate since individual holding office of county assessor or any other full-time, elective office, is physically incapable of performing duties of that office and those of delegate to convention at same time. 1969 Op. Att'y Gen. No. 69-35.

It would be contrary to law to pay salary to faculty member during time he is serving as a delegate to convention if his duties as delegate make it impossible for him to perform duties for which salary is paid. 1969 Op. Att'y Gen. No. 69-111.

Convention delegate and assessor incompatible positions. — In serving as delegate to constitutional convention, a county assessor would be holding incompatible

positions and would be subject to suspension or removal under provisions of 10-3-1 NMSA 1978. 1969 Op. Att'y Gen. No. 69-35.

Campaigning during duty hours illegal. — Use by elected official of duty hours to campaign for office of delegate to constitutional convention during six weeks between filing for position and election of delegates would be illegal. 1969 Op. Att'y Gen. No. 69-35.

Convention officers not employees within meaning of retirement law. — Officers of constitutional convention who are compensated are not considered employees of an affiliated public employer within meaning of law providing for retirement of public officers and employees (10-11-1 NMSA 1978 et seq.). 1969 Op. Att'y Gen. No. 69-90.

Delegates' privileges and immunities. — Rationale for the privileges given legislators in N.M. Const., art. IV, § 13, should be applied to delegates to constitutional convention. Accordingly, delegates have privileges and immunities similar to those of legislators, but they are less well defined and may not have the same broad scope as those granted to legislators. 1969 Op. Att'y Gen. No. 69-83.

Privileges which should be applied to members of constitutional convention are: (1) freedom from harassment of misdemeanor prosecutions during term of convention and (2) privilege to debate issues without fear of suits for defamation; however, the latter privilege should be characterized as "qualified," protecting only utterances made without actual malice. 1969 Op. Att'y Gen. No. 69-83.

Sec. 3. [Initiative restricted.]

If this constitution be in any way so amended as to allow laws to be enacted by direct vote of the electors the laws which may be so enacted shall be only such as might be enacted by the legislature under the provisions of this constitution. (As amended November 7, 1911.)

ANNOTATIONS

1911 amendment. — As originally adopted, this section read as does the present text, but it was included in the required amendment of this article which was proposed by congress and incorporated in the congressional resolution of August 21, 1911 (37 Stat. 39), providing for admission of New Mexico as a state, which stipulated that adoption of the amendment should be a prerequisite to admission. It was adopted by the people at the first election of state officers on November 7, 1911, by a vote of 34,897 for and 22,831 against.

Law reviews. — For student symposium, "Constitutional Revision - Constitutional Amendment Process," see 9 Nat. Resources J. 422 (1969).

For article, "The Citizen's Initiative Petition to Amend State Constitutions: A Concept Whose Time Has Passed, or a Vigorous Component of Participatory Democracy at the State Level?", see 28 N.M.L. Rev. 227 (1998).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 42 Am. Jur. 2d Initiative and Referendum § 13.

Initiative petition, amendment proposed by, 62 A.L.R. 1350.

Number of amendments that may be submitted under initiative and referendum clause, 62 A.L.R. 1350.

Proposition submitted to people as covering one or more than one proposed constitutional amendment, 94 A.L.R. 1510.

82 C.J.S. Statutes § 118.

Sec. 4. [Amendment of compact with United States.]

When the United States shall consent thereto, the legislature, by a majority vote of the members in each house, may submit to the people the question of amending any provision of Article XXI of this constitution on compact with the United States to the extent allowed by the act of congress permitting the same, and if a majority of the qualified electors who vote upon any such amendment shall vote in favor thereof the said article shall be thereby amended accordingly. (As amended November 7, 1911.)

ANNOTATIONS

Cross references. — As to consent of congress necessary to amendment of compact, see N.M. Const., art. XXI, § 10.

1911 amendment. — As originally adopted, this section read as does the present text, but it was included in the required amendment of this article which was proposed by congress and incorporated in the congressional resolution of August 21, 1911 (37 Stat. 39), providing for admission of New Mexico as a state, which stipulated that adoption of the amendment should be a prerequisite to admission. It was adopted by the people at the first election of the state officers on November 7, 1911, by a vote of 34,897 for and 22,831 against.

Law reviews. — For note, "Procedural Problems in Amending New Mexico's Constitution," see 4 Nat. Resources J. 151 (1964).

For student symposium, "Constitutional Revision - Indians in the New Mexico Constitution," see 9 Nat. Resources J. 466 (1969).

Sec. 5. [Repealed.]

ANNOTATIONS

Repeals. — The repeal of this section, prohibiting revision of Section 1 of Article 19 of the Constitution, was proposed by H.J.R. No. 2 (Laws 1996) and was adopted at the general election held November 5, 1996, by a vote of 294,328 for and 166,415 against.

ARTICLE XX
Miscellaneous

Section 1. [Oath of officer.]

Every person elected or appointed to any office shall, before entering upon his duties, take and subscribe to an oath or affirmation that he will support the constitution of the United States and the constitution and laws of this state, and that he will faithfully and impartially discharge the duties of his office to the best of his ability.

ANNOTATIONS

Effect of failure to take oath. — Mere appointment or election of an official, without his qualification, will not oust incumbent from office; to do so he must take an oath and give bond where required. Bowman Bank & Trust Co. v. First Nat'l Bank, 18 N.M. 589, 139 P. 148 (1914).

Assistant attorneys general need not be formally sworn in. — This section does not require assistant attorneys general appointed at the pleasure of the attorney general pursuant to 8-5-5 NMSA 1978 to undergo the same formal swearing-in ceremony as the attorney general or other public official. State v. Koehler, 96 N.M. 293, 629 P.2d 1222 (1981).

Oath not required for members of continuing board. — Nothing in this constitutional provision or elsewhere requires members of a continuing board to subscribe to new oaths every time board is reconstituted either by appointment or election. 1957-58 Op. Att'y Gen. No. 58-210.

There is no legal objection to taking oath on Sunday. 1966 Op. Att'y Gen. No. 66-126.

Comparable provisions. — Utah Const., art. IV, § 10.

Wyoming Const., art. VI, § 20.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 63A Am. Jur. 2d Public Officers and Employees §§ 4, 131 to 132.

Member of grand or petit jury as officer within constitutional or statutory provisions in relation to oath or affirmation, 118 A.L.R. 1098.

Constitutional, statutory or charter provision as to time of taking oath of office and giving official bond as mandatory or directory, 158 A.L.R. 639.

Validity of governmental requirement of oath of allegiance or loyalty, 18 A.L.R.2d 268.

67 C.J.S. Officers and Public Employees § 46.

Sec. 2. [Tenure of office.]

Every officer, unless removed, shall hold his office until his successor has duly qualified.

ANNOTATIONS

Cross references. — As to succession in county or precinct office, see 10-3-3 NMSA 1978.

As to succession of officers of boards of regents for state colleges and universities, see 21-7-5 NMSA 1978.

Member of municipal board of education is an "officer" within the meaning of this section. 1957-58 Op. Att'y Gen. No. 57-43.

Public service commissioner is an "officer." 1971 Op. Att'y Gen. No. 71-9.

Appointed county clerk to serve until successor elected. — A county clerk appointed to the office upon the resignation of the elected clerk is to serve as county clerk until a successor clerk is elected by the county voters and duly qualified according to law. State ex rel. Walker v. Dilley, 86 N.M. 796, 528 P.2d 209 (1974).

Replacement of regents appointed to fill vacancies. — Even though the terms of regents who were appointed to fill vacancies had expired at the end of the terms of their predecessors, they were authorized to remain in office until their successors were appointed by the governor by and with the consent of the senate and they could not be summarily removed. Denish v. Johnson, 1996-NMSC-005, 121 N.M. 280, 910 P.2d 914.

Treasurer of the board of regents of New Mexico state university may continue functioning in that capacity after a new board is appointed, until his successor is elected by the new board and is qualified by filing the proper bond. Bowman Bank & Trust Co. v. First Nat'l Bank, 18 N.M. 589, 139 P. 148 (1914).

Member of board of nursing home administrators. — Under the holdover provision of this section, a member of the board of nursing home administrators may continue to

serve as a member of the board after his term expires and before his successor is duly appointed and qualified for that office. 1989 Op. Att'y Gen. No. 89-08.

"Removal" contemplates statutory removals, and trial court was without power to oust officer where no successor had qualified. Haymaker v. State ex rel. McCain, 22 N.M. 400, 163 P. 248 (1917).

Proper to suspend pending removal investigation. — Law (10-4-20 and 10-4-25 NMSA 1978) which confers upon district courts power to suspend public official pending investigation of an accusation looking to his removal does not violate this section. State ex rel. Harvey v. Medler, 19 N.M. 252, 142 P. 376 (1914).

Proper removal by governor conclusive on court. — If power of removal is vested in governor and he assigns a constitutional cause for removal, his action is conclusive on court. State ex rel. Ulrick v. Sanchez, 32 N.M. 265, 255 P. 1077 (1926).

Notice and hearing not prerequisites to removal unless specifically provided. — Where no provision of constitution or statute law requires that notice and hearing be given before removal can be made, neither notice nor hearing is a necessary condition precedent to a valid removal. State ex rel. Ulrick v. Sanchez, 32 N.M. 265, 255 P. 1077 (1926).

Incumbent holds over until successor qualifies. — This section continues incumbent in office beyond his term until his successor has duly qualified. State ex rel. Rives v. Herring, 57 N.M. 600, 261 P.2d 442 (1953).

When newly elected legislator fails to qualify for any reason, former member from district holds over and serves in ensuing legislature. 1943-44 Op. Att'y Gen. No. 4211.

After next regular election. — Where county treasurer-elect dies before qualifying, incumbent would hold over until successor is elected at a regular election. 1921-22 Op. Att'y Gen. 192.

Failure to have election effects hold-over. — Since election was not held for office of police judge at time last regular city election was held, person holding office prior to that date continues to hold it. 1955-56 Op. Att'y Gen. No. 6452.

Where appointment is made to fill vacancy in office of county commissioner and no one is elected to fill balance of unexpired term, appointee continues to exercise authority of such office until January 1 next succeeding the general election. 1964 Op. Att'y Gen. No. 64-139.

Even where election deliberately blocked. — Where, at meeting of board of directors of New Mexico insane asylum (now New Mexico state hospital) attended by statutory three-member quorum, on the statutory election day which was the second Monday in March, proceeding to elect a president was begun, and one member of such quorum, to

block election, left the room, and remaining two members, less than a quorum, attempted to elect, the election, so attempted, was ineffective as such, and incumbent was entitled to remain in office until arrival of day upon which, next thereafter, an election could legally be held, which would be the second Monday in March of the next year. 1915-16 Op. Att'y Gen. 53.

Creation of vacancy in office does not, ipso facto, terminate right of incumbent to hold the office. Under this constitutional provision every officer, unless removed, holds his office until his successor qualifies. 1959-60 Op. Att'y Gen. No. 60-154.

If resignation by operation of law occurs, incumbent school superintendent is still entitled to hold office until such time as his resignation is accepted by board of county commissioners and a successor is appointed and qualifies. 1959-60 Op. Att'y Gen. No. 60-154.

Expiration of term does not produce vacancy which may be filled by authority having power to fill vacancies. Territory ex rel. Klock v. Mann, 16 N.M. 744, 120 P. 313 (1911); 1957-58 Op. Att'y Gen. No. 58-233.

County surveyor holds his office until his successor is qualified, and as long as he so holds there is no vacancy, and the board cannot appoint. 1921-22 Op. Att'y Gen. 64.

Nor does dual office-holding. — Where person is appointed to office which is incompatible with office then held, no vacancy is created, except for purpose of supplying another person for the office; court, in absence of qualified successor, is without power to remove officeholder. State v. Blancett, 24 N.M. 433, 174 P. 207 (1918), dismissed for want of jurisdiction, 252 U.S. 574, 40 S. Ct. 395, 64 L. Ed. 723 (1920); Haymaker v. State ex rel. McCain, 22 N.M. 400, 163 P. 248 (1917).

But section not designed to give incumbent additional term. — Failure of duly elected state officer to qualify creates vacancy which may be filled by appointment by governor. This section is not designed to give incumbent an additional term. 1923-24 Op. Att'y Gen. 33.

Incumbent of two consecutive terms ineligible for appointment. — A vacancy in a county office occurs where the successor fails to qualify; the board of county commissioners must appoint a person to fill the vacancy and an incumbent who has already served two consecutive terms is ineligible for that appointment. 1979 Op. Att'y Gen. No. 79-19.

Hold-over and vacancy distinguished. — In the event senate should fail to confirm appointments of governor to highway commission, districts will be represented by commissioners who have been confirmed and who will hold over until governor can make an appointment during first five days of the next legislature, unless a vacancy is created by reason of happening of possible event such as death, resignation, moving from district or some other ineligibility to hold office. 1957-58 Op. Att'y Gen. No. 57-30.

Section does not apply to "position". — Since this section is applicable only to "offices," if person initially holds a "position," then acceptance of an incompatible office or position creates an automatic vacancy in the first position. 1961-62 Op. Att'y Gen. No. 62-101.

Incumbent retains authority until successor qualifies. — Incumbent justice of the peace holds over and is a de facto and de jure officer until his successor is elected and qualified. 1919-20 Op. Att'y Gen. 20.

Although vacancy technically and legally existed, absent appointment by governor a resigning judge could legally continue to exercise functions and duties of that office inasmuch as his successor had not yet duly qualified, and thus designation executed by small claims court judge on day after his resignation was competent to empower district judge, who was designated to perform duties of judge of the small claims court, and said district judge could continue to act in that capacity until appointment and qualification of successor to small claims judge or until latter's incapacity was cured, whichever occurred sooner. 1964 Op. Att'y Gen. No. 64-146.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 63A Am. Jur. 2d Public Officers and Employees §§ 166 to 169.

"Until" as word of inclusion or exclusion where term of office runs until a specified day, 16 A.L.R. 1100.

Right to resign before taking office, 19 A.L.R. 46.

Employee or officer, status of person as, as affected by tenure of office, 53 A.L.R. 606, 93 A.L.R. 333, 140 A.L.R. 1076.

Beginning or expiration of term of elective officer where no time is fixed by law, 80 A.L.R. 1290, 135 A.L.R. 1173.

When resignation of public officer becomes effective, 95 A.L.R. 215.

Power of legislature to extend term of public office, 97 A.L.R. 1428.

Constitutionality and construction of statute which fixes or specifies term of office, but provides for removal without cause, 119 A.L.R. 1437.

Duress as ground for withdrawing or avoiding resignation from public office, 132 A.L.R. 975.

Previous tenure of office, construction and effect of constitutional or statutory provisions disqualifying one for public office because of, 59 A.L.R.2d 716.

67 C.J.S. Officers and Public Employees §§ 71 to 73.

Sec. 3. [Date terms of office begin.]

The term of office of every state, county or district officer, except those elected at the first election held under this constitution, and those elected to fill vacancies, shall commence on the first day of January next after his election.

ANNOTATIONS

Cross references. — As to term of persons elected to fill vacancies, see N.M. Const., art. XX, § 4, and art. V, § 5.

For commencement of terms of officers elected at first election, see N.M. Const., art. XXII, §§ 19 and 22.

"District officer" not special class. — It was not intention of section to create a class of officers, i.e., district officers, unknown to New Mexico and relieve them from inhibitions imposed upon all other designated officials. District attorneys are state officers. State ex rel. Ward v. Romero, 17 N.M. 88, 125 P. 617 (1912).

Term of appointee filling vacancy. — Under N.M. Const., art. V, § 5, an appointee filling vacancy in state office holds his office only until next general election, and term of office of elected successor commences upon date he qualifies since he has been elected to an office to fill a vacancy. 1951-52 Op. Att'y Gen. No. 5612.

Election alone not enough to oust predecessor. — Election or appointment of officer does not serve to oust his predecessor from office. One must first qualify, i.e., take the oath and give bond where required. Election alone is not enough. 1957-58 Op. Att'y Gen. No. 58-233.

Section defines term for compensation purposes. — Fact that county clerk, assessor and sheriff were elected to respective offices in November of 1968 and charter for county setting salary for these offices did not become effective until January 1, 1969, was not violative of N.M. Const., art. IV, § 27 (relating to changes in compensation of public officers), since term of these officers did not commence until January 1, 1969, as provided by this section. 1969 Op. Att'y Gen. No. 69-134.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 63A Am. Jur. 2d Public Officers and Employees § 160.

"Until" as word of inclusion or exclusion where term of office runs until a specified day, 16 A.L.R. 1100.

Beginning or expiration of term of elective office where no time fixed by law, 80 A.L.R. 1290, 135 A.L.R. 1173.

