CHAPTER 35
Magistrate and Municipal Courts

ARTICLE 1
Magistrate Court; Establishment; Districts; Election

35-1-1. Magistrate court; establishment.

There is established the "magistrate court" as a court of limited original jurisdiction within the judicial department of the state government. Personnel of the magistrate court are subject to all laws and regulations applicable to other state offices and agencies and to other state officers and employees except where otherwise provided by law. The magistrate court is not a court of record.

History: 1953 Comp., § 36-1-1, enacted by Laws 1968, ch. 62, § 3.

ANNOTATIONS

Repeals. — Laws 1968, ch. 62, § 171, repealed former 36-1-1, 1953 Comp., relating to election of justices of the peace and constables, effective January 1, 1969.

Cross references. — For jurisdiction in civil actions, *see* 35-3-3 NMSA 1978.

For jurisdiction in criminal actions, *see* 35-3-4 NMSA 1978.

For temporary appointment to office as municipal judge, *see* 35-14-5 NMSA 1978.

For disposition of fines for ordinance violations while serving as municipal judge, *see* 35-15-12 NMSA 1978.

For disqualification of judges for interest or relationship, *see* N.M. Const., art. VI, § 18.

For conservators of peace, *see* N.M. Const., art. VI, § 21.

For power to hold preliminary examinations, *see* N.M. Const., art. VI, § 21.

For compensation, *see* N.M. Const., art. VI, § 26.

For qualifications for election or appointment, *see* N.M. Const., art. VI, § 26 and 35-2-1 NMSA 1978.

For fees not retained as compensation, *see* N.M. Const., art. VI, § 30.

For abolition of justice of the peace, *see* N.M. Const., art. VI, § 31 and 35-1-38 NMSA 1978.

For transfer of jurisdiction, powers and duties of justices of the peace, *see* N.M. Const., art. VI, § 31 and 35-1-38 NMSA 1978.

For effect of consolidation on combined municipal organizations, *see* 3-16-8 NMSA 1978.

For arrest and detention of escaped prisoners, *see* 29-1-3 to 29-1-6 NMSA 1978.

For resisting or obstructing officer, *see* 30-22-1 NMSA 1978.

For misdemeanor for impersonating a public officer, *see* 30-27-2.1 NMSA 1978.

For administrative office of the courts, *see* 34-9-1 to 34-9-10 NMSA 1978.

For authority of district attorney to appear, *see* 36-1-20 NMSA 1978.

For practice of law in courts, *see* 36-2-27 NMSA 1978.

Nature of limited jurisdiction. — The reference in N.M. Const., art VI, § 26 and this section to "limited" jurisdiction indicates that a magistrate is without authority to take action unless the authority has been affirmatively granted, and neither provision authorizes a magistrate to set aside its judgment in a criminal case. *State v. Vega*, 1977-NMCA-107, 91 N.M. 22, 569 P.2d 948, *overruled on other grounds by State v. Tollardo*, 1982-NMCA-156, 99 N.M. 115, 654 P.2d 568.

Jurisdiction does not specifically refer to municipal ordinances. — Magistrate courts are part of the judicial department of the state and their criminal jurisdiction does not specifically refer to municipal ordinances. *State v. Biswell*, 1971-NMCA-111, 83 N.M. 65, 488 P.2d 115, cert. denied, 83 N.M. 57, 488 P.2d 107 (decided under prior law).

Magistrate is without authority to take action unless authority is affirmatively granted by the constitution or statutory provision. *State v. De La O*, 1985-NMCA-023, 102 N.M. 638, 698 P.2d 911.

Magistrate's limited jurisdiction and control over criminal judgment. — "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. The time limitation for filing the appeal is 15 days. *State v. Ramirez*, 1981-NMSC-125, 97 N.M. 125, 637 P.2d 556.

Limited control over civil judgment. — A magistrate's continuing control over civil judgments expires 15 days after entry of judgment. *State v. Ramirez*, 1981-NMSC-125, 97 N.M. 125, 637 P.2d 556.

Magistrate court has no jurisdiction to set aside a jury verdict. *Jaramillo v. O'Toole*, 1982-NMSC-011, 97 N.M. 345, 639 P.2d 1199.

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.

Authority of court. — Courts of limited jurisdiction have no authority to commit defendants to a mental health facility. 2003 Op. Att'y Gen. No. 03-04.

Nature of office. — The magistrate court established under this section is a district, not a county, office and is not within the restrictions of N.M. Const., art. X, § 2. 1968 Op. Att'y Gen. No. 68-71.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 46 Am. Jur. 2d Judges § 3; 47 Am. Jur. 2d Justices of the Peace §§ 1, 8, 14, 30 to 49.

Malicious prosecution: defense of acting on advice of justice of the peace, magistrate, or lay person, 48 A.L.R.4th 250.

51 C.J.S. Justices of the Peace §§ 1, 4, 26 to 52.

35-1-2. Magistrate court; districts.

The magistrate court consists of one magistrate district in each county excepting a class A county with a population of more than two hundred thousand persons in the last federal decennial census. The name of the magistrate district is the same as the name of the county in which it is located.

History: 1953 Comp., § 36-1-2, enacted by Laws 1968, ch. 62, § 4; 1979, ch. 346, § 10.

ANNOTATIONS

Repeals. — Laws 1968, ch. 62, § 171, repealed former 36-1-2, 1953 Comp., relating to ballots for justices of the peace and constables, effective January 1, 1969.

35-1-3. Magistrate court; election; terms.

Except as otherwise provided by law, magistrates shall be nominated and elected at large within each magistrate district at the primary and general elections. In magistrate districts having more than one magistrate, the separate offices shall be designated by divisions and, in all appointments to fill vacancies and in all nominations and elections to

these offices, candidates shall be designated as appointed or elected to the office of magistrate of a specific division. Magistrates shall be nominated and elected in the 1968 primary and general elections to serve terms from January 1, 1969 until December 31, 1970. Subsequent terms shall be for four years.

History: 1953 Comp., § 36-1-3, enacted by Laws 1968, ch. 62, § 5; 2000, ch. 99, § 1.

ANNOTATIONS

Repeals. — Laws 1968, ch. 62, § 171, repealed former 36-1-3, 1953 Comp., relating to oath of office for justices of the peace, effective January 1, 1969.

The 2000 amendment, effective March 7, 2000, in Subsection A, inserted "Except as otherwise provided by law" and "at large" in the first sentence.

Election of city attorney as magistrate. — There is no legal prohibition precluding a city attorney from serving as a magistrate, but if there is only one magistrate court available there may be ethical considerations. 1970 Op. Att'y Gen. No. 70-67.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 46 Am. Jur. 2d Judges §§ 239, 240; 47 Am. Jur. 2d Justices of the Peace § 7 et seq.

Induction into military service as creating vacancy in office, 156 A.L.R. 1457, 157 A.L.R. 1456.

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.

51 C.J.S. Justices of the Peace §§ 1 to 9.

35-1-4. Repealed.

ANNOTATIONS

Repeals. — Laws 1979, ch. 346, § 13, repealed 35-1-4 NMSA 1978, relating to the Bernalillo magistrate district courts, effective July 1, 1980.

35-1-5. Magistrate court; Catron district.

There shall be one magistrate in Catron magistrate district whose principal court is in Reserve.

History: 1953 Comp., § 36-1-5, enacted by Laws 1968, ch. 62, § 7; 1977, ch. 153, § 1; 1985, ch. 145, § 1; 2017, ch. 8, § 1.

ANNOTATIONS

The 2017 amendment, effective June 16, 2017, eliminated the magistrate circuit court in Quemado, and deleted the last sentence of the section, which provided "The magistrate shall ride circuit to Quemado on a regularly scheduled basis.".

35-1-6. Magistrate court; Chaves district.

There shall be two magistrates in Chaves magistrate district, divisions 1 and 2 operating as a single court in Roswell.

History: 1953 Comp., § 36-1-6, enacted by Laws 1968, ch. 62, § 8; 1982, ch. 101, § 1.

ANNOTATIONS

Repeals. — Laws 1968, ch. 62, § 171, repealed former 36-1-6, 1953 Comp., relating to the certificate of qualification and failure to execute oath and bond of justice of the peace, effective January 1, 1969.