Time of giving official bond, constitutional, statutory or charter provision as to, as mandatory or directory, 158 A.L.R. 639.

Time of taking oath of office, constitutional, statutory or charter provision as to, as mandatory or directory, 158 A.L.R. 639.

67 C.J.S. Officers and Public Employees § 68.

Sec. 4. [Vacancies in offices of district attorney or county commissioner.]

If a vacancy occurs in the office of district attorney or county commissioner, the governor shall fill such vacancy by appointment, and such appointee shall hold such office until the next general election. His successor shall be chosen at such election and shall hold his office until the expiration of the original term. (As amended November 8, 1988.)

ANNOTATIONS

I. GENERAL CONSIDERATION.

The 1988 amendment, which was proposed by S.J.R. No. 1, § 1 (Laws 1988) and adopted at the general election held on November 8, 1988, by a vote of 203,509 for and 159,957 against, in the first sentence, substituted "vacancy occurs" for "vacancy occur" near the beginning and deleted ", judge of the supreme or district court" following "district attorney".

Compiler's notes. — An amendment to this section, proposed by S.J.R. No. 2 (Laws 1981), which would have deleted "judge of the supreme or district court" near the beginning of the first sentence, was submitted to the people at the general election held on November 2, 1982. It was defeated by a vote of 117,601 for and 139,643 against.

Degree to which section is self-executing. — The first sentence of this section is self-enacting. The second sentence, however, quite obviously needs legislation to provide the manner of nomination and conduct of election and must be considered as not self-executing inasmuch as it merely indicates a principle without laying down rules having force of law. State ex rel. Noble v. Fiorina, 67 N.M. 366, 355 P.2d 497 (1960).

Contrary charter provisions allowed. — Charter of combined city and county organization may provide for filling vacancies in commission thereof contrary to provisions of this section. 1957-58 Op. Att'y Gen. No. 57-204.

Terms beginning and ending at same time under all calculations. — Under all equations of vacancy in these offices, excepting only vacancy occurring by creation of a new district attorney, terms of district attorneys will begin and end at same time. State ex rel. Swope v. Mechem, 58 N.M. 1, 265 P.2d 336 (1954).

Comparable provisions. — Iowa Const., art. IV, § 10.

Montana Const., art. VI, § 8.

Utah Const., art. VII, § 9.

Wyoming Const., art. IV, § 7.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 56 Am. Jur. 2d Municipal Corporations, Counties, and Other Political Subdivisions § 254; 63A Am. Jur. 2d Prosecuting Attorneys § 8; 63A Am. Jur. 2d Public Officers and Employees §§ 105, 135, 137.

Death or disability of one elected to office before qualifying as creating a vacancy, 74 A.L.R. 486.

Reconsideration of appointment to fill vacancy, 89 A.L.R. 141.

Election within contemplation of constitutional or statutory provisions relating to filling vacancy in public office occurring before expiration of regular term, 132 A.L.R. 574.

Military service, induction or voluntary service for, as creating vacancy in public office or employment, 143 A.L.R. 1470, 147 A.L.R. 1427, 148 A.L.R. 1400, 150 A.L.R. 1447, 151 A.L.R. 1462, 152 A.L.R. 1459, 154 A.L.R. 1456, 156 A.L.R. 1457, 157 A.L.R. 1456.

Validity of contract by officer with public for rendition of new or special service to be paid for in addition to regular compensation, 159 A.L.R. 606.

Vacancy in public office within constitutional or statutory provision for filling vacancy, where incumbent appointed or elected for fixed term and until successor is appointed or elected, is holding over, 164 A.L.R. 1248.

Conviction of offense under federal law or law of another state or county as vacating accused's holding of state or local office, 20 A.L.R.2d 732.

Power to appoint public officer for term commencing at or after expiration of term of appointing officer or body, 75 A.L.R.2d 1277.

Delegation to private persons or organizations of power to appoint or nominate to public office, 97 A.L.R.2d 361.

20 C.J.S. Counties § 64; 27 C.J.S. District or Prosecuting Attorneys § 3; 67 C.J.S. Officers and Public Employees §§ 74 to 79.

II. VACANCY.

No qualification that vacancy be by specific reason. — There is no qualification that vacancy be by reason of death, resignation or any other specific reason. State ex rel. Swope v. Mechem, 58 N.M. 1, 265 P.2d 336 (1954).

No incumbent required. — This section does not apply only in those cases where there was an incumbent in office. State ex rel. Swope v. Mechem, 58 N.M. 1, 265 P.2d 336 (1954).

Resignations prior to approval of 1988 amendment. — The office of any supreme court justice, district court judge, or metropolitan court judge who resigns before the 1988 general election must be placed on the 1988 general election ballot in accordance with the requirements of 1-8-8 NMSA 1978. 1988 Op. Att'y Gen. No. 88-52.

III. APPOINTEE.

Executive act cannot be exercised by legislature. — Where constitution makes act of appointment an executive one, it cannot be exercised by legislature, nor can legislature rob executive of such power by conferring it on outside agency of its own choosing. State ex rel. Swope v. Mechem, 58 N.M. 1, 265 P.2d 336 (1954).

Appointee need not reside in district. — Appointment of county commissioner, where vacancy exists, may be made regardless of district wherein person resides so long as person is otherwise qualified under laws of state and is a resident of the county. 1953-54 Op. Att'y Gen. No. 5907.

"Until the next general election" means the next election at which a successor to incumbent of office would have been elected if there had been no vacancy. 1959-60 Op. Att'y Gen. No. 60-151; 1989 Op. Att'y Gen. No. 89-11.

Term of office of appointee terminates at time of general election next succeeding his appointment. 1964 Op. Att'y Gen. No. 64-139.

Unless no one elected for balance of unexpired term. — Where appointment is made to fill vacancy in office of county commissioner and no one is elected to fill balance of unexpired term though another person is elected for a regular term, appointee continues to exercise authority of such office until January 1 of the next succeeding general election or until the person elected qualifies if said person does not qualify on January 1. 1964 Op. Att'y Gen. No. 64-139.

IV. SUCCESSOR.

Section applies to all political parties. — This section cannot be made effective only as to major political parties - it must apply to all parties. State ex rel. Noble v. Fiorina, 67 N.M. 366, 355 P.2d 497 (1960).

Last sentence effective as to district attorney only. — The last sentence of this section need not have been included insofar as it concerns office of county commissioner. In the first instance, the term was limited to two years, and in the second, N.M. Const., art. VI, §§ 4 and 10, make clear the intent that scattered terms be maintained. Therefore, effective application of last sentence of section is addressed to office of district attorney. State ex rel. Swope v. Mechem, 58 N.M. 1, 265 P.2d 336 (1954).

Last sentence applies to all vacancies following an incumbent; assuming death of incumbent in office of district attorney, there can be no doubt that appointee or his successor (elected at general election following appointment) serves only until termination date of term of original incumbent. State ex rel. Swope v. Mechem, 58 N.M. 1, 265 P.2d 336 (1954).

Sec. 5. [Interim appointments.]

If, while the senate is not in session, a vacancy occur in any office the incumbent of which was appointed by the governor by and with the advice and consent of the senate, the governor shall appoint some qualified person to fill the same until the next session of the senate; and shall then appoint by and with the advice and consent of the senate some qualified person to fill said office for the period of the unexpired term.

ANNOTATIONS

Section applies to initial appointments. — This section in terms applies only to vacancies in office occurring while senate is not in session, but requirement applies as well to initial appointments to offices created by legislature to be filled while senate is not in session. 1970 Op. Att'y Gen. No. 70-10.

"Next session" means any next session - regular-long, regular-short or special. 1970 Op. Att'y Gen. No. 70-10.

Applicability to appointments to board of regents. — This section does not conflict with N.M. Const., art. XII, § 13. Denish v. Johnson, 1996-NMSC-005, 121 N.M. 280, 910 P.2d 914.

Appointee subject to section but rejection not termination of official existence. — Appointment of member of board of regents of New Mexico normal university (now New Mexico highlands university) by governor five days after death of incumbent whose term of office had expired two days before his death, is nevertheless a vacation appointment to fill a vacancy, and appointee will hold office until, at next session of senate, a new appointment is made, and confirmed by senate. Action of senate in rejecting vacation appointee does not terminate his official existence. 1912-13 Op. Att'y Gen. 27, 180.

Recess appointment of regent. — A nominee to the board of regents of an educational institution who is neither confirmed nor rejected by the senate cannot serve

as regent unless, following adjournment of both houses of the legislature, the governor makes a recess appointment of the person, in which case, that person may serve as a full-fledged regent until the next session of the legislature. As either a de jure or de facto officer, the regent's actions are valid as to the public. The governor is not obliged to re-submit the former nominee to the next session of the legislature and may make a new nomination. The new nominee may assume the duties as regent, either upon approval by the senate or by a recess appointment by by the governor if the senate fails to take any action. 1991 Op. Att'y Gen. No. 91-04.

Replacement of regents appointed to fill vacancies. — Even though the terms of regents who were appointed to fill vacancies had expired at the end of the terms of their predecessors, they were authorized to remain in office until their successors were appointed by the governor by and with the consent of the senate and they could not be summarily removed. Denish v. Johnson, 1996-NMSC-005, 121 N.M. 280, 910 P.2d 914.

Comparable provisions. — Utah Const., art. VII, § 10.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 63A Am. Jur. 2d Public Officers and Employees §§ 119, 135, 137.

Right of de facto officer to salary or other compensation annexed to office, 93 A.L.R. 258, 151 A.L.R. 952.

Power of board to make appointment to office or contract extending beyond its own term, 149 A.L.R. 336, 75 A.L.R.2d 1277.

67 C.J.S. Officers and Public Employees §§ 42, 75 to 79; 81A C.J.S. States §§ 84, 87.

Sec. 6. [Date of general elections.]

General elections shall be held in the state on the Tuesday after the first Monday in November in each even-numbered year.

ANNOTATIONS

"General election" in statute construed. — Term "general election" in statute (Laws 1897, ch. 40, § 1, now repealed), authorizing city or town to effect change in its name by favorable vote of qualified electors at next "general election" following appropriate action by its governing body, contemplated the biennial election for choosing state and county officials and national representatives. Benson v. Williams, 56 N.M. 560, 246 P.2d 1046 (1952).

The term "general election" refers to the statewide biennial election when all state and county officials as well as the congressional representatives are elected. 1981 Op. Att'y Gen. No. 81-9.

Comparable provisions. — Iowa Const., art. II, amendment 14.

Utah Const., art. IV, § 9.

Wyoming Const., art. VI, § 17.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 26 Am. Jur. 2d Elections § 318.

Scheduling election on religious holiday as violation of federal constitutional rights, 44 A.L.R. Fed. 886.

29 C.J.S. Elections §§ 76, 77.

Sec. 7. [Canvass of returns for officers elected by more than one county.]

The returns of all elections for officers who are chosen by the electors of more than one county shall be canvassed by the county canvassing board of each county as to the vote within their respective counties. Said board shall immediately certify the number of votes received by each candidate for such office within such county, to the state canvassing board herein established, which shall canvass and declare the result of the election.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 26 Am. Jur. 2d Elections § 394 et seq.

Statutory provision relating to form or manner in which election returns from voting districts or precincts are to be made, failure to comply with, 106 A.L.R. 398.

Deceased or disqualified person, result of election as affected by votes cast for, 133 A.L.R. 319.

Excess or illegal ballots, treatment of, when it is not known for which candidate or upon which side of a proposition they were cast, 155 A.L.R. 677.

Power of election officer to withdraw or change returns, 168 A.L.R. 855.

29 C.J.S. Elections §§ 222, 235 to 239.

Sec. 8. [First national election.]

In the event that New Mexico is admitted into the union as a state prior to the Tuesday next after the first Monday in November in the year nineteen hundred and twelve, and if no provision has been made by the state legislature therefor, an election shall be held in the state on the said Tuesday next after the first Monday in November,

nineteen hundred and twelve, for the election of presidential electors; and such election shall be held as herein provided for the election upon the ratification of this constitution, and the returns thereof made to, and canvassed and certified by, the state canvassing board as herein provided in case of the election of state officers.

Sec. 9. [State officers limited to salaries.]

No officer of the state who receives a salary, shall accept or receive to his own use any compensation, fees, allowance or emoluments for or on account of his office, in any form whatever, except the salary provided by law.

ANNOTATIONS

Cross references. — For prohibition of extra compensation to public officers, see N.M. Const., art. IV, § 27.

As to fees collected by county officers, see N.M. Const., art. X, § 1.

For general salary provisions, see 2-1-3 to 2-1-11, 4-44-1 to 4-44-45 NMSA 1978.

Intent of section. — It was intention of constitutional convention to abolish fee system as to officers indicated. State ex rel. Delgado v. Romero, 17 N.M. 81, 124 P. 649 (1912).

Clerk prohibited from keeping excess federal fees. — This section, in addition to 34-6-37 NMSA 1978 (concerning disposition of court income), precludes district court clerk from keeping fees, collected in connection with passports and like federal functions, in excess of those remitted to federal government. 1968 Op. Att'y Gen. No. 68-77.

District attorney to receive salary only. — District attorney is a state officer and is precluded from receiving fees, allowances or emoluments other than salary provided by law. State ex rel. Ward v. Romero, 17 N.M. 88, 125 P. 617 (1912).

Judge prohibited from accepting gratuity for marriage ceremony. — Except for municipal judges, a judge may not accept a gratuity in connection with the performance of a marriage ceremony without violating the New Mexico Constitution. 1991 Op. Att'y Gen. No. 91-09.

No extra compensation for official acts. — Boards of county commissioners have no duties to perform other than official duties, and all services rendered to such boards by district attorneys are official duties; therefore, there are no legal services that can be rendered by district attorney for board for which he may exact extra compensation. Act of advising board with respect to validity of contract was official act required of that office. Hanagan v. Board of County Comm'rs, 64 N.M. 103, 325 P.2d 282 (1958).

Different situation when officer not salaried. — It may be that assistant district attorney and county commissioners may make arrangements for former's compensation when law contains no salary provision for said assistant. 1915-16 Op. Att'y Gen. 225.

And when person holds two offices. — This section does not prohibit state officer from holding another office not inconsistent with his elective office, nor from receiving compensation therefor. 1912-13 Op. Att'y Gen. 875.

Adjutant-general of the state holds two offices - one a civil office and the other brigadier-general of the national guard, and when ordered to duty as national guard officer, he is entitled to pay both as adjutant-general and as officer of guard. 1933-34 Op. Att'y Gen. 152.

And when fees used in connection with office business. — Section prohibits receipt of fees to personal use of secretary of state but does not prevent collection of fees provided by law to be paid to secretary and their use in business of office. 1912-13 Op. Att'y Gen. 49.

Section does not prohibit governor from using contingent fund annually appropriated to him for any purpose properly connected with obligations of office. 1912-13 Op. Att'y Gen. 29.

Prior inconsistent law not in force. — New Mexico Const., art. XXII, § 4, does not continue in force fee and salary provisions of Laws 1909, ch. 22, said law being inconsistent with this section. State ex rel. Ward v. Romero, 17 N.M. 88, 125 P. 617 (1912).

Comparable provisions. — Utah Const., art. XXI, §§ 1, 2.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 63A Am. Jur. 2d Public Officers and Employees §§ 450, 451, 453.

Per diem compensation, 1 A.L.R. 276.

Stolen property, right of officer to compensation for services in recovering, 58 A.L.R. 1125.

Administrative officer's or board's power in respect of compensation of public officer under statute fixing maximum or minimum compensation, 70 A.L.R. 1050.

Priority or preference in payment of their salary or fees and expenses, right of public officers and employees to, 92 A.L.R. 635.

Constitutional or statutory limitation of compensation of public officer as applicable to one in governmental service who is paid in whole or part from funds not derived from taxation, 135 A.L.R. 1033.

Earnings, or opportunity of earning, from other sources, as reducing claim of public officer wrongfully excluded from his office, 150 A.L.R. 100.

Constitutional provision fixing or limiting salary of public officer as precluding allowance for expenses or disbursements, 5 A.L.R.2d 1182.

Probate and guardianship proceedings, constitutionality of statutes which provide for fees for service of officers in, graduated according to the amount of the estate, 76 A.L.R.3d 1117.

67 C.J.S. Officers and Public Employees §§ 223, 224; 81A C.J.S. States § 106.

Sec. 10. [Child labor.]

The legislature shall enact suitable laws for the regulation of the employment of children.

ANNOTATIONS

Cross references. — For statutory provisions, see Chapter 50, Article 6 NMSA 1978.

Comparable provisions. — Idaho Const., art. XIII, § 4.

Utah Const., art. XVI, §§ 3, 8.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 48A Am. Jur. 2d Labor and Labor Relations § 3808 et seq.

Child labor laws as impairing obligation of contracts, 2 A.L.R. 1221.

43 C.J.S. Infants § 99; 51 C.J.S. Labor Relations §§ 3, 4; 51B C.J.S. Labor Relations §§ 1017, 1021, 1043, 1186, 1190, 1192.

Sec. 11. [Women as public officers.]

Women may hold the office of notary public and such other appointive offices as may be provided by law.

ANNOTATIONS

Woman may be appointed state librarian. — A woman is qualified to hold appointive office of state librarian. 1912-13 Op. Att'y Gen. 81.

And assistant commissioner of public lands. — A woman may hold appointive office of assistant commissioner of public lands. 1919-20 Op. Att'y Gen. 184.

Comparable provisions. — Utah Const., art. IV, § 1.

Wyoming Const., art. VI, § 1.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 63A Am. Jur. 2d Public Officers and Employees § 63.

Women's suffrage amendment as affecting eligibility of women to office, 71 A.L.R. 1333.

Notary public as officer under rule limiting right to hold office to males or electors, 79 A.L.R. 451.

67 C.J.S. Officers and Public Employees § 20.

Sec. 12. [Publication of laws in English and Spanish.]

For the first twenty years after this constitution goes into effect all laws passed by the legislature shall be published in both the English and Spanish languages and thereafter such publication shall be made as the legislature may provide.

ANNOTATIONS

Laws published as enacted. — Requirement of this section relates to publication of laws in the form of their enactment. State v. Armstrong, 31 N.M. 220, 243 P. 333 (1924).

Legislature may require dual publication and appropriate for translation. — Legislature has valid power to provide that all laws passed by it shall be published in both English and Spanish, and any appropriation voted by legislature to pay for translation is valid. 1951-52 Op. Att'y Gen. No. 5332.

Succeeding legislature may appropriate for extra services. — When legislature of 1915 appropriated money for translation of code from English into Spanish, succeeding legislature could constitutionally appropriate money to pay for extra services not contemplated by original appropriation. State ex rel. Sedillo v. Sargent, 24 N.M. 333, 171 P. 790 (1918).

Law reviews. — For comment, "Education and the Spanish-Speaking - An Attorney General's Opinion on Article XII, Section 8 of the New Mexico Constitution," see 3 N.M. L. Rev. 364 (1973).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 73 Am. Jur. 2d Statutes § 257.

82 C.J.S. Statutes §§ 63, 66.

Sec. 13. [Sacramental wines.]

The use of wines solely for sacramental purposes under church authority at any place within the state shall never be prohibited.

ANNOTATIONS

Spirit of section is against prohibition of sale for purpose specified. 1915-16 Op. Att'y Gen. 114.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 45 Am. Jur. 2d Intoxicating Liquors §§ 31, 77.

48 C.J.S. Intoxicating Liquors § 230.

Sec. 14. [Public officers barred from using railroad passes.]

It shall not be lawful for the governor, any member of the state board of equalization, any member of the corporation commission [public regulation commission], any judge of the supreme or district court, any district attorney, any county commissioner or any county assessor, during his term of office to accept, hold or use any free pass; or purchase, receive or accept transportation over any railroad within this state for himself or his family upon terms not open to the general public; and any person violating the provisions hereof shall, upon conviction in a court of a competent jurisdiction, be punished as provided in Sections Thirty-Seven and Forty of the article on Legislative Department in this constitution.

ANNOTATIONS

Cross references. — For prohibition applicable to legislators, see N.M. Const., art. IV, § 37.

For references to state corporation commission being construed as references to the public regulation commission, see 8-8-21 NMSA 1978.

Bracketed material. — The bracketed material in this section was inserted by the compiler. It was not enacted by the legislature and is not part of the law.

"Sections Thirty-Seven and Forty of the article on Legislative Department". — New Mexico Const., art. IV, § 37, provides that use of a pass or receipt of railroad transportation upon terms not open to general public shall work a forfeiture of legislator's office. Section 40 defines the offense as a felony and provides for punishment of fine or imprisonment. This section adopts the above sanctions for violation of its own like prohibitions.

Railroads may issue passes to assistant district attorneys. 1937-38 Op. Att'y Gen. 39.

Intrastate motor carrier may not grant passes. — It is unlawful for an intrastate motor carrier which is regulated by state to grant passes to state employees or officials, or for such persons to accept them. 1937-38 Op. Att'y Gen. 160.

No free transportation required. — No carrier is required to transport any state employee or other person free of charge whether traveling on official business or not. 1937-38 Op. Att'y Gen. 160.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 14 Am. Jur. 2d Carriers § 846.

13 C.J.S. Carriers § 499.

Sec. 15. [Penitentiary to be reformatory and industrial school; labor by inmates.]

The penitentiary is a reformatory and an industrial school, and all persons confined therein shall, so far as consistent with discipline and the public interest, be employed in some beneficial industry; and where a convict has a dependent family, his net earnings shall be paid to said family if necessary for their support.

ANNOTATIONS

Cross references. — For prohibition on leasing convict labor, see N.M. Const., art. XX, § 18.

Inmates not "employees". — Notwithstanding the fact that prison industries must comply with occupational health and safety standards, inmates engaged in prison-operated industries or enterprises are not "employees" of the penitentiary for purposes of filing an occupational health and safety complaint with the environmental improvement division. 1981 Op. Att'y Gen. No. 81-23.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 21 Am. Jur. 2d Criminal Law §§ 588, 604, 606; 60 Am. Jur. 2d Penal and Correctional Institutions §§ 100, 162 to 166, 168, 169.

Liability for death of or injury to prisoner, 46 A.L.R. 94, 50 A.L.R. 268, 61 A.L.R. 569.

Liability of lessee of convict labor for injury to convict, 46 A.L.R. 106, 50 A.L.R. 268, 61 A.L.R. 569.

Mandamus, under 28 USCS § 1361, to obtain change in prison condition or release of federal prisoner, 114 A.L.R. Fed. 225.

18 C.J.S. Convicts §§ 13 to 15; 72 C.J.S. Prisons and Rights of Prisoners §§ 59, 63.

Sec. 16. [Railroad's liability to employees.]

Every person, receiver or corporation owning or operating a railroad within this state shall be liable in damages for injury to, or the death of, any person in its employ, resulting from the negligence, in whole or in part, of said owner or operator, or of any of the officers, agents or employees thereof, or by reason of any defect or insufficiency, due to its negligence, in whole or in part, in its cars, engines, appliances, machinery, track, roadbed, works or other equipment.

An action for negligently causing the death of an employee as above provided shall be maintained by the executor or administrator for the benefit of the employee's surviving widow or husband and children; or if none, then his parents; or if none, then the next of kin dependent upon said deceased. The amount recovered may be distributed as provided by law. Any contract or agreement made in advance of such injury with any employee waiving or limiting any right to recover such damages shall be void.

This provision shall not be construed to affect the provisions of Section Two of Article Twenty-Two of this constitution, being the article upon Schedule.

ANNOTATIONS

Cross references. — For general wrongful death action against public conveyance businesses, see 41-2-4 NMSA 1978.

For statute on injury to employees from defective equipment, see 63-3-23 NMSA 1978.

Compiler's notes. — New Mexico Const., art. XXII, § 2, referred to in the last paragraph of this section, provides that the Federal Employers' Liability Act (45 U.S.C. §§ 51 to 60) shall remain in force in this state to the same extent as it was in the New Mexico territory, until otherwise provided by law.

Except for the Morstad case (catchlined "Section abrogates common law fellow servant doctrine"), the cases annotated under this section were decided under the Federal Employers' Liability Act. However, according to the New Mexico supreme court in Bourguet v. Atchison, T. & S.F.R.R., 65 N.M. 200, 334 P.2d 1107 (1958), the Federal Employers' Liability Act is set out in this section and N.M. Const., art. XXII, § 2. Accordingly, the cases have been placed under this section.

Section abrogates common law fellow servant doctrine as to railroads. Morstad v. Atchison, T. & S.F. Ry., 23 N.M. 663, 170 P. 886 (1918).

Jurisdiction of federal district courts not curtailed. — Congress has not curtailed, withdrawn or denied jurisdiction of United States district courts by limiting right of removal. Bourguet v. Atchison, T. & S.F.R.R., 65 N.M. 200, 334 P.2d 1107 (1958).

Duty to assume jurisdiction over these federal rights. — State court having jurisdiction to enforce rights similar to those created by an act of congress has

mandatory duty to assume jurisdiction over federally created rights. Bourguet v. Atchison, T. & S.F.R.R., 65 N.M. 200, 334 P.2d 1107 (1958).

Power in congress to force jurisdiction. — Congress, under supremacy clause of federal constitution, has power to force jurisdiction upon courts of the states where constitution of the state or legislature of the state has limited such jurisdiction. Bourguet v. Atchison, T. & S.F.R.R., 65 N.M. 200, 334 P.2d 1107 (1958).

What constitutes negligence is federal question. — What constitutes negligence under Federal Employers' Liability Act is a federal question and does not vary in accordance with differing conceptions of negligence applicable under state and local laws for other purposes, and federal decisional law formulating and applying concept governs. Bourguet v. Atchison, T. & S.F. Ry., 65 N.M. 207, 334 P.2d 1112 (1959).

Test of a jury case is simply whether proofs justify with reason conclusion that employer negligence played any part, even the slightest, in producing injury or death for which damages are sought. It does not matter that from the evidence jury may also with reason, on grounds of probability, attribute result to other causes, including employee's contributory negligence. Bourguet v. Atchison, T. & S.F. Ry., 65 N.M. 207, 334 P.2d 1112 (1959); Rogers v. Missouri Pac. R.R., 352 U.S. 500, 77 S. Ct. 443, 1 L. Ed. 2d 493, reh'g denied, 353 U.S. 943, 77 S. Ct. 808, 1 L. Ed. 2d 764 (1957).

Test whether employer is liable for providing defective or improper tools is not whether employer knew them to be unsafe, but whether it exercised reasonable care and diligence to make them safe. Bourguet v. Atchison, T. & S.F. Ry., 65 N.M. 207, 334 P.2d 1112 (1959).

No assumption of risk doctrine. — Every vestige of doctrine of assumption of risk has been eliminated. Bourguet v. Atchison, T. & S.F. Ry., 65 N.M. 207, 334 P.2d 1112 (1959).

Employee need not request help first time he does job. — Defendant cannot escape liability because of plaintiff's failure to ask for additional help in performing assigned work for first time. Bourguet v. Atchison, T. & S.F. Ry., 65 N.M. 207, 334 P.2d 1112 (1959).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 32B Am. Jur. 2d Federal Employers' Liability and Compensation Acts § 5 et seq.; 27 Am. Jur. 2d Employment Relationship §§ 263 et seq., 393.

Validity of provisions denying right of action for simple negligence, 36 A.L.R. 1400.

Constitutionality of statutes imposing absolute liability on private persons or corporations, irrespective of negligence or breach of a specific statutory duty, for injury to person or property, 53 A.L.R. 875.

Employer's liability for negligence of an assistant procured or permitted by his employee without authority, 25 A.L.R.2d 984.

Defect in appliance or equipment as proximate cause of injury to railroad employee in repair or investigation thereof, 30 A.L.R.2d 1192.

Duty of railroad company towards employees with respect to close clearance of objects alongside track, 50 A.L.R.2d 674.

Surface of yard, duty of railroad company to prevent injury of employee due to, 57 A.L.R.2d 493.

Contributory negligence of railroad employee in jumping from moving train or car to avoid collision or other injury, 58 A.L.R.2d 1232.

Liability of master for injury or death of servant inflicted by fellow servant on master's premises where injury occurs outside working hours, 76 A.L.R.2d 1215.

Recovery of prejudgment interest in actions under the Federal Employers' Liability Act or Jones Act, 80 A.L.R. Fed. 185.

Excessiveness or adequacy of award of damages for personal injury or death in actions under Federal Employers' Liability Act (45 USCS § 51 et seq.) - modern cases, 97 A.L.R. Fed. 189.

30 C.J.S. Employers' Liability § 1 et seq.; 74 C.J.S. Railroads § 370.

Sec. 17. [Repealed.]

ANNOTATIONS

Repeals. — House J.R. No. 4 (Laws 1971), adopted at a special election held on November 2, 1971, by a vote of 49,971 for and 24,437 against, repealed this section, which formerly read: "There shall be a uniform system of textbooks for the public schools which shall not be changed more than once in six years."

Sec. 18. [Leasing of convict labor prohibited.]

The leasing of convict labor by the state is hereby prohibited.

ANNOTATIONS

Generally. — Under § 3528, 1897 C.L., superintendent of penitentiary, under direction of board of penitentiary commissioners, could hire out labor of convicts to the best advantage. 1909-12 Op. Att'y Gen. 200.

Comparable provisions. — Utah Const., art. XVI, § 3.

Work-release programs must necessarily provide, even if only implicitly, that any prisoners working for private enterprise must act of their own accord and, when a prisoner voluntarily participated in a work-release program and was injured while under the direction of a private business, he was an employee of that business and thus entitled to workers' compensation benefits. Benavidez v. Sierra Blanca Motors, 120 N.M. 837, 907 P.2d 1018 (Ct. App. 1995), rev'd in part on other grounds, 1996-NMSC-045, 122 N.M. 209, 922 P.2d 1205.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 60 Am. Jur. 2d Penal and Correctional Institutions § 170.

18 C.J.S. Convicts § 19.

Sec. 19. [Eight-hour day in public employment.]

Eight hours shall constitute a day's work in all cases of employment by and on behalf of the state or any county or municipality thereof.

ANNOTATIONS

This section is not self-executing but is a declaration of principle or policy as to number of hours employees of the class named should work to be entitled to a day's wages. Jaramillo v. City of Albuquerque, 64 N.M. 427, 329 P.2d 626 (1958).

Framers of New Mexico constitution literally transplanted Okla. Const., art. XXIII, § 1, to constitution of New Mexico with full knowledge that enabling legislation was necessary to its effectiveness. Jaramillo v. City of Albuquerque, 64 N.M. 427, 329 P.2d 626 (1958).

So no duty on officials. — Section is not self-executing, so there is no duty imposed upon municipal officials, the violation of which affords grounds for removal from office, or which will sustain a mandamus action in case it is not performed. 1931-32 Op. Att'y Gen. 127.

Intent of section. — This provision is intended to limit state, county and municipal employment to eight hours per day, although it is possible to construe it as a fixed minimum day. 1931-32 Op. Att'y Gen. 73.

Section applies only to persons employed and paid by the day. 1912-13 Op. Att'y Gen. 124.

Eight-hour day not required. — There is no specific requirement, either constitutional or statutory, that employees of state work an eight-hour day. 1967 Op. Att'y Gen. No. 67-89.

Working more than eight hours not prevented. — Notwithstanding this section, there is nothing to prevent employment of persons to work more than eight hours and to be paid whatever may be agreed upon. 1912-13 Op. Att'y Gen. 124.

Comparable provisions. — Arizona Const., art. XVIII, § 1.

Idaho Const., art. XIII, § 2.

Oklahoma Const., art. XXIII, § 1.

Utah Const., art. XVI, § 6.

Wyoming Const., art. XIX, § 2.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 48A Am. Jur. 2d Labor and Labor Relations § 3808 et seq.

51B C.J.S. Labor Relations § 1186 et seq.

Sec. 20. [Waiver of indictment; proceedings on information.]

Any person held by a committing magistrate to await the action of the grand jury on a charge of felony or other infamous crime, may in open court with the consent of the court and the district attorney, to be entered upon the record, waive indictment and plead to an information in the form of an indictment filed by the district attorney, and further proceedings shall then be had upon said information with like force and effect as though it were an indictment duly returned by the grand jury.

ANNOTATIONS

Cross references. — For provision on indictment and information and rights of accused, see N.M. Const., art. II, § 14.

"Open court" means a time and place when court is regularly organized for transaction of business, and must be limited to regular sessions of court held at time fixed by law or specially called by judge in accordance with law. 1912-13 Op. Att'y Gen. 34.

Generally regarding use of information. — Prior to 1923 amendment to N.M. Const., art. II, § 14, the permissive use of an information was surrounded by so many safeguards as to render it unlikely that framers could have contemplated that requirements of N.M. Const., art. II, § 14, could be waived otherwise than by provisions of this section. State v. Chacon, 62 N.M. 291, 309 P.2d 230 (1957).

Federal grand jury requirement not applicable to states. — Presentment or indictment of a grand jury, required by U.S. Const., amend. V (see Pamphlet 1), is not applicable to the states. State v. Holly, 79 N.M. 516, 445 P.2d 393 (Ct. App. 1968).