Compiler's notes. — In Aguilar v. Gonzales, CIV No. 96-0909-MV/JHG, in paragraph 6 of the Consent Order Approving Settlement Agreement, filed on June 9, 1997, as amended by the Consent Order Modifying June 9, 1997 Consent Order Approving Settlement Agreement, filed on July 3, 1997, the United States District Court for the District of New Mexico ordered that, beginning in the 1998 general election, the at-large system of electing the two magistrate court judges in Chaves county will no longer be utilized. The two magistrate court judges shall be elected from two electoral divisions; the qualified, registered electors in each of the two electoral divisions will elect one magistrate court judge. A candidate for magistrate court judge must, at the time of filing for candidacy, reside in the electoral division from which he or she seeks to be elected and, if elected, must maintain residency in that electoral division. In the event a magistrate court judge is appointed to fill a vacancy pursuant to state law, the appointee must be a resident of and maintain residency in the electoral division to which he or she is appointed. Nothing in the order shall be deemed to affect the jurisdiction and powers of the magistrate court judges under current law. Paragraph 7 provides that the New Mexico legislature shall have the opportunity during the regular 1998 session to draw the boundaries of the two electoral divisions for Chavez county magistrate court judge's elections. The electoral divisions shall have one minority-majority electoral division with no less than 46.4% Hispanic voting age population. Paragraph 8 provides that if the legislature fails to enact legislation in compliance with paragraphs 6 and 7 or if the governor fails to approve such legislation, the electoral divisions for Chaves county magistrate court judge shall be as follows: electoral division 1: Chaves county voting precincts 14, 15, 16, 24, 25, 32, 34, 42, 43, 51, 52, 61, 62, 63, 71, 72, 73, 90, 91, 101, 102, 103 and 104; and electoral division 2: Chaves county voting precincts 1, 2, 3, 4, 5, 6, 7, 10, 11, 12, 13, 21, 22, 23, 31, 33, 35, 35, 41, 81, 82, 83, 84, 85, 92 and 93.

35-1-6.1. Magistrate court; Cibola district.

There shall be two magistrates in Cibola magistrate district, divisions 1 and 2 operating as a single court in Grants.

History: 1978 Comp., § 35-1-6.1, enacted by Laws 1982, ch. 101, § 2; 1993, ch. 146, § 1.

ANNOTATIONS

The 1993 amendment, effective June 18, 1993, substituted "divisions 1 and 2 operating as a single court in Grants" for "division 1 in Grants and division 2 in Milan".

35-1-7. Magistrate court; Colfax district.

There shall be two magistrates in Colfax magistrate district, division 1 in Raton and division 2 in Springer.

History: 1953 Comp., § 36-1-7, enacted by Laws 1968, ch. 62, § 9; 1975 (S.S.), ch. 13, § 1; 1985, ch. 145, § 2; 1988, ch. 43, § 1; 2009, ch. 54, § 1.

ANNOTATIONS

Repeals. — Laws 1968, ch. 62, § 171, repealed former 36-1-7, 1953 Comp., relating to bond of constables, effective January 1, 1969.

The 2009 amendment, effective July 1, 2009, deleted the last sentence which provided that the magistrates shall ride circuit to Cimarron.

Temporary provisions. — Laws 2009, ch. 54, § 6 provided that the magistrate court clerk positions assigned to the magistrate courts shall not be decreased as a result of this act, but the administrative office of the courts shall reassign positions from the eliminated division in the Lea district to other magistrate courts. The administrative office of the courts shall reassign other resources, including furniture, equipment and supplies, to other magistrate courts as needed.

The 1988 amendment, effective May 18, 1988, substituted "two magistrates in Colfax magistrate district, division 1 in Raton and division 2 in Springer" for "one magistrate in Colfax magistrate district whose principal court is in Raton", and made minor stylistic changes.

35-1-8. Magistrate court; Curry district.

There shall be two magistrates in Curry magistrate district, both divisions operating as a single court in Clovis.

History: 1953 Comp., § 36-1-8, enacted by Laws 1968, ch. 62, § 10.

ANNOTATIONS

Repeals. — Laws 1968, ch. 62, § 171, repealed former 36-1-8, 1953 Comp., relating to death, resignation or removal of justice, effective January 1, 1969.

Compiler's notes. — In Chavez v. Lujan, CIV No.05-579 LH/RLP, in paragraph 4 of the Agreed Order and Judgment Approving Settlement, filed on April 1, 2008, the United States District Court for the District of New Mexico approved and adopted the Stipulation of Facts and Settlement Agreement, filed on March 10, 2008 and in paragraph 6 ordered that, beginning at the next scheduled election for magistrate judges in Curry county, the at-large system of electing the two magistrate court judges in Curry county will no longer be utilized in future elections. The two magistrate court judges shall be elected from two electoral divisions (districts); the qualified, registered electors in each of the two electoral divisions will elect one magistrate court judge. A candidate for magistrate court judge must, at the time of filing for candidacy, reside in the electoral division from which he or she seeks to be elected and, if elected, must maintain residency in the electoral division. Nothing in the order shall be deemed to affect the jurisdiction and powers of the magistrates under current law and practice. Magistrate judges elected from the electoral divisions and districts will continue to have county-wide jurisdiction as provided under current law and practice. Paragraph 8 provides that in future elections the electoral divisions for Curry county magistrate court judge shall be as follows: electoral district and division 1: Curry county voting precincts 5, 6, 7, 8, 9, 11, 12, 20, 21, 22, 25, 26, 27, 28, 30 and 33; and electoral district and division 2: Curry county voting precincts 1, 2, 3, 4, 10, 13, 14, 15, 16, 17, 18, 19, 23, 24, 29, 31, 32, 34, 35, 36 and 37.

35-1-9. Magistrate court; DeBaca district.

There shall be one magistrate in DeBaca magistrate district with a court in Fort Sumner.

History: 1953 Comp., § 36-1-9, enacted by Laws 1968, ch. 62, § 11.

ANNOTATIONS

Repeals. — Laws 1968, ch. 62, § 171, repealed former 36-1-9, 1953 Comp., relating to creation of conference of justices of the peace, effective January 1, 1969.

35-1-10. Magistrate court; Dona Ana district.

There shall be seven magistrates in Dona Ana magistrate district. Divisions 1, 2, 3, 4, 5, 6 and 7 shall operate as a single court in Las Cruces and shall rotate riding circuit to Anthony and Hatch on a regularly scheduled basis.

History: 1953 Comp., § 36-1-10, enacted by Laws 1968, ch. 62, § 12; 1976 (S.S.), ch. 53, § 1; 1985, ch. 145, § 3; 1989, ch. 207, § 1; 1999 (1st S.S.), ch. 4, § 2; 2001, ch. 306, § 1; 2010, ch. 3, § 2; 2014, ch. 73, § 5.

ANNOTATIONS

Repeals. — Laws 1968, ch. 62, § 171, repealed former 36-1-10, 1953 Comp., relating to conference meetings of justices of the peace, effective January 1, 1969.

The 2014 amendment, effective May 21, 2014, created an additional magistrate; in the first sentence, after "shall be", changed "six" to "seven"; and in the second sentence, after "4, 5", deleted "and", and after "5, 6", added "and 7".

Temporary provisions. — Laws 2014, ch. 73, § 7 provided that the office of magistrate in Dona Ana district, division 7, shall be filled by appointment by the governor. The appointed magistrate shall begin serving on July 1, 2014 and shall serve until succeeded by a magistrate elected at the general election in 2014. The first full term of office of the elected magistrate shall begin on January 1, 2015.

The 2010 amendment, effective February 23, 2010, increased the number of magistrates from five magistrates to six magistrates and added division 6.

The 2001 amendment, effective July 1, 2001, added a fifth magistrate and division.

The 1999 amendment, effective May 21, 1999, substituted "four magistrates" for "three magistrates" and "Divisions 1, 2, 3 and 4 shall operate" for "Divisions 1, 2 and 3 operating" and made a minor stylistic change.

The 1989 amendment, effective June 16, 1989, inserted "and Hatch" in the second sentence.

35-1-11. Magistrate court; Eddy district.

There shall be three magistrates in Eddy magistrate district, divisions 1 and 2 in Carlsbad operating as a single court and division 3 in Artesia.

History: 1953 Comp., § 36-1-11, enacted by Laws 1968, ch. 62, § 13; 1981, ch. 266, § 5; 1985, ch. 145, § 4.

ANNOTATIONS

Repeals. — Laws 1968, ch. 62, § 171, repealed former 36-1-11, 1953 Comp., relating to cooperation between the conference of justices and state agencies, effective January 1, 1969.