No entitlement to grand jury indictment. — Defendant who was charged by criminal information was not entitled to be indicted by grand jury because under N.M. Const., art. II, § 14, a defendant may be charged either by grand jury action or by a criminal information. State v. Mosley, 79 N.M. 514, 445 P.2d 391 (Ct. App. 1968).

So this section inapplicable where information used. — Since defendant was charged by criminal information, provisions of this section concerning waiver of grand jury indictment and consent to such waiver are not applicable. Flores v. State, 79 N.M. 420, 444 P.2d 605 (Ct. App. 1968).

Even when person arrested before information filed. — Person arrested before information is filed is not forthwith entitled to grand jury action in his case, and subsequent filing of an information does not violate this section. State v. Reyes, 78 N.M. 527, 433 P.2d 506 (Ct. App. 1967).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 41 Am. Jur. 2d Indictments and Informations § 6 et seq.

"Infamous" offense, what is, within constitutional or statutory provision in relation to presentment or indictment by grand jury, 24 A.L.R. 1002.

Right to waive indictment, information, or other formal accusation, 56 A.L.R.2d 837.

42 C.J.S. Indictments and Informations § 7.

Sec. 21. [Pollution control.]

The protection of the state's beautiful and healthful environment is hereby declared to be of fundamental importance to the public interest, health, safety and the general welfare. The legislature shall provide for control of pollution and control of despoilment of the air, water and other natural resources of this state, consistent with the use and development of these resources for the maximum benefit of the people. (As added November 2, 1971.)

ANNOTATIONS

Cross references. — For Pollution Control Revenue Bond Act, see 3-59-1 to 3-59-14 NMSA 1978.

Special election. — Laws 1971, ch. 308, §§ 1 and 2, provided that all constitutional amendments proposed by the thirtieth legislature be voted upon at a special election on the first Tuesday of November, 1971, unless otherwise specified, and appropriated $171,000 for election expenses.

Law reviews. — For note, "On Building Better Laws for New Mexico's Environment," see 4 N.M. L. Rev. 105 (1973).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 61A Am. Jur. 2d Pollution Control § 1 et seq.

Secured lender liability: application of security interest exemption from definition of "owner or operator" under § 101(20)(A) of Comprehensive Environmental Response, Compensation, and Liability Act (42 USCS § 9601 (20)(A)), 131 A.L.R. Fed. 293.

39A C.J.S. Health and Environment §§ 115 to 157.

Sec. 22. [Public employees and educational retirement systems trust funds; expenditures and encumbrances prohibited; administration; vesting of property rights.] (1998)

A. All funds, assets, proceeds, income, contributions, gifts and payments from any source whatsoever paid into or held by a public employees retirement system or an educational retirement system created by the laws of this state shall be held by each respective system in a trust fund to be administered and invested by each respective system for the sole and exclusive benefit of the members, retirees and other beneficiaries of that system. Expenditures from a system trust fund shall only be made for the benefit of the trust beneficiaries and for expenses of administering the system. A system trust fund shall never be used, diverted, loaned, assigned, pledged, invested, encumbered or appropriated for any other purpose. To the extent consistent with the provisions of this section, each trust fund shall be invested and the systems administered as provided by law.

B. The retirement board of the public employees retirement system and the board of the educational retirement system shall be the trustees for their respective systems and have the sole and exclusive fiduciary duty and responsibility for administration and investment of the trust fund held by their respective systems.

C. A retirement board shall have the sole and exclusive power and authority to adopt actuarial assumptions for its system based upon the recommendations made by an independent actuary with whom it contracts. The legislature shall not enact any law that increases the benefits paid by the system in any manner or changes the funding formula for a retirement plan unless adequate funding is provided.

D. Upon meeting the minimum service requirements of an applicable retirement plan created by law for employees of the state or any of its political subdivisions or institutions, a member of a plan shall acquire a vested property right with due process protections under the applicable provisions of the New Mexico and United States constitutions.

E. Nothing in this section shall be construed to prohibit modifications to retirement plans that enhance or preserve the actuarial soundness of an affected trust fund or individual retirement plan. (As added November 3, 1998.)

ANNOTATIONS

The 1998 amendment to Article XX, which was proposed by S.J.R. No. 6, § 1 (Laws 1998) and adopted at the general election held on November 3, 1998 by a vote of 336,043 for and 97,716 against, added this section.

Compiler's notes. — Section 2 of H.J.R. No. 11 (Laws 1993) proposed to amend the constitution by adding a new section providing for a statewide lottery and video machines. This amendment was submitted to the people at the general election held on November 8, 1994, but the New Mexico Supreme Court entered an order prohibiting the certification of the amendment as unconstitutional.

ARTICLE XXI
Compact with the United States

ANNOTATIONS

Cross references. — For amendment of compact with United States, see N.M. Const., art. XIX, § 4.

"Act of Congress". — Preamble refers to the Enabling Act (June 20, 1910, 36 Stat. 557, ch. 310), which is set out in Pamphlet 3.

Law reviews. — For note, "Procedural Problems in Amending New Mexico's Constitution," see 4 Nat. Resources J. 151 (1964).

Section 1. [Religious toleration; polygamy.]

Perfect toleration of religious sentiment shall be secured, and no inhabitant of this state shall ever be molested in person or property on account of his or her mode of religious worship. Polygamous or plural marriages and polygamous cohabitation are forever prohibited. (As amended September 15, 1953.)

ANNOTATIONS

Cross references. — For other provisions guaranteeing religious freedom, see N.M. Const., art. II, § 11, and art. XII, § 9.

The 1953 amendment, which was proposed by S.J.R. No. 11 (Laws 1953) and adopted at a special election held on September 15, 1953. with a vote of 18,410 for and 11,875 against, deleted provision at end of section applying to prohibition of sale, barter or gift of intoxicating liquors to Indians or introduction of such liquors into Indian country.

Consent of congress to 1953 amendment — See 67 Stat. 586, ch. 502, § 3 (1953).

This section is the same as Enabling Act, § 2A. Tenorio v. Tenorio, 44 N.M. 89, 98 P.2d 838 (1940) (decided before 1953 amendment). See Pamphlet 3.

Trial court determines whether belief is "religious". — Whether a defendant's belief is "religious" is to be decided by the trial court, and unless the trial court rules that the belief is religious, evidence of a defendant's religious belief should not be introduced before the jury. State v. Brashear, 92 N.M. 622, 593 P.2d 63 (Ct. App. 1979).

Traditionalism of belief is a factor to be considered, particularly in connection with organizations, in determining whether a belief is religious; however, traditionalism, in itself, is not determinative because it would give no effect to conversions or to revelations. State v. Brashear, 92 N.M. 622, 593 P.2d 63 (Ct. App. 1979).

Nature of belief factor to be considered in determining whether the belief is religious. State v. Brashear, 92 N.M. 622, 593 P.2d 63 (Ct. App. 1979).

But absence of organization espousing belief no factor. — The absence of an organization espousing the belief that a defendant contends is religious does not, in itself, determine whether an individual's belief is religious. State v. Brashear, 92 N.M. 622, 593 P.2d 63 (Ct. App. 1979).

Sunday laws not religious. — The Sunday laws (40-44-1 to 40-44-5, 1953 Comp., now repealed) are not for any religious observance nor founded upon any religious considerations. 1915-16 Op. Att'y Gen. 149.

Observance of Saturday as Sunday does not excuse violation of Sunday laws (40-44-1 to 40-44-5, 1953 Comp., now repealed). 1915-16 Op. Att'y Gen. 149.

Congress had power to prohibit introduction of liquor into Pueblo lands, notwithstanding that Indians had a fee simple title; such legislation did not encroach upon police power of state. United States v. Sandoval, 231 U.S. 28, 34 S. Ct. 1, 58 L. Ed. 107 (1913) (decided before 1953 amendment).

Use of marijuana not intrinsic part of religion. — Where the evidence shows that defendant's belief was derived from defendant's personal views of the Bible, and those views under the evidence are no more than that the use and distribution of marijuana is permitted because marijuana is a gift from God, such a personal use does not amount to an intrinsic part of a religion. State v. Brashear, 92 N.M. 622, 593 P.2d 63 (Ct. App. 1979).

Comparable provisions. — Utah Const., art. III, First.

Wyoming Const., art. XXI, § 25.

Law reviews. — For student symposium, "Constitutional Revision - Indians in the New Mexico Constitution," see 9 Nat. Resources J. 466 (1969).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 10 Am. Jur. 2d Bigamy § 24; 16A Am. Jur. 2d Constitutional Law § 477; 52 Am. Jur. 2d Marriage §§ 92, 94.

Advertising matter, statute or ordinance relating to distribution of, as interference with religious freedom, 22 A.L.R. 1484, 114 A.L.R. 1446.

Bigamy, religious belief as affecting crime of, 24 A.L.R. 1237.

Vaccination of school children, requirement of, as invasion of religious liberty, 93 A.L.R. 1431.

Patriotic ritual, such as oath of allegiance or salute to flag, etc., power of legislature to require, 110 A.L.R. 383, 120 A.L.R. 655, 127 A.L.R. 1502, 141 A.L.R. 1030, 147 A.L.R. 698.

Solicitation of alms or contributions for charitable, religious or individual purposes, validity of statutory regulations of, 128 A.L.R. 1361, 130 A.L.R. 1504.

Public officers, discrimination because of religious creed in respect of appointment, compensation, etc., of, 130 A.L.R. 1516.

Streets or parks, legislation as to use of, for religious purposes, 133 A.L.R. 1415.

License tax or regulations, constitutional guarantee of freedom of religion as applied to, 141 A.L.R. 538, 146 A.L.R. 109, 152 A.L.R. 322.

Constitutionality of statute providing school bus service for pupils of parochial or private schools, 168 A.L.R. 1434.

Inclusion of period of service in sectarian school in determining public school teachers' seniority, salary or retirement benefits, as a violation of constitutional separation of church and state, 2 A.L.R.2d 1033.

Releasing public school pupils from attendance for purpose of receiving religious education, 2 A.L.R.2d 1371.

Compulsory education law, religious beliefs of parents as defense to prosecution for failure to comply with, 3 A.L.R.2d 1401.

Public regulation and prohibition of sound amplifiers or loud-speaker broadcasts in streets and other public places, 10 A.L.R.2d 627.

Guardian, consideration and weight of religious affiliations in appointment or removal of, 22 A.L.R.2d 696.

Sunday, construction of statute or ordinance prohibiting or regulating sports and games on, 24 A.L.R.2d 813.

Divorce, separation or annulment, racial, religious or political differences as ground for, 25 A.L.R.2d 928.

Statute, ordinance or other measure involving chemical treatment of public water supply as interference with religious freedom, 43 A.L.R.2d 453.

Wills or deeds: validity of provisions prohibiting, penalizing or requiring marriage to one of a particular religious faith, 50 A.L.R.2d 740.

Wearing of religious garb by public school teachers, 60 A.L.R.2d 300.

Zoning regulations as affecting churches, 74 A.L.R.2d 377, 62 A.L.R.3d 197.

Use of public school premises for religious purposes during nonschool time, 79 A.L.R.2d 1148.

Public payment of tuition, scholarship or the like, to sectarian school, 81 A.L.R.2d 1309.

Furnishing free textbooks to sectarian school or student therein, 93 A.L.R.2d 986.

Power of courts or other public agencies, in the absence of statutory authority, to order compulsory medical care for adults, 9 A.L.R.3d 1391.

Provision of religious facilities for prisoners, 12 A.L.R.3d 1276.

Validity of blasphemy statutes or ordinances, 41 A.L.R.3d 519.

Adoption proceedings, religion as factor in, 48 A.L.R.3d 383.

Religion as factor in child custody and visitation cases, 22 A.L.R.4th 971.

Constitutionality of regulation or policy governing prayer, meditation, or "moment of silence" in public schools, 110 A.L.R. Fed. 211.

Bible distribution or use in public schools - modern cases, 111 A.L.R. Fed. 121.

10 C.J.S. Bigamy § 7; 16A C.J.S. Constitutional Law § 515; 55 C.J.S. Marriage § 17.

Sec. 2. [Control of unappropriated or Indian lands; taxation of federal government, nonresident and Indian property.]

The people inhabiting this state do agree and declare that they forever disclaim all right and title to the unappropriated and ungranted public lands lying within the

boundaries thereof, and to all lands lying within said boundaries owned or held by any Indian or Indian tribes, the right or title to which shall have been acquired through the United States, or any prior sovereignty; and that until the title of such Indian or Indian tribes shall have been extinguished the same shall be and remain subject to the disposition and under the absolute jurisdiction and control of the congress of the United States; and that the lands and other property belonging to citizens of the United States residing without this state shall never be taxed at a higher rate than the lands and other property belonging to residents thereof; that no taxes shall be imposed by this state upon lands or property therein belonging to or which may hereafter be acquired by the United States or reserved for its use; but nothing herein shall preclude this state from taxing as other lands and property are taxed, any lands and other property outside of an Indian reservation, owned or held by any Indian, save and except such lands as have been granted or acquired as aforesaid, or as may be granted or confirmed to any Indian or Indians under any act of congress; but all such lands shall be exempt from taxation by this state so long and to such extent as the congress of the United States has prescribed or may hereafter prescribe.

ANNOTATIONS

I. GENERAL CONSIDERATION.

This section is the same as Enabling Act, § 2B. Tenorio v. Tenorio, 44 N.M. 89, 98 P.2d 838 (1940). See Pamphlet 3.

No violation as to foreign corporations. — Foreign corporations are not taxed at higher rate than domestic corporations. 1912-13 Op. Att'y Gen. 26.

State's power to tax federal property. — State may not impose taxes upon assets or property of any agency or branch of federal government, with the exception of real property, without consent of congress. 1957-58 Op. Att'y Gen. No. 57-189.

Severance tax applicable to federal areas. — Unless state has relinquished its legislative jurisdiction over federal areas, severance tax (7-26-1 to 7-26-9 NMSA 1978) is applicable thereto. 1951-52 Op. Att'y Gen. No. 5353.

Lessee for construction on federal land subject to taxation. — Congress having explicitly removed bar of sovereign immunity as it applied to property belonging to United States, the immunity granted federal government by this section and N.M. Const., art. VIII, § 3 (relating to tax exempt property), clearly was not available to one who had lease to construct military housing on federal land; it was his interest that was subject to taxation. Kirtland Heights, Inc. v. Board of County Comm'rs, 64 N.M. 179, 326 P.2d 672 (1958).

Comparable provisions. — Utah Const., art. III, Second.

Wyoming Const., art. XXI, § 26.

Law reviews. — For note, "State Regulation of Oil and Gas Pools on State, Federal, Indian and Fee Lands," see 2 Nat. Resources J. 355 (1962).

For article, "The Bill of Rights and American Indian Tribal Governments," see 6 Nat. Resources J. 581 (1966).

For student symposium, "Constitutional Revision - Indians in the New Mexico Constitution," see 9 Nat. Resources J. 466 (1969).

For article, "Indians - Civil Jurisdiction in New Mexico - State, Federal and Tribal Courts," see 1 N.M. L. Rev. 196 (1971).

For comment, "Indians - State Jurisdiction Over Real Estate Developments on Tribal Lands," see 2 N.M. L. Rev. 81 (1972).

For article, "The Indian Tax Cases - A Territorial Analysis," see 9 N.M.L. Rev. 221 (1979).

For article, "Survey of New Mexico Law, 1979-80: Indian Law," see 11 N.M.L. Rev. 189 (1981).

For note, "Non-Lease Agreements Available for Indian Mineral Development," see 24 Nat. Resources J. 195 (1984).

For comment, "Administration of Reserved and Non-Reserved Water Rights on an Indian Reservation: Post-Adjudication Questions on the Big Horn River," see 32 Nat. Resources J. 681 (1992).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 41 Am. Jur. 2d Indians § 58 et seq.; 71 Am. Jur. 2d State and Local Taxation §§ 183, 221, 223, 235, 236.

Estoppel to deny validity of lease by acquiescence in, or silence concerning, improvements by lessee, 76 A.L.R. 319.

Governmental and proprietary functions of states or its agency, distinction between, as affecting exemption from taxation, 155 A.L.R. 423.

Consent to state taxation of federal property or instrumentalities as affecting exemption thereof under provision of state Enabling Act, constitution or statute, 168 A.L.R. 547.

Constitutional exemption from taxation as subject to legislative regulation respecting conditions of its assertion, 4 A.L.R.2d 744.

Leasehold estate in public property as subject of tax, 54 A.L.R.3d 402.

Taxation of property owned by public body but not devoted to public or governmental use, 54 A.L.R.3d 402.

Proof and extinguishment of aboriginal title to Indian lands, 41 A.L.R. Fed. 425.