Compiler's notes. — In Aguilar v. Gonzales, CIV No. 96-0909-MV/JHG, in paragraph 9 of the Consent Order Approving Settlement Agreement, filed on June 9, 1997, as amended by the Consent Order Modifying June 9, 1997 Consent Order Approving Settlement Agreement, filed on July 3, 1997, the United States District Court for the District of New Mexico ordered that, beginning in the 1998 general election, the at-large system of electing the three magistrate court judges in Eddy county will no longer be utilized. The three magistrate court judges shall be elected from three electoral divisions; the qualified, registered electors in each of the three electoral divisions will elect one magistrate court judge. A candidate for magistrate court judge must, at the time of filing for candidacy, reside in the electoral division from which he or she seeks to be elected and, if elected, must maintain residency in that electoral division. In the event a magistrate court judge is appointed to fill a vacancy pursuant to state law, the appointee must be a resident of and maintain residency in the electoral division to which he or she is appointed. Nothing in the order shall be deemed to affect the jurisdiction and powers of the magistrate court judges under current law. Paragraph 10 provides that the New Mexico legislature shall have the opportunity during the regular 1998 session to draw the boundaries of the three electoral divisions for Eddy County magistrate court judges elections; provided that the electoral divisions shall have one minority-majority electoral division with no less than 50.2% Hispanic voting age population. Paragraph 11 provides that if the legislature fails to enact legislation in compliance with paragraphs 9 and 10 or if the governor fails to approve such legislation, the electoral divisions for Eddy county magistrate court judge shall be as follows: electoral division 1: Eddy county voting precincts 9, 10, 11, 12, 13, 14, 15, 16, 31, 32 and 33; electoral division 2: Eddy county voting precincts 1, 4, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 36, 37 and 42; and electoral division 3: Eddy county voting precincts 2, 3, 5, 6, 7, 8, 29, 30, 34, 35, 38, 39, 40, 41, 43 and 44.

35-1-12. Magistrate court; Grant district.

There shall be two magistrates in Grant magistrate district, division 1 in Silver City and division 2 in Bayard.

History: 1953 Comp., § 36-1-12, enacted by Laws 1968, ch. 62, § 14.

35-1-13. Magistrate court; Guadalupe district.

There shall be one magistrate in Guadalupe magistrate district whose principal court is in Santa Rosa.

History: 1953 Comp., § 36-1-13, enacted by Laws 1968, ch. 62, § 15; 1985, ch. 145, § 5; 2009, ch. 54, § 2.

ANNOTATIONS

The 2009 amendment, effective July 1, 2009, deleted the last sentence which provided that the magistrates shall ride circuit to Vaughn.

Temporary provisions. — Laws 2009, ch. 54, § 6 provided that the magistrate court clerk positions assigned to the magistrate courts shall not be decreased as a result of this act, but the administrative office of the courts shall reassign positions from the eliminated division in the Lea district to other magistrate courts. The administrative office of the courts shall reassign other resources, including furniture, equipment and supplies, to other magistrate courts as needed.

35-1-14. Magistrate court; Harding district.

There shall be one magistrate in Harding magistrate district with a court in Roy.

History: 1953 Comp., § 36-1-14, enacted by Laws 1968, ch. 62, § 16.

35-1-15. Magistrate court; Hidalgo district.

There shall be one magistrate in Hidalgo magistrate district with a court in Lordsburg.

History: 1953 Comp., § 36-1-15, enacted by Laws 1968, ch. 62, § 17.

35-1-16. Magistrate court; Lea district.

A. Through December 31, 2010, there shall be five magistrates in Lea magistrate district, division 1 in Lovington, divisions 2 and 5 operating as a single court in Hobbs, division 3 in Eunice and division 4. The division 3 magistrate shall ride circuit to Jal on a regularly scheduled basis and shall ride circuit to Hobbs as needed. The division 4 magistrate shall ride circuit to Lovington, Hobbs and Eunice.

B. On January 1, 2011, there shall be four magistrates in the Lea magistrate district, divisions 1 and 2 operating as a single court in Hobbs, division 3 in Eunice and division 4 in Lovington. The division 3 magistrate shall ride circuit to Jal on a regularly scheduled basis and shall ride circuit to Hobbs as needed.

C. Magistrate judges shall not be elected at large from the district but shall be elected by the voters of the division for which the magistrate sits. Magistrate judges shall reside in their divisions but shall have district-wide jurisdiction. For the 2010 and subsequent elections, the composition of the divisions for elections and residence purposes is as follows:

(1) division 1 is composed of Lea county precincts 23 through 30, 32 and 41 through 43;

(2) division 2 is composed of Lea county precincts 33 through 35, 44, 51 through 55 and 61;

(3) division 3 is composed of Lea county precincts 20, 22, 31, 36, 62 and 71 through 74; and

(4) division 4 is composed of Lea county precincts 2, 3, 10 through 18 and 21.

History: 1953 Comp., § 36-1-16, enacted by Laws 1968, ch. 62, § 18; 1985, ch. 145, § 6; 1992, ch. 71, § 1; 2009, ch. 54, § 3.

ANNOTATIONS

Compiler's notes. — In Llanez v. Gonzales, CIV No. 98-1266 BB/LCS, in paragraph 5 of the Agreed Final Judgment, filed on November 18, 1999, the United States District Court for the District of New Mexico ordered that, beginning at the next election for magistrates, the at-large system of electing the five magistrate court judges in Lea county will no longer be utilized. The five magistrate court judges shall be elected from five electoral divisions; the qualified, registered electors in each of the five electoral divisions will elect one magistrate court judge. A candidate for magistrate court judge must, at the time of filing for candidacy, reside in the electoral division from which he or she seeks to be elected and, if elected, must maintain residency in that electoral division. In the event a magistrate court judge is appointed to fill a vacancy pursuant to state law, the appointee must be a resident of and maintain residency in the electoral division to which he or she is appointed. Nothing in the order shall be deemed to affect the jurisdiction, powers, or authority of the magistrate court judges under current law and practice. Paragraph 6 provides that the electoral divisions for Lea county magistrate court judge shall be as follows: electoral division 1 (Lovington courthouse): Lea county voting precincts 15, 16, 17, 18, 20, 22, 23, 24 and 30; electoral division 2 (Hobbs minority district): Lea county voting precincts 35, 51, 52, 53, 54, 55 and 61; electoral division 3 (Eunice courthouse): Lea county voting precincts 31, 32, 34, 36, 62, 71, 72, 73 and 74; electoral division 4 (Tatum courthouse): Lea county voting precincts 2, 3, 10, 11, 12, 13, 14, 21 and 26; and electoral division 5 (Hobbs courthouse): Lea county voting precincts 25, 27, 28, 29, 33, 41, 42, 43 and 44.

The 2009 amendment, effective July 1, 2009, in Subsection A, added "Through December 31, 2010" at the beginning of the first sentence and added the last sentence; and added Subsections B and C.

Temporary provisions. — Laws 2009, ch. 54, § 6 provided that the magistrate court clerk positions assigned to the magistrate courts shall not be decreased as a result of this act, but the administrative office of the courts shall reassign positions from the eliminated division in the Lea district to other magistrate courts. The administrative office of the courts shall reassign other resources, including furniture, equipment and supplies, to other magistrate courts as needed.

The 1992 amendment, effective July 1, 1992, substituted "five" for "four" and "divisions 2 and 5 operating as a single court" for "division 2" in the first sentence.

35-1-17. Magistrate court; Lincoln district.

There shall be two magistrates in Lincoln magistrate district, division 1 in Carrizozo and division 2 in Ruidoso.

History: 1953 Comp., § 36-1-17, enacted by Laws 1968, ch. 62, § 19; 1985, ch. 145, § 7.

35-1-18. Magistrate court; Los Alamos district.

There shall be one magistrate in Los Alamos magistrate district with a court in Los Alamos.

History: 1953 Comp., § 36-1-18, enacted by Laws 1968, ch. 62, § 20.

35-1-19. Magistrate court; Luna district.

There shall be one magistrate in Luna magistrate district with a court in Deming.

History: 1953 Comp., § 36-1-19, enacted by Laws 1968, ch. 62, § 21.

35-1-20. Magistrate court; McKinley district.

There shall be three magistrates in McKinley magistrate district, divisions 1, 2 and 3 operating as a single court in Gallup. The division 3 magistrate shall ride circuit to Thoreau.

History: 1953 Comp., § 36-1-20, enacted by Laws 1968, ch. 62, § 22; 1979, ch. 296, § 1; 2009, ch. 54, § 4.

ANNOTATIONS

The 2009 amendment, effective July 1, 2009, added division 3 in Gallup; deleted "and division 3 in Thoreau"; and added the last sentence.

Temporary provisions. — Laws 2009, ch. 54, § 6 provided that the magistrate court clerk positions assigned to the magistrate courts shall not be decreased as a result of this act, but the administrative office of the courts shall reassign positions from the eliminated division in the Lea district to other magistrate courts. The administrative office of the courts shall reassign other resources, including furniture, equipment and supplies, to other magistrate courts as needed.

35-1-21. Magistrate court; Mora district.

There shall be one magistrate in Mora magistrate district with a court in Mora.

History: 1953 Comp., § 36-1-21, enacted by Laws 1968, ch. 62, § 23.

35-1-22. Magistrate court; Otero district.