Effect of federal assault statute (18 USCS § 113) on prosecutions under Assimilative Crimes Act (18 USCS § 13) making state criminal laws applicable to acts committed on federal reservations, 57 A.L.R. Fed. 957.

42 C.J.S. Indians §§ 30, 69, 70, 131; 84 C.J.S. Taxation §§ 27, 207, 212, 252, 258.

II. JURISDICTION OVER INDIANS.

Compact added nothing to authority and jurisdiction of United States over Indian land as it existed under earlier congressional acts. Martinez v. Martinez, 49 N.M. 83, 157 P.2d 484 (1945).

State disclaimed only proprietary interest in Indian lands. — Disclaimer in this section whereby people of New Mexico forever disclaimed all right and title to all lands lying within boundaries of state owned or held by any Indian or Indian tribes, right or title to which shall have been acquired through United States or any prior sovereignty, is a disclaimer of proprietary, rather than of governmental, interest. Sangre De Cristo Dev. Corp. v. City of Santa Fe, 84 N.M. 343, 503 P.2d 323 (1972), cert. denied, 411 U.S. 938, 93 S. Ct. 1900, 36 L. Ed. 2d 400 (1973); Paiz v. Hughes, 76 N.M. 562, 417 P.2d 51 (1966).

Civil jurisdiction over suit on promissory note against Indian who does not live on reservation is clearly a governmental and not a proprietary interest. Batchelor v. Charley, 74 N.M. 717, 398 P.2d 49 (1965).

Disclaimer of proprietary rather than governmental interest did not prevent New Mexico state courts from obtaining jurisdiction over Indian residing on Indian reservation established by United States government by issuing and serving process upon Indian while he was on the reservation, such Indian having entered into a contract while off reservation and in this state; issuance and service of process was unrelated to any proprietary interest. State Sec., Inc. v. Anderson, 84 N.M. 629, 506 P.2d 786 (1973).

State's constitutional disclaimer of all right and title to Indian lands applies only to a proprietary interest in such lands and does not apply to a nonproprietary intent in subjecting the United States to a state action involving a general water right adjudication. Jicarilla Apache Tribe v. United States, 601 F.2d 1116 (10th Cir.), cert. denied, 444 U.S. 995, 100 S. Ct. 530, 62 L. Ed. 2d 426 (1979).

Indian lands subject to absolute congressional jurisdiction and control. — State lacks jurisdiction over Indian lands until and unless Indian title is extinguished. Until such extinguishment of title, lands involved are subject to absolute jurisdiction and

control of congress of United States. State v. Begay, 63 N.M. 409, 320 P.2d 1017, cert. denied, 357 U.S. 918, 78 S. Ct. 1359, 2 L. Ed. 2d 1363 (1958), overruled to extent opinion declared exclusive federal jurisdiction over Indian lands, State v. Warner, 71 N.M. 418, 379 P.2d 66 (1963).

Congress legislates for pueblos. — Congress and not state of New Mexico legislates for pueblos of New Mexico. Toledo v. Pueblo De Jemez, 119 F. Supp. 429 (D.N.M. 1954).

No state governmental power absent congressional or supreme court sanction. — Terms upon which New Mexico was admitted as state and this section left no room for claim by state to governmental power over Indians or Indian lands except where such jurisdiction has been specifically granted by act of congress or sanctioned by decisions of supreme court of United States. Your Food Stores, Inc. v. Village of Espanola, 68 N.M. 327, 361 P.2d 950, cert. denied, 368 U.S. 915, 82 S. Ct. 194, 7 L. Ed. 2d 131 (1961).

And state must act to accept jurisdiction granted. — Although congress did specifically act in 1953 to give its consent to state to assume jurisdiction over Indians within its boundaries, such jurisdiction is prohibited until state should amend its constitution or statute, removing any legal impediment to such assumption of jurisdiction. New Mexico has not seen fit to amend this section and so has not accepted jurisdiction over the Indians. Chino v. Chino, 90 N.M. 203, 561 P.2d 476 (1977); Your Food Stores, Inc. v. Village of Espanola, 68 N.M. 327, 361 P.2d 950, cert. denied, 368 U.S. 915, 82 S. Ct. 194, 7 L. Ed. 2d 131 (1961).

Federal authority over Indians not exclusive. — Reservation is not a completely separate entity existing outside of political and governmental jurisdiction of New Mexico. State has some jurisdiction, and there is not and never has been "exclusive federal authority." Montoya v. Bolack, 70 N.M. 196, 372 P.2d 387 (1962).

We reject broad assertion that federal government has exclusive jurisdiction over tribe for all purposes. Even on reservations, state laws may be applied unless such application would interfere with reservation self-government or impair a right granted or reserved by federal law. Mescalero Apache Tribe v. Jones, 411 U.S. 145, 93 S. Ct. 1267, 36 L. Ed. 2d 114 (1973).

Test of validity of state action is whether such action interferes with right of reservation Indians to make their own laws and be ruled by them. Test is not exclusive jurisdiction of the Indians or of the United States over Indian reservation lands. Paiz v. Hughes, 76 N.M. 562, 417 P.2d 51 (1966).

Political nature of Indian tribes. — Indian tribes are distinct political entities with right to self-government, having exclusive authority within their territorial boundaries and not subject to laws of state in which they are located nor to federal laws except where applicability of federal laws or jurisdiction of courts is expressly conferred by federal

legislation. Your Food Stores, Inc. v. Village of Espanola, 68 N.M. 327, 361 P.2d 950, cert. denied, 368 U.S. 915, 82 S. Ct. 194, 7 L. Ed. 2d 131 (1961).

Limits of state jurisdiction are reservation self-government and federal law. — Even on reservations, state laws may be applied unless such application would interfere with reservation self-government or would impair a right granted or reserved by federal law; neither Navajo tribal self-government nor rights granted or reserved by federal law would be in conflict with state's operation and exclusive control of schools located on reservation lands, leased by district with approval of both Navajo tribe and secretary of the interior. Prince v. Board of Educ., 88 N.M. 548, 543 P.2d 1176 (1975).

In matters not affecting either federal government or tribal relations, an Indian has same status to sue and be sued in state courts as any other citizen. Batchelor v. Charley, 74 N.M. 717, 398 P.2d 49 (1965).

City and board of commissioners may not exercise claimed authority over lands if they would thereby interfere with self-government of the Tesuque pueblo or impair a right granted, reserved or preempted by congress. Sangre De Cristo Dev. Corp. v. City of Santa Fe, 84 N.M. 343, 503 P.2d 323 (1972), cert. denied, 411 U.S. 938, 93 S. Ct. 1900, 36 L. Ed. 2d 400 (1973).

Criteria for deciding whether interference with Indian self-government. — Criteria to be considered to determine whether or not application of state law would infringe upon self-government of Indians are: (1) whether parties are Indians or non-Indians, (2) whether cause of action arose within Indian reservation and (3) what is nature of interest to be protected. Chino v. Chino, 90 N.M. 203, 561 P.2d 476 (1977).

Support obligations properly within state court jurisdiction. — Enforcement of the former New Mexico Revised Uniform Reciprocal Enforcement of Support Act (now see Chapter 40, Article 6A NMSA 1978) did not interfere with internal self-government of Zuni tribe or contravene an express federal grant or reservation by placing jurisdiction of actions to enforce support obligations in district courts of New Mexico rather than tribal courts, as support obligation here arises from marital relationship between appellant and appellee. Natewa v. Natewa, 84 N.M. 69, 499 P.2d 691 (1972).

Likewise criminal prosecutions against non-Indians. — Exercise of jurisdiction by state courts over criminal offenses on Indian reservation lands, by non-Indians against non-Indians and where no Indian property is involved, would not affect authority of tribal counsel over reservation affairs and therefore would not infringe on right of Indians to govern themselves. State v. Warner, 71 N.M. 418, 379 P.2d 66 (1963); 1933-34 Op. Att'y Gen. 139.

And enforcement of compulsory school attendance laws. — It has long been policy of federal government to encourage and support states in providing public education to Indian children whether they live on or off a reservation, and secretary of interior has been authorized to permit states to enforce penalties of state compulsory school

attendance laws against Indian children and their parents, if tribe adopts resolution consenting to such enforcement. Navajo tribal code has given consent to application of state compulsory school attendance laws to Indians of Navajo tribe and their enforcement on lands of reservation wherever an established public school district lies or extends within such reservation. Prince v. Board of Educ., 88 N.M. 548, 543 P.2d 1176 (1975).

But state should not fill vacuums in Indian law. — For state to move into areas where Indian law and procedure have not achieved degree of certainty of state law and procedure would deny Indians the opportunity of developing their own system. Chino v. Chino, 90 N.M. 203, 561 P.2d 476 (1977).

Especially in area of real property. — Action for forcible entry and unlawful detainer deals directly with question of occupancy and ownership of land, and when land lies within a reservation, enforcement of owner's rights to such property by state court would infringe upon governmental powers of tribe, whether those owners are Indians or non-Indians. Civil jurisdiction of lands within reservation remains with tribe despite fact that tribal law makes no provision for a wrongful entry and detainer action. Chino v. Chino, 90 N.M. 203, 561 P.2d 476 (1977).

State may not condemn Indian lands. — Absolute sovereignty of Pueblo Indian lands having been ceded to United States, state may not condemn such lands for public highways. 1921-22 Op. Att'y Gen. 115.

Easement does not confer criminal jurisdiction. — Where federal government's permission for state to construct highway across Indian reservation was merely an easement, beneficial title in Indians was not extinguished, and state did not have criminal jurisdiction over Indian driving an automobile on such highway. State v. Begay, 63 N.M. 409, 320 P.2d 1017, cert. denied, 357 U.S. 918, 78 S. Ct. 1359, 2 L. Ed. 2d 1363 (1958), overruled on another point, State v. Warner, 71 N.M. 418, 379 P.2d 66 (1963).

But state may adjudicate water rights. — This section does not prohibit state adjudication of Indian water rights since state would not be asserting a proprietary interest in Indian lands and since state can exercise power over Indians where, as in this case, federal government has specifically granted it. State ex rel. Reynolds v. Lewis, 88 N.M. 636, 545 P.2d 1014 (1976).

Jurisdiction over state offenses committed by Indians. — State courts have jurisdiction in offenses against law of state committed by pueblo Indians. 1914 Op. Att'y Gen. 99.

No service of process on reservations. — Navajo Indian lands are outside of territorial jurisdiction of state courts, and therefore any attempt to make service of process on Navajo defendant within territorial limits of said lands would be a useless act. 1957-58 Op. Att'y Gen. No. 58-213.

Without permission of Indian agent. — Officer of state cannot serve subpoena or arrest person on Indian reservation without permission of Indian agent. In such cases agent should be notified and should deliver or assist in delivering fugitive from justice to proper state authority. 1933-34 Op. Att'y Gen. 139.

But service proper on nonreservation Indians outside reservation. — Where nonreservation Indians were involved and service of process was not made within an Indian reservation, service of process upon these Indians on privately leased lands would not affect authority of tribal Indians over reservation affairs or impinge on right of reservation Indians to make their own laws or be governed by them. Batchelor v. Charley, 74 N.M. 717, 398 P.2d 49 (1965).

Game laws apply to non-Indians everywhere. — State has jurisdiction to prosecute non-Indians violating hunting and fishing laws even though such violation occurs on Indian reservation. 1953-54 Op. Att'y Gen. No. 6041.

And to Indians outside reservations absent special rights. — If there is no treaty or agreement between United States and Indian tribe recognizing or granting rights to Indians to hunt and fish outside Indian country, an Indian hunting or fishing in New Mexico outside Indian country is subject to laws of state the same as any other person. 1953-54 Op. Att'y Gen. No. 6041.

But not to Indians on reservations. — An Indian hunting or fishing on reservation not his own is still an Indian in Indian country and is exempt from game laws of state. 1953-54 Op. Att'y Gen. No. 6041.

Even if items transported elsewhere. — As to possession of hides, skins, pelts, heads and game animals, birds or fish or parts thereof, in the case of such items taken by an Indian on a reservation and transported elsewhere, state would have absolutely no jurisdiction whatsoever. 1953-54 Op. Att'y Gen. No. 6041.

Policy permitting sale of handcrafted works by Indians only, valid. — The policy of the state of New Mexico and that of the city of Santa Fe, which permits Indians to display and to sell their handcrafted jewelry, arts and crafts on the grounds of the museum of New Mexico and the palace of the governors, but which prohibits any persons other than Indians from offering for sale handcrafted jewelry and specifically forbids sales by persons other than Indians within the plaza, is valid. Livingston v. Ewing, 601 F.2d 1110 (10th Cir.), cert. denied, 444 U.S. 870, 100 S. Ct. 147, 62 L. Ed. 2d 95 (1979).

State cannot regulate reservation gas systems. — Indians acquiring gas resources from sources wholly upon Indian reservations are not public utilities subject to regulation by public service commission of New Mexico. 1953-54 Op. Att'y Gen. No. 5690.

Indians operating gas distribution system wholly on reservation regardless of manner in which they acquire gas on reservation are not subject to laws of state in relation to regulation as public utilities. 1953-54 Op. Att'y Gen. No. 5690.

Indian rights to sue and be sued in state courts. — In matters not affecting either the federal government or tribal relations, an Indian has the same status to sue and be sued in state courts as any other citizen, but when Indians do invoke jurisdiction of state courts, they are bound by decisions of these courts and cannot be heard to complain of adjudication of all claims and issues which can be and are properly asserted by or against them in suits which they have initiated. Paiz v. Hughes, 76 N.M. 562, 417 P.2d 51 (1966).

Civil courts of New Mexico are open to Indians as are federal courts should they feel that injunctive relief is necessary against members or employees of state highway commission [state transportation commission] for violation of their property rights. 1953-54 Op. Att'y Gen. No. 5632.

Right to vote and run in school elections. — If isolated segment of reservation upon which Indian resides was not specifically excluded from area covered by school district, the Indian, if otherwise qualified and registered, is entitled to vote in school election in precinct in which he lives, and he is also entitled to be a candidate and to hold office of member of school board of school district in which he resides. 1955-56 Op. Att'y Gen. No. 6087.

Inclusion of Indian lands in watershed district must comply with law. — Federal, reservation and state lands may be included in a watershed district only if officials charged with administering such lands specifically agree to inclusion of lands in the district. It would also be necessary that officials administering lands in question also agree to put up a pro rata share of district's budget based on value of lands included in district because the assessment is to be uniform throughout district. This amount may be difficult of computation since in most counties property exempt from taxation is not carried on tax rolls and the value of real property as indicated on tax rolls is a determining factor in computing assessment. 1961-62 Op. Att'y Gen. No. 61-87.

Pueblo Indians have no power to alienate Indian land except to United States since the fee of such lands is in the United States subject only to right of occupancy; thus, to acquire title in Indian lands, the title both of the Indian pueblo and of the United States must be acquired. United States ex rel. Pueblo of San Ildefonso v. Brewer, 184 F. Supp. 377 (D.N.M. 1960).

Indian authorities do not act under color of state law. — Pueblos do not derive their governmental powers from state nor from United States, and consequently there was no basis for holding that conduct of pueblo civil authorities of which protestant Pueblo Indians complain (allegedly subjecting plaintiffs to indignities, threats and reprisals because of their faith) was done under color of state law, statute, ordinance, regulation, custom or usage. Toledo v. Pueblo De Jemez, 119 F. Supp. 429 (D.N.M. 1954).

III. TAXATION OF INDIANS.

Permanent improvements on reservation immune from property tax. — Permanent improvements on tribe's tax-exempt land would certainly be immune from state's ad valorem property tax. Mescalero Apache Tribe v. Jones, 411 U.S. 145, 93 S. Ct. 1267, 36 L. Ed. 2d 114 (1973).

Personal property and improvements belonging to Indian trader and located in and upon Indian reservation, which may be removed by such trader on leaving the reservation, are subject to general property tax, but it is otherwise if such improvements become part of the land. 1935-36 Op. Att'y Gen. 38.

All reservation lands and property exempt. — This section clearly precludes state from taxing Indian lands and Indian property on the reservation. Prince v. Board of Educ., 88 N.M. 548, 543 P.2d 1176 (1975).

Indian income earned on reservation. — New Mexico may not tax income and gross receipts of Indians residing on reservation when income and gross receipts involved are derived solely from activities within reservation. Hunt v. O'Cheskey, 85 N.M. 381, 512 P.2d 954 (Ct. App.), cert. denied, 85 N.M. 388, 512 P.2d 961 (1973).

No tax on reservation gas pumps. — License tax provisions (Laws 1915, § 582, now repealed) are not enforceable on persons handling gasoline from pumps which are located upon Indian reservations. 1931-32 Op. Att'y Gen. 25.