There shall be two magistrates in Otero magistrate district, divisions 1 and 2 operating as a single court in Alamogordo.

History: 1953 Comp., § 36-1-22, enacted by Laws 1968, ch. 62, § 24; 1985, ch. 145, § 8.

35-1-23. Magistrate court; Quay district.

There shall be one magistrate in Quay magistrate district whose principal court is in Tucumcari.

History: 1953 Comp., § 36-1-23, enacted by Laws 1968, ch. 62, § 25; 1985, ch. 145, § 9; 2009, ch. 54, § 5.

ANNOTATIONS

The 2009 amendment, effective July 1, 2009, deleted the last sentence which provided that the magistrates shall ride circuit to San Jon.

Temporary provisions. — Laws 2009, ch. 54, § 6 provided that the magistrate court clerk positions assigned to the magistrate courts shall not be decreased as a result of this act, but the administrative office of the courts shall reassign positions from the eliminated division in the Lea district to other magistrate courts. The administrative office of the courts shall reassign other resources, including furniture, equipment and supplies, to other magistrate courts as needed.

35-1-24. Magistrate court; Rio Arriba district.

There shall be two magistrates in Rio Arriba magistrate district, divisions 1 and 2 operating as a single court in Espanola. The magistrates shall rotate riding circuit to Chama as needed.

History: 1953 Comp., § 36-1-24, enacted by Laws 1968, ch. 62, § 26; 1985, ch. 145, § 10; 1993, ch. 345, § 1.

ANNOTATIONS

The 1993 amendment, effective June 18, 1993, substituted "divisions 1 and 2 operating as a single court in Espanola" for "division 1 in Chama and division 2 in Espanola" in the first sentence and rewrote the second sentence.

35-1-25. Magistrate court; Roosevelt district.

There shall be one magistrate in Roosevelt magistrate district with a court in Portales.

History: 1953 Comp., § 36-1-25, enacted by Laws 1968, ch. 62, § 27.

35-1-26. Magistrate court; Sandoval district.

There shall be three magistrates in Sandoval magistrate district, divisions 1 and 3 in Bernalillo and division 2 in Cuba.

History: 1953 Comp., § 36-1-26, enacted by Laws 1968, ch. 62, § 28; 2005, ch. 284, § 6.

ANNOTATIONS

The 2005 amendment, effective July 1, 2005, increased the number of magistrates from two to three and provided that division 3 shall be in Bernalillo.

Temporary provision. — Laws 2005, ch. 284, § 10 provided that the offices of magistrate in San Juan division 5, Sandoval division 3 and Santa Fe division 4 shall be filled by appointment by the governor to begin serving on July 1, 2005. The appointed magistrates shall serve until succeeded by magistrates elected at the general election in 2006. The first full term of office of the elected magistrates shall begin on January 1, 2007.

35-1-27. Magistrate court; San Juan district election division precincts.

A. There shall be six magistrate divisions in San Juan magistrate district, each division having its own magistrate. Divisions 1, 4 and 6 shall operate as a single court in Aztec and divisions 2, 3 and 5 shall operate as a single court in Farmington.

B. Magistrate judges shall not be elected at large from the district, but shall be elected by the voters of the division for which the magistrate sits. Magistrate judges may reside anywhere within the magistrate district and shall have district-wide jurisdiction. The composition of the divisions for elections purposes is:

(1) division 1 is composed of San Juan county precincts 41, 48, 55, 57, 58, 60 through 67 and 72;

(2) division 2 is composed of San Juan county precincts 1 through 7, 20, 21, 23, 24 and 50;

(3) division 3 is composed of San Juan county precincts 28, 31, 32, 38 through 40, 42 through 44, 46, 47, 49 and 59;

(4) division 4 is composed of San Juan county precincts 8 through 19, 52, 53, 71 and 77;

(5) division 5 is composed of San Juan county precincts 22, 25 through 27, 29, 30, 33 through 37, 45 and 51; and

(6) division 6 is composed of San Juan county precincts 54, 56, 68 through 70 and 73 through 76.

History: 1953 Comp., § 36-1-27, enacted by Laws 1968, ch. 62, § 29; 1982, ch. 101, § 3; 1999 (1st S.S.), ch. 4, § 3; 2000, ch. 99, § 2; 2001 (1st S.S.), ch. 2, § 1; 2005, ch. 284, § 7; 2007, ch. 140, § 4; 2013, ch. 89, § 1.

ANNOTATIONS

Compiler's notes. — In Tsosie v. King, No. CIV 91-0905-M, in paragraph 7 of an order dated January 7, 1993, the United States District Court for the District of New Mexico provides that for magistrate elections in San Juan County after 1992, San Juan County will be divided into three election divisions, with at least one division containing a voting age population that is at least 70% Native American. One magistrate judge shall be elected by the qualified, registered electors in each division, but the magistrate judges will not have to reside in the division from which they are elected. Magistrate judges elected from these election divisions will continue to have county-wide jurisdiction as provided under current law and practice. The order further provides that enactment by the New Mexico Legislature during its 1993 session and approval by the Governor of legislation creating the electoral divisions and otherwise consistent with the provisions of paragraph 7 shall meet the requirements of that paragraph. See 2000 amendment of this section.

By order dated December 23, 1993, the United States District Court for the District of New Mexico provides for final dismissal of Tsosie v. King, No. 91-0905-M. The order further provides in paragraph 2 that since the New Mexico Legislature did not enact legislation during its 1993 session sufficient to meet the requirements of paragraph 7 of the January 7, 1993 Settlement Agreement and Order, the electoral divisions are created as follows: electoral division 1 consists of precincts numbered 29, 30, 41, 42, 46, 56, 60-74, 78-80, 82, and 83; electoral division 2 consists of precincts numbered 1-14, 16-19, 75-77, and 81; and electoral division 3 consists of precincts numbered 15, 20-28, 31, 32, 43-45, 51-55, 57 and 58. *See* 2000 amendment of this section.

The 2013 amendment, effective June 14, 2013, renumbered precincts to coincide with current precinct numbers; redistricted magistrate divisions; in Subsection B, in Paragraph (1), after "precincts", deleted "41, 46, 47, 60 through 67, 69, and 72" and added "41, 48, 55, 57, 58, 60 through 67 and 72"'; in Paragraph (2), deleted "1 through

4, 8, through 14, 19 and 82" and added "1 through 7, 20, 21, 23, 24 and 50"; in Paragraph (3), deleted 20, 22 through 25, 27, 28, 30, 40, 42 through 44 and 49" and added "28, 31, 32, 38 through 40, 42 through 44, 46, 47, 49 and 59"; in Paragraph (4), deleted "5 through 7, 15, 16, 53, 57, 71, 79, 81 and 83 through 86" and added "8 through 19 , 52, 53, 71 and 77"; in Paragraph (5), deleted "18, 21, 26, 29, 31, 45, 51, 52, and 54" and added "22, 25 through 27, 29, 30, 33 through 37, 45 and 51"; and in Paragraph (6), deleted "55, 56, 58, 59, 68, 70 and 73 through 76" and added "54, 56, 68 through 70 and 73 through 76".

The 2007 amendment, effective July 1, 2007, increased the number of magistrate divisions in the San Juan magistrate district from five to six, requires division 6 to operate in Aztec, and changed the precincts in each division.

Temporary provisions. — Laws 2007, ch. 140, § 6 provided that the office of magistrate in San Juan division 6 shall be filled by appointment by the governor to begin serving on July 1, 2007. The appointed magistrate shall serve until succeeded by a magistrate elected at a general election in 2008. The first full term of office of the elected magistrate shall begin on January 1, 2009.

The 2005 amendment, effective July 1, 2005, in Subsection A, increased the number of magistrate divisions from four to five and provided that division 5 shall be in Farmington; in Subsections B(1) through (5), changed the precincts for division 1 from 47, 59 through 70 and 72 through 76 to 60 through 69 and 72 through 76; for division 2 from 2 through 2, 8 through 14, 18, 28 through 31 and 82 to 2 through 4, 8 through 14, 18, 19 and 82; for division 3 from 20 through 27, 40 through 46, 49, 51, 52 and 54 to 20, 22 through 25, 27, 30, 40 through 44, 46, 47 and 49; for division 4 from 1, 5 through 7, 15, 16, 19, 53, 55 through 58, 71, 79, 81 and 83 through 86 to 1, 5 through 7, 15, 16, 53, 57, 58, 71, 79, 81 and 83 through 86; and for division 5, 21, 26, 28, 29, 31, 45, 51, 52, 54 through 56, 59 and 70.

The 2001 (1st S.S.) amendment, effective October 3, 2001, rewrote Paragraphs B(1) through B(4), redefining the composition of the four magistrate divisions.

The 2000 amendment, effective March 7, 2000, inserted "election division precincts" in the section heading; designated the former provisions of the section as Subsection A; in Subsection A, substituted "magistrate divisions" for "magistrates", inserted "each division having its own magistrate" in the first sentence and substituted "shall operate" for "operating" twice in the second sentence; and added Subsection B.

The 1999 amendment, effective May 21, 1999, substituted "four magistrates" for "three magistrates" and "divisions 1 and 4 operating as a single court" for "division 1".

35-1-28. Magistrate court; San Miguel district.

There shall be two magistrates in San Miguel magistrate district, divisions 1 and 2 operating as a single court in Las Vegas.

History: 1953 Comp., § 36-1-28, enacted by Laws 1968, ch. 62, § 30; 1985, ch. 145, § 11.

35-1-29. Magistrate court; Santa Fe district.

There shall be four magistrates in the Santa Fe magistrate district, divisions 1, 2, 3 and 4 operating as a single court in Santa Fe; however, one magistrate shall ride circuit to Pojoaque on a regularly scheduled basis.

History: 1953 Comp., § 36-1-29, enacted by Laws 1968, ch. 62, § 31; 1969, ch. 231, § 1; 1985, ch. 145, § 12; 2005, ch. 284, § 8.

ANNOTATIONS

The 2005 amendment, effective July 1, 2005, increased the number for magistrates from three to four and provided that division 4 shall be in Santa Fe.

Temporary provision. — Laws 2005, ch. 284, § 10 provided that the offices of magistrate in San Juan division 5, Sandoval division 3 and Santa Fe division 4 shall be filled by appointment by the governor to begin serving on July 1, 2005. The appointed magistrates shall serve until succeeded by magistrates elected at the general election in 2006. The first full term of office of the elected magistrates shall begin on January 1, 2007.

35-1-30. Magistrate court; Sierra district.

There shall be one magistrate in Sierra magistrate district with a court in Truth or Consequences.

History: 1953 Comp., § 36-1-30, enacted by Laws 1968, ch. 62, § 32.

35-1-31. Magistrate court; Socorro district.

There shall be one magistrate in Socorro magistrate district with a court in Socorro.

History: 1953 Comp., § 36-1-31, enacted by Laws 1968, ch. 62, § 33.

35-1-32. Magistrate court; Taos district.

There shall be two magistrates in Taos magistrate district, divisions 1 and 2 operating as a single court in Taos.

History: 1953 Comp., § 36-1-32, enacted by Laws 1968, ch. 62, § 34; 1972, ch. 45, § 1; 1985, ch. 145, § 13; 2017, ch. 8, § 2.

ANNOTATIONS

The 2017 amendment, effective June 16, 2017, eliminated the magistrate circuit court in Questa, and deleted the last sentence of the section, which provided “The magistrates shall rotate riding circuit to Questa on a regularly scheduled basis.”.

35-1-33. Magistrate court; Torrance district.

There shall be one magistrate in Torrance magistrate district whose principal court is in Moriarty. The magistrate shall ride circuit to Estancia on a regularly scheduled basis.

History: 1953 Comp., § 36-1-33, enacted by Laws 1968, ch. 62, § 35; 1972, ch. 45, § 2; 1985, ch. 145, § 14.

35-1-34. Magistrate court; Union district.

There shall be one magistrate in Union magistrate district with a court in Clayton.

History: 1953 Comp., § 36-1-34, enacted by Laws 1968, ch. 62, § 36.

35-1-35. Magistrate court; Valencia district.

There shall be three magistrates in Valencia magistrate district, division 1 and division 3 in Los Lunas and division 2 in Belen.

History: 1953 Comp., § 36-1-35, enacted by Laws 1968, ch. 62, § 37; 1972, ch. 45, § 3; 1982, ch. 101, § 4; 1992, ch. 30, § 1.

ANNOTATIONS

The 1992 amendment, effective July 1, 1993, substituted "three magistrates" for "two magistrates" and "division 3 in Los Lunas" for "division 2 in Los Lunas".

35-1-36. Repealed.

ANNOTATIONS

Repeals. — Laws 1981, ch. 266, § 6, repealed 35-1-36 NMSA 1978, as enacted by Laws 1968, ch. 62, § 38, relating to compensation for each specific magistrate district, effective January 1, 1983.

35-1-36.1. Magistrate court; compensation.

A. All magistrates shall be full-time.

B. A full-time magistrate is defined as a magistrate who holds office hours a minimum of forty hours per week and who holds no other employment that may conflict with his full-time judicial duties.

History: 1978 Comp., § 35-1-36.1, enacted by Laws 1986, ch. 96, § 1; 1988, ch. 136, § 5; 1989, ch. 283, § 5; 1990, ch. 115, § 5; 1993, ch. 278, § 3; 1994, ch. 74, § 1.

ANNOTATIONS

Cross references. — For administrative office of the courts, *see* 34-9-1 NMSA 1978 et seq.

The 1994 amendment, effective March 4, 1994, deleted Subsections C and D, defining half-time and quarter-time magistrate, and rewrote Subsection A, which formerly read: "All magistrates, except for Lea magistrate district division 4 and McKinley magistrate district division 3, shall be full-time magistrates. The Lea magistrate district division 4 magistrate shall serve one-quarter time and the McKinley magistrate district division 3 magistrate shall serve one-half time."

The 1993 amendment, effective January 1, 1994, deleted the former second sentence of Subsections B, C and D, which concerned the compensation of full-time magistrates, half-time magistrates, and quarter-time magistrates, respectively.

The 1990 amendment, effective July 6, 1990, in Subsection B, increased the salary of full-time magistrates from $38,035 to $45,000; in Subsection C, increased the salary of half-time magistrates from $19,020 to $22,500; and deleted former Subsection E which read "The administrative office of the courts shall review the need for quarter-time and half-time magistrates and make recommendations to the thirty-ninth legislature, second session".

The 1989 amendment, effective at the beginning of the first full pay period of the seventy-ninth fiscal year, in Subsection B, substituted "thirty-eight thousand thirty-five dollars ($38,035)" for "thirty-one thousand sixty-eight dollars ($31,068)", and, in Subsection C, substituted "nineteen thousand twenty dollars ($19,020)" for "fifteen thousand five hundred thirty-four dollars ($15,534)".

The 1988 amendment, effective on the beginning of the first pay period of the seventy-seventh fiscal year, substituted "thirty-one thousand sixty-eight dollars ($31,068)" for "twenty-nine thousand six hundred eighty-eight dollars ($29,688)" in the second sentence of Subsection B, substituted "fifteen thousand five hundred thirty-four dollars ($15,534)" for "fourteen thousand eight hundred forty-four dollars ($14,844)" in the second sentence of Subsection C, and substituted "eleven thousand six hundred fifty-one dollars ($11,651)" for "eleven thousand one hundred thirty-three dollars ($11,133)" in the second sentence of Subsection D.

35-1-36.2. Repealed.

ANNOTATIONS

Repeals. — Laws 1986, ch. 96, § 2 repealed 35-1-36.2 NMSA 1978, as enacted by Laws 1981, ch. 266, § 3, relating to category designations of magistrates courts, effective January 1, 1987.

35-1-37. Magistrate court; presiding magistrate.

In magistrate districts where two or more divisions operate as a single court, the director of the administrative office of the courts shall designate the magistrate of one of the divisions as "presiding magistrate" to perform administrative duties prescribed by regulation of the administrative office.

History: 1953 Comp., § 36-1-37, enacted by Laws 1968, ch. 62, § 39; 1999, ch. 95, § 1.

ANNOTATIONS

The 1999 amendment, effective July 1, 1999, purported to amend this section but made no change.

35-1-38. Magistrate court; justices of the peace abolished; transfer.

The office of justice of the peace is abolished. All jurisdiction, powers and duties conferred by law upon justices of the peace are transferred to the magistrate court. Whenever the term "justice of the peace" may be used in the laws, it shall be construed to refer to the magistrate court.

History: 1953 Comp., § 36-1-38, enacted by Laws 1968, ch. 62, § 40.

ANNOTATIONS

Cross references. — For establishment of magistrate court, *see* N.M. Const., art. VI, § 26, and 35-1-1 NMSA 1978.

For abolition of justice of the peace, *see* N.M. Const., art. VI, § 31.

Effect in criminal cases. — The transfer provision of this section does not grant a magistrate the authority to set aside its judgment in a criminal case. *State v. Vega*, 1977-NMCA-107, 91 N.M. 22, 569 P.2d 948, *overruled on other grounds by State v. Tollardo*, 1982-NMCA-156, 99 N.M. 115, 654 P.2d 568.