Unless congress allows. — Service station on Apache reservation, operated by Mescalero Apache Tribal Enterprises, is liable for payment of New Mexico motor fuel tax (64-26-2 and 64-26-2.1, 1953 Comp., now repealed) by virtue of congressional authorization (4 U.S.C. § 104). 1957-58 Op. Att'y Gen. No. 57-263.

State may tax Indian property outside reservation. — By virtue of Enabling Act (see Pamphlet 3), federal government permitted state to tax, as other lands and property are taxed, any lands and other property outside of Indian reservation owned or held by any Indian. Mescalero Apache Tribe v. Jones, 83 N.M. 158, 489 P.2d 666 (Ct. App.), cert. denied, 83 N.M. 151, 489 P.2d 659 (1971), reversed in part on account of immunity from tax afforded by Indian Reorganization Act (25 U.S.C. § 465), 411 U.S. 145, 93 S. Ct. 1267, 36 L. Ed. 2d 114 (1973).

Unless Congress forbids it, New Mexico retains right to tax all Indian land and Indian activities located or occurring outside of reservation. Mescalero Apache Tribe v. Jones, 411 U.S. 145, 93 S. Ct. 1267, 36 L. Ed. 2d 114 (1973).

Including land held under ordinary patent. — Land held by pueblo Indian under ordinary patent from United States is taxable. 1915-16 Op. Att'y Gen. 280.

Indians are subject to road tax for benefit of roads outside their lands. 1915-16 Op. Att'y Gen. 9.

Implied congressional consent to reservation Indians acquiring property outside reservation. — This section's reservation to state of limited power to tax lands and property of Indians outside of reservations implies consent of congress to acquisition by reservation Indians of land and property outside of an Indian reservation. Trujillo v. Prince, 42 N.M. 337, 78 P.2d 145 (1938).

Taxing non-Indians' activities on Indian land does not violate this section, which is a disclaimer of proprietary interest, not of governmental control. G.M. Shupe, Inc. v. Bureau of Revenue, 89 N.M. 265, 550 P.2d 277 (Ct. App.), cert. denied, 89 N.M. 321, 551 P.2d 1368 (1976).

Private non-Indian corporations cannot escape obligation to pay state taxes by locating their property on Indian reservations. Nothing forbids imposition of such a tax since it does not in any way infringe on right of reservation Indians to make their own laws and be ruled by them. Although the land itself cannot be taxed, the non-Indian property, which does not belong to and may not be acquired by United States or reserved for its use, can be. Prince v. Board of Educ., 88 N.M. 548, 543 P.2d 1176 (1975).

The gross receipts tax, 7-9-4 NMSA 1978, may be constitutionally imposed on a contractor doing work on an Indian reservation, where there is no imposition on the sovereignty of the United States or infringement of the Indian tribe's right to self-government. Tiffany Constr. Co. v. Bureau of Revenue, 96 N.M. 296, 629 P.2d 1225 (1981).

Claimant of adverse possession still must prove payment of taxes. — In suit by United States as guardian of pueblo of Taos to quiet title to certain lands granted Pueblo Indians, such lands were not exempt from taxation so as to relieve claimants by adverse possession from proving, under Pueblo Lands Act (June 7, 1924, 43 Stat. 636, ch. 331, §§ 4 and 5), their payment of all taxes on the lands claimed which were assessed and levied in conformity with New Mexico laws. United States v. Wooten, 40 F.2d 882 (10th Cir. 1930).

Sec. 3. [Assumption of territorial debts.]

The debts and liabilities of the territory of New Mexico and the debts of the counties thereof, which were valid and subsisting on the twentieth day of June, nineteen hundred and ten, are hereby assumed and shall be paid by this state; and this state shall, as to all such debts and liabilities, be subrogated to all the rights, including rights of indemnity and reimbursement, existing in favor of said territory or of any of the several counties thereof on said date. Nothing in this article shall be construed as validating or in any manner legalizing any territorial, county, municipal or other bonds, warrants, obligations or evidences of indebtedness of, or claims against, said territory or any of the counties or municipalities thereof which now are or may be, at the time this state is admitted,

invalid and illegal; nor shall the legislature of this state pass any law in any manner validating or legalizing the same.

ANNOTATIONS

Compiler's notes. — This section is the same as Enabling Act, § 2C.

Congress intended that "debts and liabilities" only should be covered, believing at time that there was practically no reimbursement to be made. Bryant v. Board of Loan Comm'rs, 28 N.M. 319, 211 P. 597 (1922).

Not claims against county for wild animal bounties. — Section does not authorize payment by state of claims against county for wild animal bounties. State ex rel. Beach v. Board of Loan Comm'rs, 19 N.M. 266, 142 P. 152 (1914).

State may pay interest from proceeds of donated lands. — Interest on series "A" state bonds, by which territorial bonds for insane hospital and for military institute were assumed by state, was properly payable from proceeds of sales and rentals of lands donated by congress to the two institutions. 1915-16 Op. Att'y Gen. 31.

Comparable provisions. — Utah Const., art. III, Third.

Wyoming Const., art. XXI, § 27.

Law reviews. — For article, "Ad Valorem Tax Status of a Private Lessee's Interest in Publicly Owned Property: Taxability of Possessory Interests in Industrial Projects under the New Mexico Industrial Revenue Bond Act," see 3 N.M. L. Rev. 136 (1973).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 81A C.J.S. States §§ 4, 5.

Sec. 4. [Public schools.]

Provision shall be made for the establishment and maintenance of a system of public schools which shall be open to all the children of the state and free from sectarian control, and said schools shall always be conducted in English.

ANNOTATIONS

Cross references. — For provision for free public school system, see N.M. Const., art. XII, § 1.

As to exclusive control of state, see N.M. Const., art. XII, § 3.

As to teachers learning English and Spanish, see N.M. Const., art. XII, § 8.

For educational rights of children of Spanish descent, see N.M. Const., art. XII, § 10.

Congress encouraged state to provide public education to all citizens. — Indicative of congressional policy of encouraging New Mexico to provide public education to all of its citizens, including Indians, is § 2 D of Enabling Act (see Pamphlet 3) which orders that provision be made for establishment and maintenance of system of public schools open to all children of state and free from sectarian control, which mandate is picked up in N.M. Const., art. XII, § 1, and this section. Prince v. Board of Educ., 88 N.M. 548, 543 P.2d 1176 (1975).

Federal government also has duty to educate Indians. — Federal government, in compliance with treaty obligations to Navajo tribe, has duty to provide for education and other services needed by Indians. Prince v. Board of Educ., 88 N.M. 548, 543 P.2d 1176 (1975).

Large school districts effective denial of free education. — If school districts are made so large that children are unable to make trip to school and back home each day, then they are denied a free school just as effectively as if no school existed. Prince v. Board of Educ., 88 N.M. 548, 543 P.2d 1176 (1975).

Teachers belonging to religious orders restricted. — Members of religious orders who are employed as public school teachers must refrain from teaching sectarian religion and doctrines and from disseminating religious literature while on duty; they must be under actual control and supervision of responsible school authorities. Zellers v. Huff, 55 N.M. 501, 236 P.2d 949 (1951).

Wearing of religious garb and insignia must be barred during time members of religious orders are on duty as public school teachers. Zellers v. Huff, 55 N.M. 501, 236 P.2d 949 (1951).

Penalty for sectarian teaching. — Barring certain members of religious orders from again teaching after they had knowingly taught sectarian religion during regular school hours was not improper. Zellers v. Huff, 55 N.M. 501, 236 P.2d 949 (1951).

Non-English languages not excluded. — Phrase "said schools shall always be conducted in English" means that English shall always be used, but not to exclusion of every other language. 1971 Op. Att'y Gen. No. 71-102.

Comparable provisions. — Utah Const., art. III, Fourth.

Wyoming Const., art. XXI, § 28.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 68 Am. Jur. 2d Schools §§ 6, 115, 337 to 346, 348 to 358.

Constitutionality and construction of statutes in relation to admission of nonresident pupils to school privileges, 72 A.L.R. 499, 113 A.L.R. 177.

What is common or public school within contemplation of constitutional or statutory provision, 113 A.L.R. 697.

Inclusion of period of service in sectarian school in determining public school teachers' seniority, salary or retirement benefits, as a violation of constitutional separation of church and state, 2 A.L.R.2d 1033.

Releasing public school pupils from attendance for purpose of receiving religious education, 2 A.L.R.2d 1371.

Compulsory education law, religious beliefs of parents as defense to prosecution for failure to comply with, 3 A.L.R.2d 1401.

Wearing of religious garb by public school teachers, 60 A.L.R.2d 300.

Use of public school premises for religious purposes during nonschool time, 79 A.L.R.2d 1148.

Public payment of tuition, scholarship or the like, to sectarian school, 81 A.L.R.2d 1309.

Furnishing free textbooks to sectarian school or student therein, 93 A.L.R.2d 986.

Constitutionality of regulation or policy governing prayer, meditation, or "moment of silence" in public schools, 110 A.L.R. Fed. 211.

Bible distribution or use in public schools - modern cases, 111 A.L.R. Fed. 121.

78 C.J.S. Schools and School Districts § 4 et seq.; 78A C.J.S. Schools and School Districts § 781.

Sec. 5. [Suffrage.]

This state shall never enact any law restricting or abridging the right of suffrage on account of race, color or previous condition of servitude. (As amended November 5, 1912.)

ANNOTATIONS

The 1912 amendment, which was proposed by J.R. No. 6 (Laws 1912) and was adopted by the people at the general election held on November 5, 1912, by a vote of 26,663 for and 13,678 against, deleted provisions requiring that all state officers and legislators be sufficiently fluent in English so as to conduct their duties without an interpreter. The amendment was authorized by congressional resolution of August 21, 1911 (37 Stat. 39).

Law reviews. — For student symposium, "Constitutional Revision - Indians in the New Mexico Constitution," see 9 Nat. Resources J. 466 (1969).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 25 Am. Jur. 2d Elections §§ 105 et seq., 146 et seq.

Political party, committee or officer, exclusion by, of persons from participating in primaries as voters or candidates, 70 A.L.R. 1501, 88 A.L.R. 473, 97 A.L.R. 685, 151 A.L.R. 1121.

29 C.J.S. Elections §§ 8, 31.

Sec. 6. [Capital.]

The capital of this state shall, until changed by the electors voting at an election provided for by the legislature of this state for that purpose, be at the city of Santa Fe, but no such election shall be called or provided for prior to the thirty-first day of December, nineteen hundred and twenty-five.

ANNOTATIONS

Santa Fe constitutes permanent location. — Congressional grant of land in 1898 to erect public buildings at capital of state when permanently located may be used for purposes of grant since no change in location of capital can be made until 1926. "Permanently located" does not mean "irrevocably located." 1923-24 Op. Att'y Gen. 130.

There is a requirement of permanency as to the location of state capital. 1980 Op. Att'y Gen. No. 80-16.

State board of education based in capital. — Constitution necessitates that state board of education maintain its permanent office, books, records and files in Santa Fe at the state capital, and board must in most instances hold its regular meetings at the capital. 1964 Op. Att'y Gen. No. 64-21.

But may meet elsewhere to consider local matters. — Pursuant to its authority to supervise the public schools, board may from time to time hold meetings in various parts of state to study, consider and decide matters pertinent to schools in area where meeting is held. 1964 Op. Att'y Gen. No. 64-21.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 81A C.J.S. States § 38.

Sec. 7. [Reclamation projects.]

There are hereby reserved to the United States, with full acquiescence of the people of this state, all rights and powers for the carrying out of the provisions by the United

States of the act of congress, entitled, "An act appropriating the receipts from the sale and disposal of public lands in certain states and territories to the construction of irrigation works for the reclamation of arid lands," approved June seventeenth, nineteen hundred and two, and acts amendatory thereof or supplementary thereto, to the same extent as if this state had remained a territory.

Sec. 8. [Allotted Indian lands subject to federal liquor control.]

Whenever hereafter any of the lands contained within Indian reservations or allotments in this state shall be allotted, sold, reserved or otherwise disposed of, they shall be subject for a period of twenty-five years after such allotment, sale, reservation or other disposal, to all the laws of the United States prohibiting the introduction of liquor into the Indian country; and the terms "Indian" and "Indian country" shall include the Pueblo Indians of New Mexico and the lands owned or occupied by them on the twentieth day of June, nineteen hundred and ten, or which are occupied by them at the time of the admission of New Mexico as a state.

ANNOTATIONS

Section is the same as Enabling Act, § 2 H. Tenorio v. Tenorio, 44 N.M. 89, 98 P.2d 838 (1940). See Pamphlet 3.

Indians under protection of United States. — Pueblo Indians are under protection of United States as dependent communities, and their lands and property are subject to congressional legislation. United States v. Candelaria, 271 U.S. 432, 46 S. Ct. 561, 70 L. Ed. 1023 (1925). Compare United States v. Wooten, 40 F.2d 882 (10th Cir. 1930).

In the exercise of government's guardianship over Indians and their affairs, congress has power to prohibit introduction of liquor into lands of Pueblos. United States v. Sandoval, 231 U.S. 28, 34 S. Ct. 1, 58 L. Ed. 107 (1913). In connection with this case, see United States v. Wooten, 40 F.2d 882 (10th Cir. 1930).

Law reviews. — For student symposium, "Constitutional Revision - Indians in the New Mexico Constitution," see 9 Nat. Resources J. 466 (1969).

Sec. 9. [Consent to Enabling Act provisions.]

This state and its people consent to all and singular the provisions of the said act of congress, approved June twentieth, nineteen hundred and ten, concerning the lands by said act granted or confirmed to this state, the terms and conditions upon which said grants and confirmations were made and the means and manner of enforcing such terms and conditions, all in every respect and particular as in said act provided.

ANNOTATIONS

Cross references. — For provisions regarding administration and disposition of public lands, see N.M. Const., art. XIII.

"Act of congress". — This section refers to Enabling Act (June 20, 1910, 36 Stat. 557, ch. 310, §§ 2, 6 to 12, 18), which is set out in Pamphlet 3.

Enabling Act part of New Mexico fundamental law. — By this section state consented to all provisions of Enabling Act and by virtue thereof constitution of New Mexico is subject to provisions of that act in same manner that it is subject to provisions of constitution of United States. 1953-54 Op. Att'y Gen. No. 5788.

Enabling Act became as much a part of New Mexico fundamental law as if it had been directly incorporated into New Mexico constitution, and provision forbidding donations or pledges of credit by state, except as otherwise permitted (N.M. Const., art. IX, § 14), allowed use of trust funds as required under Enabling Act. State ex rel. Interstate Stream Comm'n v. Reynolds, 71 N.M. 389, 378 P.2d 622 (1963).

Constitutional amendment required to overcome Enabling Act provisions. — Not only must congress consent to diversion from their original objects and purposes of proceeds from lands granted by congress to state, but state constitution must be amended before such consent can be effectuated. Bryant v. Board of Loan Comm'rs, 28 N.M. 319, 211 P. 597 (1922). See N.M. Const., art. XXI, § 10, on irrevocability of compact.

Title to national forest lands. — Title of state to Sections 2, 16, 32 and 36, on which there had been on June 20, 1910, a completed survey finally approved by secretary of the interior, was not lost by embracement of such sections within national forests, but such sections which were unsurveyed on said date may be withdrawn by federal government for national forests at any time prior to completing such survey. 1937-38 Op. Att'y Gen. 198. See Enabling Act, § 6 (Pamphlet 3).

State accepts conditions on land grant trusts for miners' hospitals. — In this section New Mexico expressly accepted conditions imposed on land grant trusts for miners' hospitals for disabled miners. United States v. New Mexico, 536 F.2d 1324 (10th Cir. 1976).

State cannot give absolute right to renewal of land lease. — In view of the inhibitions of Enabling Act, § 10 (regarding trust lands), N.M. Const., art. XXI, § 10 (relating to irrevocability of compact), and this section, no absolute right exists to renewal of a state land lease. Ellison v. Ellison, 48 N.M. 80, 146 P.2d 173 (1944).

But may give "preferred" right. — Statute (132-120, C.S. 1929, now repealed) giving absolute right to renewal of five-year grazing lease would be to that extent void, but "preferred" right of renewal may be given so long as it is not exclusive or absolute. State ex rel. McElroy v. Vesely, 40 N.M. 19, 52 P.2d 1090 (1935).

State properly reserved mineral rights. — State, through commissioner of public lands, properly reserved minerals and mineral rights in selling and in issuing its patent to school and asylum lands granted to it by government, and patentee was not entitled to ejectment against state's lessee of oil and gas rights. Terry v. Midwest Ref. Co., 64 F.2d 428 (10th Cir.), cert. denied, 290 U.S. 660, 54 S. Ct. 74, 78 L. Ed. 571 (1933). See N.M. Const., art. XXIV, § 1.