Lay practice must be continual. — Where the practice is not occasional and non-reoccurring, but is continual, the New Mexico supreme court will not permit the practice of law by unlicensed magistrate courts' lawyers who are unfettered by the strictures which apply to the rest of the legal profession. *State ex rel. Norvell v. Credit Bureau of Albuquerque, Inc.*, 1973-NMSC-087, 85 N.M. 521, 514 P.2d 40.

Magistrate court jurisdiction affected by transferred laws. — The jurisdiction and powers of a magistrate's court are governed by the laws relating to justices of the peace except as they have been later changed. 1969 Op. Att'y Gen. No. 69-91.

Jurisdiction affected by transferred cases. — Recourse must be had to decisions in New Mexico courts setting forth the powers of justices of the peace which now apply equally to magistrates. 1969 Op. Att'y Gen. No. 69-91.

Effect on practice of law by laymen. — Under this section a layman would be allowed to practice law in magistrate courts to whatever extent he could formerly practice in the justice of the peace courts. 1969 Op. Att'y Gen. No. 69-12.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 47 Am. Jur. 2d Justice of the Peace § 6.

51 C.J.S. Justices of the Peace §§ 1, 4, 26 to 52.

35-1-39. Deleted.

ANNOTATIONS

Compiler's notes. — This section, as enacted by Laws 1995, ch. 85, § 18, relating to the magistrate court in the new county created by Chapter 4, Article 1A NMSA 1978, was deleted by the compiler in 1996. Section 20 of Laws 1995, ch. 85 provided that the act shall be effective upon certification by the state canvassing board that a majority of votes cast in the referendum conducted pursuant to 4-1A-15 NMSA 1978 was for the creation and operation of the new county; that referendum was defeated at the general election held November 5, 1996, by a vote of 2,224 for and 9,055 against. For provisions of former section, *see* the 1994 NMSA 1978 on *NMOneSource.com*.

ARTICLE 2
Magistrate Court; Qualification

35-2-1. Qualification; personal qualifications.

A. Each magistrate shall be a qualified elector of, and reside in, the magistrate district for which the magistrate is elected or appointed.

B. No person is eligible for election or appointment to the office of magistrate unless the person has graduated from high school or has attained the equivalent of a high school education as indicated by possession of a high school equivalency credential issued by the public education department based upon the record made on the high school equivalency credential test.

C. In magistrate districts with a population of more than two hundred thousand persons in the last federal decennial census, no person is eligible for election to the office of magistrate unless the person:

(1) is a member of the bar of this state and licensed to practice law in this state; or

(2) holds the office of magistrate in that district when the federal decennial census is published, as long as there is no break in service.

D. In magistrate districts with a population of more than two hundred thousand persons in the last federal decennial census, no person is eligible for appointment to the office of magistrate unless the person is a member of the bar of this state and licensed to practice law in this state.

E. A person holding the office of magistrate shall not engage in the private practice of law during tenure in office.

History: 1953 Comp., § 36-2-1, enacted by Laws 1968, ch. 62, § 41; 1979, ch. 7, § 1; 2013, ch. 26, § 1; 2015, ch. 122, § 19.

ANNOTATIONS

Repeals. — Laws 1968, ch. 62, § 171, repealed former 36-2-1, 1953 Comp., relating to the declaration of justices of the peace, effective January 1, 1969.

The 2015 amendment, effective July 1, 2015, replaced "certificate of equivalency" and "general education development" with "high school equivalency credential" in the provision relating to qualifications for a magistrate; and in Subsection B, after "possession of a", deleted "certificate of" and added "high school", after "equivalency", added "credential", and after "upon the record made on the", deleted "general education development" and added "high school equivalency credential".

The 2013 amendment, effective July 1, 2013, permitted magistrates in districts with a population of more than two hundred thousand persons to be elected if there is no break in service; provided that only members of the bar who are licensed to practice law in New Mexico may be appointed magistrate in districts with a population of more than two hundred thousand persons; prohibited magistrates from engaging in the private practice of law; in Subsection C, in the first sentence, after "eligible for election", deleted "or appointment"; in Paragraph (1) of Subsection C, after "practice of law in this state", deleted "but he shall not engage in the private practice of law during his tenure in office" and added "or"; added Paragraph (2) of Subsection C; and added Subsections D and E.

Constitutionality where high school education equivalency required. — The requirement that magistrates have the equivalent of a high school education does not violate N.M. Const., art. VII, § 2, 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. 69-08.

Constitutionality of lawyer requirement. — The requirement 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 N.M. Const., art. II, § 18, or N.M. Const., art. IV, § 24. 1969 Op. Att'y Gen. No. 69-08.

Law reviews. — For article, "Disorder in the People's Court: Rethinking the Role of Non-Lawyer Judges in Limited Jurisdiction Court", see 29 N.M.L. Rev. 119 (1999).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 47 Am. Jur. 2d Justices of the Peace § 7 et seq.

51 C.J.S. Justices of the Peace §§ 5 to 7.

35-2-2. Qualification; vacancies.

The governor shall fill vacancies in the office of magistrate by appointment of persons who possess the personal qualifications established by law to serve until the next general election.

History: 1953 Comp., § 36-2-2, enacted by Laws 1968, ch. 62, § 42.

ANNOTATIONS

Repeals. — Laws 1968, ch. 62, § 171, repealed former 36-2-2, 1953 Comp., relating to administration of oaths and affidavits of justices, effective January 1, 1969.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 51 C.J.S. Justices of the Peace §§ 4, 6, 8.

35-2-3. Qualification; certificate of magistrate qualification.

A. Within fifteen days after each general election, the administrative office of the courts shall notify each apparently successful candidate for the office of magistrate of the requirements for qualification. Within thirty days after election or appointment, each apparently successful candidate and each appointee shall file with the administrative office an application for certificate of magistrate qualification. The application shall be in a form prescribed by the administrative office and shall include:

(1) the oath of office prescribed by the constitution for public officers subscribed to by the applicant;

(2) the applicant's certificate of election or appointment; and

(3) evidence of the applicant's possession of personal qualifications required by law.

B. Each applicant for a certificate of magistrate qualification who has not previously held such a certificate shall attend a qualification training program conducted by the administrative office as a prerequisite to the issuance of his first certificate. The administrative office shall prescribe the content of the qualification training program so as to inform applicants with reference to judicial powers and duties.

C. Upon approval of the application and, when required, upon the applicant's attendance at a qualification training program, the administrative office shall certify the applicant's initial qualification in accordance with the requirements of law by issuing to the applicant a "certificate of magistrate qualification." Each magistrate shall post the certificate in a conspicuous place in his courtroom.

D. If not sooner suspended or revoked as provided by law, each certificate of magistrate qualification automatically expires at the end of the term to which the magistrate is elected or appointed or when his successor in office is qualified, whichever is later.

E. Any magistrate who fails to complete the requirements for initial qualification within forty-five days of election or appointment shall be held to have resigned his office, and the administrative office shall certify the existence of the vacancy to the governor.

History: 1953 Comp., § 36-2-3, enacted by Laws 1968, ch. 62, § 43.

ANNOTATIONS

Repeals. — Laws 1968, ch. 62, § 171, repealed former 36-2-3, 1953 Comp., relating to jurisdictional amount in civil matters, effective January 1, 1969.

Cross references. — For constitutional oath of office, *see* N.M. Const., art. XX, § 1.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 47 Am. Jur. 2d Justices of the Peace § 9.

35-2-4. Qualification; continuing in office; mandatory training program.

A. As a qualification for continuing in office, each magistrate shall attend at least one magistrate training program each year unless excused in writing by the chief justice of the supreme court for good cause shown.

B. The administrative office of the courts shall prescribe and conduct annual magistrate training programs designed to inform magistrates with reference to judicial powers and duties and to improve the administration of justice, and shall notify each

magistrate of times and places designated for such training programs each year. All officers, agencies and institutions of the state shall cooperate and assist with magistrate training programs upon request of the administrative office.

C. Any magistrate who fails to attend and remain present through all proceedings of at least one magistrate training program during any calendar year without being excused as provided in Subsection A shall be held to have resigned his office, and the administrative office shall revoke his certificate of magistrate qualification and certify the existence of the vacancy to the governor.

D. Magistrates shall be reimbursed per diem and mileage for one round trip to attend one magistrate training program each year. Per diem and mileage shall be paid as provided in the Per Diem and Mileage Act [10-8-1 to 10-8-8 NMSA 1978].

History: 1953 Comp., § 36-2-4, enacted by Laws 1968, ch. 62, § 44; 1971, ch. 7, § 3.

ANNOTATIONS

Repeals. — Laws 1968, ch. 62, § 171, repealed 36-2-4, 1953 Comp., relating to titles to land, effective January 1, 1969.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 51 C.J.S. Justices of the Peace § 15.

35-2-5. Qualification; failure to qualify.