Improper to divert income from granted lands to unauthorized purposes. — Drainage law (Laws 1917, ch. 69, as amended by Laws 1919, ch. 87) which directed commissioner of public lands to issue proper vouchers for drainage assessments, payable out of income derived from granted state lands of class benefited, was unconstitutional since under Enabling Act, § 10, state has no power to improve granted lands at expense of the lands or income derived therefrom. Lake Arthur Drainage Dist. v. Field, 27 N.M. 183, 199 P. 112 (1921).

It is breach of trust for commissioner to use funds derived from lands granted state for advertising resources and advantages of state, and he may be enjoined from so using the funds. Ervien v. United States, 251 U.S. 41, 40 S. Ct. 75, 64 L. Ed. 128 (1919).

Irrigation district has no clear legal right to draw on income from land granted by congress, the use of which was limited to establishment of reservoirs and hydraulic engineering, and mandamus directed to drawing of warrant thereon will be denied. Carson Reclamation Dist. v. Vigil, 31 N.M. 402, 246 P. 907 (1926).

Laws 1951, ch. 181 (now repealed) and ch. 227 (general appropriation bill), attempting diversion of trust funds derived from public lands to general fund for general purposes, were clearly unconstitutional and were mere nullities. State ex rel. Shepard v. Mechem, 56 N.M. 762, 250 P.2d 897 (1952).

Lands granted to state of New Mexico by United States are held by state in trust for purposes of the grant and no other purposes; diversion of land grant trust moneys to any other purpose, however salutary, is unconstitutional. 1957-58 Op. Att'y Gen. No. 57-314.

Proper for commissioner of public lands to bring mandamus proceeding. — Mandamus is available to enforce provisions of Enabling Act in view of acceptance of its provisions by adoption of this section and N.M. Const., art. XXI, § 10, and commissioner of public lands is proper party to bring proceeding to prevent alleged illegal diversion of trust funds. State ex rel. Shepard v. Mechem, 56 N.M. 762, 250 P.2d 897 (1952).

But citizen may not sue to enjoin misapplication of proceeds. — Neither this section nor Enabling Act, § 10, give citizen right to sue to enjoin misapplication of proceeds of land grants. Asplund v. Hannett, 31 N.M. 641, 249 P. 1074 (1926).

Law reviews. — For note, "Administration of Grazing Lands in New Mexico: A Breach of Trust," see 15 Nat. Resources J. 581 (1975).

Sec. 10. [Compact irrevocable.]

This ordinance is irrevocable without the consent of the United States and the people of this state, and no change or abrogation of this ordinance, in whole or in part, shall be made by any constitutional amendment without the consent of congress.

ANNOTATIONS

Cross references. — For amendment of compact with United States, see N.M. Const., art. XIX, § 4.

State consent to change requires constitutional amendment. — Congress in 1920 consented to change in regard to use of proceeds of land granted state, but state itself must adopt constitutional amendment whereby this consent can be carried into effect. Bryant v. Board of Loan Comm'rs, 28 N.M. 319, 211 P. 597 (1922). See N.M. Const., art. XIX, § 4.

Law reviews. — For note, "Procedural Problems in Amending New Mexico's Constitution," see 4 Nat. Resources J. 151 (1964).

For student symposium, "Constitutional Revision - Indians in the New Mexico Constitution," see 9 Nat. Resources J. 466 (1969).

For note, "Administration of Grazing Lands in New Mexico: A Breach of Trust," see 15 Nat. Resources J. 581 (1975).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 72 Am. Jur. 2d States, Territories, and Dependencies §§ 7, 12.

81A C.J.S. States §§ 4, 24, 27.

Sec. 11. [Consent to exchange of lands.]

This state and its people consent to the provisions of the act of congress, approved June 15, 1926, providing for such exchanges and the governor and other state officers mentioned in said act are hereby authorized to execute the necessary instrument or instruments to effect the exchange of lands therein provided for with the government of the United States; provided that in the determination of values of the lands now owned by the state of New Mexico, the value of the lands, the timber thereon and mineral rights pertaining thereto shall control the determination of value. The legislature may enact laws for the carrying out of the provisions hereof in accordance herewith. (As added November 8, 1932.)

ANNOTATIONS

The 1932 amendment to Article XXI, which was proposed by the senate steering committee substitute for H.J.R. No. 10 (Laws 1931) and was adopted at the general election held on November 8, 1932, by a vote of 34,028 for and 14,739 against, added this section.

Compiler's notes. — An amendment to this article, proposed by H.J.R. No. 9 (Laws 1990), which would have added a new Section 12 providing authorization for the commissioner of public lands to exchange land under his control for land of the United States, a state agency or political subdivision, a public lands beneficiary, an Indian tribe or pueblo, or a private entity was submitted to the people at the general election held on November 6, 1990. It was defeated by a vote of 129,889 for and 177,245 against.

"Such exchanges". — "Such exchanges" near the beginning of this section refers to exchanges of state timberlands, scattered throughout the state, for larger tracts of federal grazing lands. See preamble to senate steering committee substitute for H.J.R. No. 10 (proposing this section) in Laws 1931.

ARTICLE XXII
Schedule

Section 1. [Effective date of constitution.]

This constitution shall take effect and be in full force immediately upon the admission of New Mexico into the union as a state.

ANNOTATIONS

Comparable provisions. — Idaho Const., art. XXI, § 7.

Utah Const., art. XXIV, § 16.

Wyoming Const., art. XXI, § 8.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 16 Am. Jur. 2d Constitutional Law § 63.

16 C.J.S. Constitutional Law § 15.

Sec. 2. [Federal Employers' Liability Act.]

Until otherwise provided by law, the act of congress of the United States, entitled, "An act relating to liability of common carriers, by railroads to their employees in certain cases," approved April twenty-two, nineteen hundred and eight, and all acts amendatory thereof, shall be and remain in force in this state to the same extent that they have been in force in the territory of New Mexico.

ANNOTATIONS

Cross references. — For substance of railroad's liability to employees, see N.M. Const., art. XX, § 16, and notes thereto.

"Act of congress". — The statute referred to in this section is the Federal Employers' Liability Act (45 U.S.C. §§ 51 to 60).

Am. Jur. 2d, A.L.R. and C.J.S. references. — State statutes and rules of law, applicability of, to Federal Employers' Liability Act, 12 A.L.R. 693, 36 A.L.R. 917, 89 A.L.R. 693.

Transportation Act as extending period for bringing suit under Federal Employers' Liability Act, 19 A.L.R. 683, 52 A.L.R. 296.

"Works," "ways," "equipment," "machinery," etc., meaning of, in Federal Employers' Liability Act, 23 A.L.R. 716.

Independence of contract considered with reference to Federal Employers' Liability Act, 43 A.L.R. 352.

Applicability of state statutes and rules of law as affecting construction and application of provisions of Federal Employers' Liability Act relating to contributory negligence, assumption of risk and comparative negligence, 89 A.L.R. 693.

Nonresident aliens, right to maintain action for wrongful death for benefit of, 138 A.L.R. 695.

Release or contract after injury as affected by provision of Federal Employers' Liability Act invalidating contract, rule, or device to exempt carrier from liability, 166 A.L.R. 648.

Federal Employers' Liability Act, as amended in 1939, as excluding state law, where employee is injured in course of acts contributory to intrastate and interstate commerce, 173 A.L.R. 794.

Loaned servant doctrine under Federal Employers' Liability Act, 1 A.L.R.2d 302.

Power of state or state court to decline jurisdiction of action under Federal Employer's Liability Act, 43 A.L.R.2d 774.

Liability, under Federal Employers' Liability Act, for injury to or death of employee riding train resulting from sudden stop, start, or jerk of train, 60 A.L.R.2d 637.

Applicability of state practice and procedure in actions brought in state courts, 79 A.L.R.2d 553.

Sec. 3. [Federal Mining Inspection Act.]

Until otherwise provided by law, the act of congress, entitled, "An act for the protection of the lives of miners," approved March three, eighteen hundred and ninety-one, and all acts amendatory thereof, shall be and remain in force in this state to the same extent that they have been in force in the territory of New Mexico; the words "governor of the state," are hereby substituted for the words "governor of such organized territory," and for the words "secretary of the interior" wherever the same appear in said acts; and the chief mine inspector for the territory of New Mexico, appointed by the president of the United States, is hereby authorized to perform the duties prescribed by said acts until superseded by the "inspector of mines" appointed by the governor, as elsewhere provided by the constitution, and he shall receive the same compensation from the state, as he received from the United States.

ANNOTATIONS

Cross references. — For provisions regarding state mine inspector, see N.M. Const., art. XVII, § 1 and 69-5-1 to 69-5-21 and 69-8-5 NMSA 1978.

For mine regulation and inspection generally, see Articles 4 and 5 of Chapter 69 NMSA 1978.

"Act of congress". — The statute referred to in this section is the Federal Mining Inspection Act (26 Stat. 1104, ch. 564).

Effect of act. — Congress provides method whereby operators of coal mines may be compelled to provide ventilation and other appliances necessary for safety of miners. 1914 Op. Att'y Gen. 13.

Am. Jur. 2d, A.L.R. and C.J.S. references. — "Mine" defined, 11 A.L.R. 154.

Duty of employer with respect to timbering of mine as affected by his duty to inspect, 15 A.L.R. 1386.

Independence of contract considered with relation to statutes imposing on mine owners' duties with respect to security of workmen, 43 A.L.R. 353.

Custom as standard of care, 68 A.L.R. 1445.

Sec. 4. [Territorial laws.]

All laws of the territory of New Mexico in force at the time of its admission into the union as a state, not inconsistent with this constitution, shall be and remain in force as the laws of the state until they expire by their own limitation, or are altered or repealed; and all rights, actions, claims, contracts, liabilities and obligations, shall continue and remain unaffected by the change in the form of government.

ANNOTATIONS

I. GENERAL CONSIDERATION.

Applicability of prior laws generally. — In acquisition of territory by conquest or cession, jurisprudence not political but municipal in character, affecting personal property rights and domestic relations as they existed between people under government from which territory was carved, remain in full force until altered by government of United States. The civil law as it existed in Spain and New Mexico at time of Treaty of Guadalupe Hidalgo was in force in territory of New Mexico. In re Chavez, 149 F. 73 (8th Cir. 1906)(construing similar provision in Kearny Code. See Pamphlet 3.)

State, as to fiscal affairs, was mere successor of territory. State ex rel. Lucero v. Marron, 17 N.M. 304, 128 P. 485 (1912).

Federal law does not affect state courts' jurisdiction and powers. — District courts of state derive their jurisdiction and powers from constitution and laws of state, and no act of congress concerning jurisdiction of courts in state had any effect after statehood came. Crist v. Abbott, 22 N.M. 417, 163 P. 1085 (1917).

Length of notary's term. — Appointment of notary public in 1911 holds good until expiration of term for which it was made. 1914 Op. Att'y Gen. 68.

Absent constitutional provision, existing laws govern. — It is presumed that it was intended that existing territorial laws were to govern election of justices of the peace, constables, school directors or other minor officers, where constitution made no provision for their election. Territory ex rel. Welter v. Witt, 16 N.M. 335, 117 P. 860 (1911).

Also judicial constructions. — New Mexico wrongful death statutes (41-2-4 NMSA 1978) were adopted from territorial statutes, and construction thereof by territorial supreme court was also adopted with statutes. Mallory v. Pioneer S.W. Stages, Inc., 54 F.2d 559 (10th Cir. 1931).

Section provides for changes in statutory duties. — It is clear from reading this section that constitution-makers anticipated there might be need for changes in statutory duties from time to time and expressly provided therefor. Torres v. Grant, 63 N.M. 106, 314 P.2d 712 (1957).

New enactments supersede territorial laws. — Territorial laws concerning salaries of officers remained in force only until adoption of salary bill by legislature. 1915-16 Op. Att'y Gen. 77.

Statute (Laws 1921, ch. 133, § 507, now repealed) giving state tax commission discretionary power to cause reassessment of property of a county, employing its own

agents therefor, did not conflict with this section, which carried forward territorial law creating office of assessor. Herd v. State Tax Comm'n, 31 N.M. 44, 240 P. 988 (1925).

Effect of constitutional amendment on territorial law. — Constitutional amendment of 1914, deleting N.M. Const., art. VIII, § 8, which had permitted legislature to exempt newly constructed railroads from taxation, gave rise to doubt as to whether prior statute (Code 1915, §§ 4724 and 5432, now repealed) so exempting such railroads, remained effective. 1915-16 Op. Att'y Gen. 11.

Fixed rights unaffected by contrary constitutional provision. — Where rights of city under lien of assessment for local improvement had accrued and become fixed at time New Mexico became a state, such rights would not be affected by constitution, even if law and ordinance under which assessment was made were in conflict with constitution. City of Roswell v. Bateman, 20 N.M. 77, 146 P. 950 (1915).

Comparable provisions. — Idaho Const., art. XXI, § 2.

Iowa Const., art. XII, § 2.

Utah Const., art. XXIV, § 2.

Wyoming Const., art. XXI, § 3.

II. CONSISTENCY WITH CONSTITUTION.

Territorial statute not invalid because of method of enactment. — Section refers to conflict, if any, in substance of prior laws with constitution; it does not invalidate territorial law, validly enacted at time of its adoption, which would have been invalid under constitution on account of method of its enactment. State v. Elder, 19 N.M. 393, 143 P. 482 (1914).

Municipal bonds provision not inconsistent with constitution. — Section 2402, 1897 C.L. (now repealed), being part of Laws 1884, ch. 39, § 14, authorizing issuance of municipal bonds for certain purposes, was not inconsistent with N.M. Const., art. IX, § 12, and was continued in effect by this section. Smith v. City of Raton, 18 N.M. 613, 140 P. 109 (1914).

Constitution may modify territorial law. — In absence of legislation subsequent to adoption of constitution, territorial law relative to elections for removal of county seats was carried forward, modified by N.M. Const., art. X, § 3, to extent that three-fifths vote was required instead of a majority. Orchard v. Board of Comm'rs, 42 N.M. 172, 76 P.2d 41 (1938).

Statutory law concerning issuance of writs of error by supreme court remained in force as modified by provisions of N.M. Const., art. VI, § 3. Farmers' Dev. Co. v. Rayado Land

& Irrigation Co., 18 N.M. 138, 134 P. 216 (1913), criticized on another point, Canavan v. Canavan, 18 N.M. 468, 138 P. 200 (1914).

But not necessarily destroy it. — While greater part of duties of superintendent of insurance was transferred by constitutional provision creating corporation commission (now public regulation commission), enough was left to office to justify view that old territorial law creating it remained in force. Mitchell v. National Sur. Co., 206 F. 807 (D.N.M. 1913).

Fee and salary provisions inconsistent. — This section did not continue in force the fee and salary provisions of Laws 1909, ch. 22 (now superseded in part), such law being inconsistent with N.M. Const., art. XX, § 9. State ex rel. Ward v. Romero, 17 N.M. 88, 125 P. 617 (1912).

Pardon not restricted by territorial provision. — In pardoning person convicted of misdemeanor, governor was not bound by territorial legislative restriction. 1915-16 Op. Att'y Gen. 240.

Burden of proving inconsistency. — One asserting inconsistency of territorial law with constitution must show it. Stout v. City of Clovis, 37 N.M. 30, 16 P.2d 936 (1932).

Sec. 5. [Pardons for violation of territorial laws.]

The pardoning power herein granted shall extend to all persons who have been convicted of offenses against the laws of the territory of New Mexico.

ANNOTATIONS

Cross references. — For grant of pardoning power to governor, see N.M. Const., art. V, § 6.

Sec. 6. [Territorial property vested in state.]

All property, real and personal, and all moneys, credits, claims and choses in action belonging to the territory of New Mexico, shall become the property of this state; and all debts, taxes, fines, penalties, escheats and forfeitures, which have accrued or may accrue to said territory, shall inure to this state.

ANNOTATIONS

Comparable provisions. — Idaho Const., art. XXI, § 3.

Utah Const., art. XXIV, § 4.

Wyoming Const., art. XXI, § 4.

Sec. 7. [Obligations due territory or subdivision.]

All recognizances, bonds, obligations and undertakings entered into or executed to the territory of New Mexico, or to any county, school district, municipality, officer or official board therein, shall remain valid according to the terms thereof, and may be sued upon and recovered by the proper authority under the state law.

ANNOTATIONS

Comparable provisions. — Idaho Const., art. XXI, § 4.

Iowa Const., art. XII, § 5.

Utah Const., art. XXIV, § 5.

Wyoming Const., art. XXI, § 5.

Sec. 8. [Territorial judicial process and proceedings.]

All lawful process, writs, judgments, decrees, convictions and sentences issued, rendered, had or pronounced, in force at the time of the admission of the state, shall continue and remain in force to the same extent as if the change of government had not occurred, and shall be enforced and executed under the laws of the state.

ANNOTATIONS

Judgment by holdover territorial justice valid. — Judgment by territorial justice who was still holding office in January, 1912, his successor not having qualified and taken office, was not void. Luna v. Cerrillos Coal R.R., 29 N.M. 161, 218 P. 435 (1923), rehearing denied, 29 N.M. 647, 226 P. 655 (1924).

Sec. 9. [Territorial courts and officers; seals.]

All courts existing, and all persons holding offices or appointments under authority of said territory, at the time of the admission of the state, shall continue to hold and exercise their respective jurisdictions, functions, offices and appointments until superseded by the courts, officers or authorities provided for by this constitution.

Until otherwise provided by law, the seal of the territory shall be used as the seal of the state, and the seals of the several courts, officers and official boards in the territory shall be used as the seals of the corresponding courts, officers and official boards in the state; and for any new court, office or board created by this constitution, a seal may be adopted by the judge of said court, or the incumbent of said office, or by the said board.

ANNOTATIONS

Justices of peace not chosen at first election. — Justices of the peace were not to be elected at first state election. 1909-12 Op. Att'y Gen. 210.

Territorial officers in power until successors qualified. — Under this section, all officers holding office at time territory was admitted to statehood continued to hold office and to exercise functions thereof until their successors duly elected or appointed under statehood had qualified. Luna v. Cerrillos Coal R.R., 29 N.M. 161, 218 P. 435 (1923), rehearing denied, 29 N.M. 647, 226 P. 655 (1924).

Judgment by holdover territorial justice valid. — See same catchline in notes to N.M. Const., art. XXII, § 8.

Status of superintendent of insurance. — Superintendent of insurance continued in office until superseded by corporation commission (now public regulation commission), and since he was not fully superseded by reason of legislative action, he could still exercise such functions of his office as were not specifically transferred to corporation commission (now public regulation commission). State ex rel. Chavez v. Sargent, 18 N.M. 627, 139 P. 144 (1914). See also, Mitchell v. National Sur. Co., 206 F. 807 (D.N.M. 1913).

Comparable provisions. — Idaho Const., art. XXI, §§ 5, 17.

Utah Const., art. XXIV, §§ 6 to 8; 10.

Wyoming Const., art. XXI, §§ 6, 16.

Sec. 10. [Pending actions.]

All suits, indictments, criminal actions, bonds, process, matters and proceedings pending in any of the courts in the territory of New Mexico at the time of the organization of the courts provided for in this constitution shall be transferred to and proceed to determination in such courts of like or corresponding jurisdiction. And all civil causes of action and criminal offenses which shall have been commenced, or indictment found, shall be subject to action, prosecution, indictment and review in the proper courts of the state, in like manner and to the same extent as if the state had been created and said courts established prior to the accrual of such causes of action and the commission of such offenses.

Sec. 11. [Execution and deposit of constitution.]

This constitution shall be signed by the president and secretary of the constitutional convention, and such delegates as desire to sign the same, and shall be deposited in the office of the secretary of the territory where it may be signed at any time by any delegate.

Sec. 12. [Territorial obligations; names of political subdivisions.]

All lawful debts and obligations of the several counties of the territory of New Mexico not assumed by the state and of the school districts, municipalities, irrigation districts and improvement districts, therein, existing at the time of its admission as a state, shall remain valid and unaffected by the change of government, until paid or refunded according to law; and all counties, municipalities and districts in said territory shall continue with the same names, boundaries and rights until changed in accordance with the constitution and laws of the state.

ANNOTATIONS

Purpose of section. — This section was made necessary by Enabling Act, § 2 C, which required state to assume payment of debts and liabilities which were valid and subsisting on June 20, 1910. One purpose of this section was to provide for validity of debts contracted by territory after June 20, 1910. State ex rel. Lucero v. Marron, 17 N.M. 304, 128 P. 485 (1912). See N.M. Const., art. XXI, § 3.

Sec. 13. [Election to ratify constitution.]

This constitution shall be submitted to the people of New Mexico for ratification at an election to be held on the twenty-first day of January, nineteen hundred and eleven, at which election the qualified voters of New Mexico shall vote directly for or against the same, and the governor of the territory of New Mexico shall forthwith issue his proclamation ordering said election to be held on said day.

Except as to the manner of making returns of said election and canvassing and certifying the result thereof, said election shall be held and conducted in the manner prescribed by the laws of New Mexico now in force.

ANNOTATIONS

Comparable provisions. — Idaho Const., art. XXI, § 6.

Iowa Const., art. XII, § 13.

Utah Const., art. XXIV, § 14.

Wyoming Const., art. XXI, § 7.

Sec. 14. [Ballots for ratifying constitution.]

The ballots cast at said election in favor of the ratification of this constitution shall have printed or written thereon in both English and Spanish the words "For the Constitution"; and those against the ratification of the constitution shall have written or printed thereon in both English and Spanish the words "Against the Constitution"; and shall be counted and returned accordingly.

Sec. 15. [Canvass of ratification election returns.]

The returns of said election shall be made by the election officers direct to the secretary of the territory of New Mexico at Santa Fe, who, with the governor and the chief justice of said territory, shall constitute a canvassing board, and they, or any two of them, shall meet at said city of Santa Fe on the third Monday after said election and shall canvass the same. Said canvassing board shall make and file with the secretary of the territory of New Mexico, a certificate signed by at least two of them, setting forth the number of votes cast at said election for or against the constitution, respectively.

Sec. 16. [Submission of constitution to president and congress.]

If a majority of the legal votes cast at said election as certified to by said canvassing board, shall be for constitution, it shall be deemed to be duly ratified by the people of New Mexico and the secretary of the territory of New Mexico shall forthwith cause to be submitted to the president of the United States and to congress for approval, a certified copy of this constitution, together with the statement of the votes cast thereon.

Sec. 17. [Proclamation for first election of officers.]

If congress and the president approve this constitution, or if the president approves the same and congress fails to disapprove the same during the next regular session thereof, the governor of New Mexico shall, within thirty days after receipt of notification from the president certifying said facts, issue his proclamation for an election at which officers for a full state government, including a governor, county officers, members of the state legislature, two representatives in congress to be elected at large from the state, and such other officers as this constitution prescribes, shall be chosen by the people; said election to take place not earlier than sixty days nor later than ninety days after the date of said proclamation by the governor ordering the same.

Sec. 18. [Conduct of first state election; certification of results to president.]

Said last-mentioned election shall be held, the returns thereof made, canvassed and certified to by the secretary of said territory, in the same manner, and under the same laws, including those as to qualifications of electors, shall be applicable thereto, as hereinbefore prescribed for holding, making of the returns, canvassing and certifying the same, of the election for the ratification or rejection of this constitution.

When said election of state and county officers, members of the legislature, representatives in congress, and other officers provided for in this constitution, shall be held and the returns thereof made, canvassed and certified as hereinbefore provided, the governor of the territory of New Mexico shall immediately certify the result of said election, as canvassed and certified as hereinbefore provided, to the president of the United States.

Sec. 19. [First state officers.]

Within thirty days after the issuance by the president of the United States of his proclamation announcing the result of said election so ascertained, all officers elected at such election, except members of the legislature, shall take the oath of office and give bond as required by this constitution or by the laws of the territory of New Mexico in case of like officers in the territory, county or district, and shall thereupon enter upon the duties of their respective offices; but the legislature may by law require such officers to give other or additional bonds as a condition of their continuance in office.

ANNOTATIONS

Section does not exempt officers elected subsequently to first election from giving bond. Board of Comm'rs v. District Court, 29 N.M. 244, 223 P. 516 (1924).

Sec. 20. [First legislative session; oaths of members; election of United States senators.]

The governor of the state, immediately upon his qualifying and entering upon the duties of his office, shall issue his proclamation convening the legislature at the seat of government on a day to be specified therein, not less than thirty nor more than sixty days after the date of said proclamation.

The members-elect of the legislature shall meet on the day specified, take the oath required by this constitution and within ten days after organization shall proceed to the election of two senators of the United States for the state of New Mexico, in the manner prescribed by the constitution and laws of the United States; and the governor and secretary of the state of New Mexico shall certify the election of the senators and representatives in congress in the manner required by law.

Sec. 21. [Supplementary legislation.]

The legislature shall pass all necessary laws to carry into effect the provisions of this constitution.

ANNOTATIONS

Self-executing provision defined. — A constitutional provision which is complete in itself needs no further legislation to put it in force, but is "self-executing." State v. Rogers, 31 N.M. 485, 247 P. 828 (1926).

Sec. 22. [Terms of first officers.]

The term of office of all officers elected at the election aforesaid shall commence on the date of their qualification and shall expire at the same time as if they had been

elected on the Tuesday next after the first Monday of November in the year nineteen hundred and twelve.

ANNOTATIONS

Compiler's notes. — This section is the end of the constitution as originally adopted. It closes with the following paragraph: "Done in open convention at the City of Santa Fe, in the Territory of New Mexico, this 21st day of November, in the year of our Lord, one thousand nine hundred and ten." The names of the signers of the constitution as originally adopted appear after Article XXIV.

Effect of section on 1913 legislative session. — In view of this section, 1913 session of legislature may be regarded as a second session of 1912 legislature, and it is not duty of secretary of state to call house of representatives to order on January 14, 1913, and preside until a speaker is elected since no new speaker need be elected. 1912-13 Op. Att'y Gen. 136.

ARTICLE XXIII
Intoxicating Liquors [Repealed]

ANNOTATIONS

Enactment. — New Mexico Const., art. XXIII, §§ 1 and 2, which were proposed by J.R. No. 17 (Laws 1917) and adopted by the people at a special election held in November, 1917, by a vote of 28,732 for and 12,147 against, prohibited the importation, manufacture, sale, barter, gift or offer of alcoholic liquors (except for scientific or sacramental purposes) from and after October 1, 1918 (Section 1), and provided for punishment for violations of the prohibition (Section 2).

Repeals. — Article XXIII was repealed by an amendment proposed by senate judiciary committee substitute for S.J.R. No. 2 (Laws 1933), which was adopted by the people at a special election held on September 19, 1933, by a vote of 53,429 for and 15,541 against. The amendment provided that all laws enacted at the regular session of the eleventh state legislature relating to intoxicating liquors shall be as valid as if enacted after adoption of said amendment or after any change in constitution or laws of United States relating to intoxicating liquors.

ARTICLE XXIV
Leases on State Land

Section 1. [Contracts for the development and production of minerals or development and operation of geothermal steam and waters on state lands.]

Leases and other contracts, reserving a royalty to the state, for the development and production of any and all minerals or for the development and operation of geothermal steam and waters on lands granted or confirmed to the state of New Mexico by the act of congress of June 20, 1910, entitled "An act to enable the people of New Mexico to form a constitution and state government and be admitted into the union on an equal footing with the original states," may be made under such provisions relating to the necessity or requirement for or the mode and manner of appraisement, advertisement and competitive bidding, and containing such terms and provisions, as may be provided by act of the legislature; the rentals, royalties and other proceeds therefrom to be applied and conserved in accordance with the provisions of said act of congress for the support or in aid of the common schools, or for the attainment of the respective purposes for which the several grants were made. (As added November 6, 1928; as amended November 7, 1967.)

ANNOTATIONS

The 1928 amendment to the constitution, which was proposed by H.J.R. No. 8 (Laws 1927) and adopted by the people at the general election held on November 6, 1928, by a vote of 40,650 for and 9,774 against, added this section as Article XXIV.

The 1967 amendment, which was proposed by H.J.R. No. 17 (Laws 1967) and adopted at a special election held on November 7, 1967, with a vote of 37,897 for and 14,765 against, inserted "or for the development and operation of geothermal steam and waters" after "all minerals" near the beginning of the section.

"Act of congress". — The statute referred to in this section is the Enabling Act for New Mexico (June 20, 1910, 36 Stat. 557, ch. 310), which is set out in Pamphlet 3.

State properly reserved mineral rights. — State, through commissioner of public lands, properly reserved minerals and mineral rights in selling and issuing its patent to school and asylum lands granted to it by government, and patentee was not entitled to ejectment against state's lessee of oil and gas rights. Terry v. Midwest Ref. Co., 64 F.2d 428 (10th Cir.), cert. denied, 290 U.S. 660, 54 S. Ct. 74, 78 L. Ed. 571 (1933).

Legislature may authorize changes in contract terms. — Legislature may authorize commissioner of public lands to change terms and provisions of mineral leases and other contracts, thereby authorizing unitization agreements relative to state lands. 1943-44 Op. Att'y Gen. No. 4210.

Rulemaking authority of commissioner of public lands limited. — The commissioner of public lands has no authority to promulgate rules or regulations inconsistent with legislative enactments governing mineral leases on public lands. Harvey E. Yates Co. v. Powell, 98 F.3d 1222 (10th Cir. 1996).

The commissioner of public lands exceeded his authority and usurped a legislative function in promulgating the definition of "proceeds" in a rule so that it would require

state lessees to pay royalties even when gas was not extracted from the leased premises. Harvey E. Yates Co. v. Powell, 98 F.3d 1222 (10th Cir. 1996).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 53A Am. Jur. 2d Mines and Minerals § 33 et seq.; 63A Am. Jur. 2d Public Lands §§ 113, 121.

Improvements placed on land by adverse claimant, right of grantee to, 6 A.L.R. 95.

Escheat of land granted to alien, necessity of judicial proceeding, 23 A.L.R. 1247, 79 A.L.R. 1364.

Crops on public lands, rights in respect of, as between persons neither of whom have any authority from the government, 153 A.L.R. 508.

"Royalty" on oil or gas production within language of conveyance, exception or reservation, what constitutes, 4 A.L.R.2d 492.

Oil and gas as "minerals" within deed, lease or license, 37 A.L.R.2d 1440.

Solid mineral royalty as real or personal property, 68 A.L.R.2d 728.

Expenses and taxes deductible by lessee in computing lessor's oil and gas royalty or other return, 73 A.L.R.2d 1056.

Clay, sand or gravel as "minerals" within deed, lease or license, 95 A.L.R.2d 843.

Construction of oil and gas lease as to the lessee's right and duty of geophysical or seismograph exploration or survey, 28 A.L.R.3d 1426.

73B C.J.S. Public Lands § 197.

Signers of the Constitution as Originally Adopted

CHARLES A. SPIESS,
President of the Constitutional
Convention.

GEO. W. ARMIJO, Secretary.
I. Armijo
W. E. Garrison
Floyd C. Field
Raymundo Harrison
John G. Clancey
E. A. Miera
J. M. Cunningham
Reed Holloman

T. D. Burns
E. G. Stover
Malaquias Martinez
Antonio A. Sedillo
Juan Navarro
George W. Baker
Fred S. Brown
W. E. Lindsey
Daniel Cassidy
Gregory Page
Frank W. Parker
Nestor Montoya
Chas. H. Kohn
Venceslado Jaramillo
M. L. Stern
Candelario Vigil
Francis E. Wood
Harry W. Kelly
Eufracio F. Gallegos
Solomon Luna
Anicetos C. Abeytia
H. O. Bursom
Stephen B. Davis, Jr.
Squire Hartt, Jr.
Benj. F. Pankey
Norman W. Bartlett
Thomas H. O'Brien
Onesinio G. Martinez
George S. Brown
Jose D. Sena
Margarito Romero
Victor Ortega
N. Segura
T. B. Catron
Herbert F. Raynolds
Charles Springer
Reuben Woodford Heflin
Andrew H. Hudspeth
Charles Clayborne Davidson
M. P. Skeen
Edward D. Tittman
Thos. Jewett Mabry
James A. Hall
John H. Canning
Acasio Gallegos
Atanacio Roibal

Chas. E. Miller
Jose Amado Lucero
William McKean
Perfecto Esquibel
Anastacio Medina
Clarence J. Roberts
Jacobo J. Aragon
George W. Prichard
Wm. McIntosh
A. B. McDonald
Anastacio Gutierrez
J. B. Gilchrist
G. E. Moffett
Granville A. Richardson
Jno. J. Hinkle
C. M. Compton
Frank H. Winston
W. D. Murray
Silvestre Mirabal
Salome Martinez
H. M. Dougherty
C. R. Brice
Luciano Maez
Samuel Eldolt
Francisco Guana
E. M. Lucero
Arthur H. Harllee
Albert B. Fall
Eugenio Romero
Alejandro Sandoval
J. Frank Romero
Tranquilino Labadie
William B. Walton
J. W. Childers
John Becker
John Lee House
Ed F. Saxon.