A. Any judicial act is void if performed by a magistrate prior to the issuance to him of a certificate of magistrate qualification or during any period of suspension or revocation of the certificate, and the magistrate is personally liable for any damages resulting from such act.

B. No compensation shall be paid to any magistrate for any period of time during which he did not hold a valid certificate of magistrate qualification.

History: 1953 Comp., § 36-2-5, enacted by Laws 1968, ch. 62, § 45.

ANNOTATIONS

Repeals. — Laws 1968, ch. 62, § 171, repealed former 36-2-5, 1953 Comp., relating to jurisdiction over misdemeanors, effective January 1, 1969.

35-2-6. Appointment as special master, arbitrator or magistrate judge pro tempore; compensation.

A. A chief district court judge may appoint a retired magistrate judge, with the retired judge's consent, to serve as a magistrate judge pro tempore, subject to the money available to the judge pro tempore fund.

B. The retired magistrate judge shall be:

(1) compensated for his services in an amount equal to the hourly salary paid to magistrate judges; and

(2) reimbursed for his expenses in accordance with the provisions of the Per Diem and Mileage Act [10-8-1 to 10-8-8 NMSA 1978] that apply to nonsalaried public officers.

History: Laws 1997, ch. 114, § 1; 2001, ch. 71, § 1.

ANNOTATIONS

The 2001 amendment, effective July 1, 2001, inserted "compensation" in the section heading; inserted the Subsection A and B designations; in Subsection B, deleted "compensated for his services as provided for nonsalaried public officers in the Per Diem and Mileage Act" following "shall be" and inserted Paragraphs (1) and (2).

35-2-7. Magistrate courts; authority to conduct a mediation program; training.

A. If approved by the administrative office of the courts pursuant to Subsection B of this section, a probate judge shall have authority to conduct mediation programs in a magistrate court.

B. The director of the administrative office of the courts may approve a probate judge to exercise the authority conferred in Subsection A of this section if the judicial district for the county in which the magistrate court is located has certified that the probate judge is qualified, by training or experience, to conduct the mediation program.

C. The supreme court shall enact rules necessary for the implementation of this section.

History: Laws 1999, ch. 110, § 1.

ANNOTATIONS

Effective dates. — Laws 1999, ch. 110 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 18, 1999, 90 days after adjournment of the legislature.

Cross references. — For authorization for appointment of probate judges, *see* 34-7-1 NMSA 1978.

ARTICLE 3
Magistrate Court; Jurisdiction

35-3-1. Jurisdiction; administration of oaths.

Magistrates may administer oaths and affirmations and take acknowledgments of instruments in writing, but shall charge no fee therefor. Magistrates may acquire appropriate seals for this purpose.

History: 1953 Comp., § 36-3-1, enacted by Laws 1968, ch. 62, § 46.

ANNOTATIONS

Repeals. — Laws 1968, ch. 62, § 171, repealed former 36-3-1, 1953 Comp., relating to venue in civil suits, and disqualification of justice for interest or relationship, effective January 1, 1969.

Cross references. — For authority to take acknowledgments, *see* 14-14-3 NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 1 Am. Jur. 2d Acknowledgments §§ 4, 87; 47 Am. Jur. 2d Justices of the Peace § 17; 58 Am. Jur. 2d Oaths and Affirmations §§ 11, 14, 15, 17.

1A C.J.S. Acknowledgments § 33; 51 C.J.S. Justices of the Peace §§ 7, 26, 41; 67 C.J.S. Oaths § 5.

35-3-2. Authority; marriages.

Magistrates may solemnize the contract of matrimony throughout the state but shall charge no fee for it.

History: 1953 Comp., § 36-3-2, enacted by Laws 1968, ch. 62, § 47; 1989, ch. 160, § 1.

ANNOTATIONS

Repeals. — Laws 1968, ch. 62, § 171, repeals former 36-3-2, 1953 Comp., relating to jurisdiction where evasion of suit by defendant, effective January 1, 1969.

The 1989 amendment, effective June 16, 1989, substituted "Authority" for "Jurisdiction" in the catchline, and substituted all of the language following "matrimony" for "but shall charge no fee therefor".

Place where judge may perform marriage ceremony. — Except for probate and municipal judges, judges and justices may solemnize marriages anywhere in New Mexico. 1991 Op. Att'y Gen. No. 91-09.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 52 Am. Jur. 2d Marriage § 40.

Validity of marriage as affected by lack of legal authority of person solemnizing it, 13 A.L.R.4th 1323.

51 C.J.S. Justices of the Peace § 16; 55 C.J.S. Marriage § 29.

35-3-3. Jurisdiction; civil actions.

A. Magistrates have jurisdiction in civil actions in which the debt or sum claimed does not exceed ten thousand dollars ($10,000), exclusive of interest and costs.

B. Except as provided in Subsection C of this section, civil jurisdiction extends to actions in contract, quasi-contract and tort and where expressly conferred by law.

C. A magistrate has no jurisdiction in a civil action:

(1) for malicious prosecution, libel or slander;

(2) against public officers for misconduct in office;

(3) for specific performance of contracts for the sale of real property;

(4) in which the title or boundaries of land may be in dispute or drawn into question;

(5) affecting domestic relations, including divorce, annulment or separation or custody, support, guardianship, adoption or dependency of children;

(6) to grant writs of injunction, habeas corpus or extraordinary writs; or

(7) where jurisdiction is vested exclusively in another court.

History: 1953 Comp., § 36-3-3, enacted by Laws 1968, ch. 62, § 48; 1973, ch. 206, § 1; 1989, ch. 65, § 1; 1999, ch. 104, § 2; 2001, ch. 77, § 2.

ANNOTATIONS

Repeals. — Laws 1968, ch. 62, § 171, repealed former 36-3-3, 1953 Comp., relating to venue in civil suits, effective January 1, 1969.

Cross references. — For jurisdiction of magistrate court, *see* Rule 2-201B NMRA.

The 2001 amendment, effective July 1, 2001, substituted "ten thousand dollars ($10,000)" for "seven thousand five hundred dollars ($7,500)" in Subsection A.

The 1999 amendment, effective July 1, 1999, substituted "seven thousand five hundred dollars ($7,500)" for "five thousand dollars ($5,000)" in Subsection A.

The 1989 amendment, effective June 16, 1989, substituted "five thousand dollars ($5,000)" for "two thousand dollars ($2,000)" in Subsection A, and inserted "of this section" in Subsection B.

Some of the following annotations are taken from cases and opinions decided and rendered under former law.

No jurisdiction where land title or boundary dispute. — Justices of the peace (now magistrates) have no jurisdiction of any matter in controversy when title or boundaries of land are in dispute. *Tapia v. Martinez*, 1888-NMSC-002, 4 N.M. (Gild.) 329, 16 P. 272.

Exception to bar of jurisdiction. — Where the title to real estate is drawn in question indirectly or incidentally, statutory and constitutional provisions are not violated. *Brown v. Bigham*, 1958-NMSC-110, 65 N.M. 45, 331 P.2d 1106.

Test of exception. — Where the statute gives a justice of the peace (now magistrate) jurisdiction, courts are powerless to impose limitations on such jurisdiction by construction. The fact that title to land may be incidentally involved does not oust a justice of the peace (now magistrate) of jurisdiction. Unless otherwise provided by statute, the test as to whether title is so directly involved as to deprive a justice of the peace (now magistrate) of jurisdiction is whether the issues to be litigated demand a judgment affecting title. Where the issues demand a judgment for the recovery of money only, title is not directly involved. *State v. Brown*, 1963-NMSC-127, 72 N.M. 274, 383 P.2d 243.

Effect on garnishment of rent. — Question of title to land raised only indirectly does not divest justice of peace (now magistrate) of jurisdiction. In garnishment proceeding in which debtor's wife claimed the money deposited in garnishee bank as her own as the rent of her property, the title to land was not involved. *Wood Garage v. Jasper*, 1937-NMSC-019, 41 N.M. 289, 67 P.2d 1000.

Garnishment in district and magistrate courts. — Since garnishment is both a special proceeding, and a remedial writ, ancillary to the main action, 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, a district court does not have jurisdiction to issue a writ of garnishment where the amount in question is not in excess of the jurisdictional amount of magistrate courts having venue within the county. *Postal Fin. Co. v. Sisneros*, 1973-NMSC-029, 84 N.M. 724, 507 P.2d 785.

Injunction. — Metropolitan Court has jurisdiction under the Mobile Home Park Act to issue injunctions. *Martinez v. Sedillo*, 2005-NMCA-029, 137 N.M. 103, 107 P.3d 543.

Jurisdiction on Sundays. — Judicial proceedings other than purely formal acts are void if performed on Sunday. Thus, misdemeanor cases cannot be tried, nor fines imposed, on Sunday. 1961 Op. Att'y Gen. No. 61-05.

Effect on jurisdiction where penalty exceeds limit. — Where the maximum penalty which may be imposed exceeds the jurisdictional limits of the authority of a magistrate, the court thereby loses jurisdiction to try the person accused. To do otherwise would be to lessen the penalties which the legislature has deemed assessable for the named offense. 1960 Op. Att'y Gen. No. 60-188.

Magistrate's monetary jurisdiction limits restitution. — The amount of compelled or agreed restitution in cases involving the Criminal Code or the Motor Vehicle Code is limited by the magistrate's monetary jurisdiction. 1979 Op. Att'y Gen. No. 79-18.

Law reviews. — For article, "Attachment in New Mexico - Part II," see 2 Nat. Resources J. 75 (1962).

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. — 47 Am. Jur. 2d Justices of the Peace § 17 et seq.

When title to real property deemed involved within contemplation of statute providing that justice of the peace (now magistrate) shall not have jurisdiction of matters relating to title to land, 115 A.L.R. 504.

Small claims: jurisdictional limits as binding on appellate court, 67 A.L.R.4th 1117.

51 C.J.S. Justices of the Peace §§ 1, 26 to 52.

35-3-4. Jurisdiction; criminal actions.

A. Magistrates have jurisdiction in all cases of misdemeanors and petty misdemeanors, including offenses and complaints under ordinances of a county. Magistrates also have jurisdiction in any other criminal action where jurisdiction is specifically granted by law, and they may hold preliminary examinations in any criminal action where authorized by law.

B. Magistrates have jurisdiction over all offenses and complaints under ordinances of a municipality and may issue subpoenas and warrants and punish for contempt if that municipality has adopted an effective ordinance to provide for magistrate jurisdiction over municipal ordinances pursuant to the provisions of Subsection B of Section 35-14-1 NMSA 1978.

C. In any criminal action in the magistrate court which is beyond the jurisdiction of the magistrate court, the magistrate may commit to jail, discharge or recognize the defendant to appear before the district court as provided by law. Whenever the defendant is bound over to the district court, the magistrate shall forthwith deliver to the clerk of the district court a transcript of all proceedings in the magistrate court in the action.

History: 1953 Comp., § 36-3-4, enacted by Laws 1968, ch. 62, § 49; 1973, ch. 206, § 2; 1984, ch. 30, § 2; 1985, ch. 59, § 1; 1985, ch. 147, § 1.

ANNOTATIONS

Repeals. — Laws 1968, ch. 62, § 171, repealed former 36-3-4, 1953 Comp., relating to grounds for change of venue, effective January 1, 1969.

Cross references. — For sheriff's fees, *see* 4-41-16 NMSA 1978.

For jurisdiction for assault and battery upon revenue bureau employees, *see* 7-1-75 NMSA 1978.

For jurisdiction under fish and game laws, *see* 17-2-9 NMSA 1978.

For duties of enforcement officials in gambling prosecutions, *see* 30-19-2 NMSA 1978.

For transfer to district court because of insanity defense, *see* 31-9-1 NMSA 1978.

Delay in enforcing sentence. — Where the court delayed enforcing defendant's sentence for thirteen months due to a mistake as to whether defendant was serving the sentence during and after an appeal, the court did not lose jurisdiction to enforce the sentence. *State v. Calabaza*, 2011-NMCA-053, 149 N.M. 612, 252 P.3d 836.

Jurisdiction in felony cases. — The dismissal of a felony charge by a 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*, 1975-NMSC-035, 88 N.M. 125, 537 P.2d 1387.

A magistrate court does not have jurisdiction to try felony charges on the merits, but does have jurisdiction to hold preliminary hearings in any criminal action as authorized by law. *McCormick v. Francoeur*, 1983-NMSC-077, 100 N.M. 560, 673 P.2d 1293; *State v. De La O*, 1985-NMCA-023, 102 N.M. 638, 698 P.2d 911.

Jurisdiction over aggravated battery. — Magistrate courts have no trial jurisdiction over aggravated battery, which is a third-degree felony, but do have authority to conduct

preliminary examinations upon charges therefor. *State ex rel. Moreno v. Floyd*, 1973-NMSC-117, 85 N.M. 699, 516 P.2d 670.

Jurisdiction under 66-8-102 NMSA 1978. — Section 66-8-102 NMSA 1978 is a valid, specific grant of concurrent jurisdiction to magistrates in cases involving driving while under the influence of intoxicating liquor or of drugs, when the same is a first offense. *State v. Rue*, 1963-NMSC-090, 72 N.M. 212, 382 P.2d 697.

No jurisdiction over misdemeanor charges tried with related felony. — Because the district court has original jurisdiction over all felony charges, when misdemeanor charges brought in a 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*, 1985-NMCA-090, 103 N.M. 382, 707 P.2d 1192, *overruled on other grounds by State v. Laguna*, 1999-NMCA-152, 128 N.M. 345, 992 P.2d 896.

No jurisdiction as to municipal ordinances. — Magistrate courts are part of the judicial department of the state and their criminal jurisdiction does not specifically refer to municipal ordinances. *State v. Biswell*, 1971-NMCA-111, 83 N.M. 65, 488 P.2d 115, cert. denied, 83 N.M. 57, 488 P.2d 107.

No right to refuse second complaint after finding of no probable cause on first. — A magistrate, who has previously heard evidence under an original criminal complaint and has found no probable cause, does not have a discretionary right to refuse the filing of a second complaint. *State v. De La O*, 1985-NMCA-023, 102 N.M. 638, 698 P.2d 911.

Former Rule 17(b) [new 6-506B NMRA], N.M.R. Crim. P. (Magis. Cts.) did not conflict with this section, by extending the dispositive powers of magistrates to cover felony charges. *State v. Mann*, 1980-NMSC-043, 94 N.M. 276, 609 P.2d 723 (decided under prior law).

Consent or waiver of jurisdiction not possible. — Where magistrate court is without subject-matter jurisdiction, there is no possibility of waiver or consent to jurisdiction. *State v. Lynch*, 1971-NMCA-049, 82 N.M. 532, 484 P.2d 374.

Consideration of jurisdiction not precluded on appeal. — The failure of defendant to file an answer or plea in the justice of the peace court (now magistrate) or the district court does not preclude consideration on appeal where the issue raised by defendant questions the sufficiency of the proof to establish a cause of action under the complaint. *Henderson v. Gibbany*, 1966-NMSC-172, 76 N.M. 674, 417 P.2d 807 (decided under former law).

Jurisdiction over violations of municipal ordinances. — A municipal court does not have exclusive jurisdiction where driving while intoxicated or acts of domestic violence are alleged to have occurred within the city limits and to violate both state laws and municipal ordinances and a municipal peace officer may refer criminal charges to any

prosecutor at any level for evaluation and prosecution in municipal, magistrate, or district court. Nothing in the law binds an officer to file charges in municipal court where the charges stem from activities that allegedly violate a municipal ordinance and a state law or a county ordinance. 2008 Op. Att'y Gen. No. 08-06.

Magistrate can compel restitution. — The magistrate 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.

Jurisdiction over juveniles. — Magistrate courts have no jurisdiction over juveniles under 18 years of age. 1969 Op. Att'y Gen. No. 69-91.

Jurisdiction on Sunday. — Judicial proceedings other than purely formal acts are void if performed on Sunday. Thus, misdemeanor cases cannot be tried, nor fines imposed, on Sunday. 1961 Op. Att'y Gen. No. 61-05 (opinion rendered under former law).

Jurisdiction over sentence modification. — Since a magistrate has no power to grant a new trial, he has no power to alter, change or suspend either the fine or a jail sentence after he has issued a jail commitment to the county sheriff even if defendant were less than 21 (now 18) years of age. 1969 Op. Att'y Gen. No. 69-91.

Jurisdiction for Motor Transportation Act violations. — Section 35-3-4 NMSA 1978, prior to its 1973 amendment, did not give magistrate courts jurisdiction to try cases arising out of violations of the Motor Transportation Act (65-1-1 to 65-1-37, 65-3-1, 65-5-1 to 65-5-3, 66-6-2, 66-7-411 to 66-7-415 NMSA 1978). 1969 Op. Att'y Gen. No. 69-53.

No jurisdiction where penalty exceeds statutory limits. — If the penalty for a misdemeanor set by the legislature prescribes a fine or imprisonment or both and either the fine or penalty exceeds the statutory jurisdictional limits of magistrate's courts, these courts are without jurisdiction to try such a violation. This does not disturb the jurisdiction of misdemeanors specifically granted to magistrate's courts by the legislature. 1960 Op. Att'y Gen. No. 60-148.

Maximum penalty determines jurisdiction. — Where the maximum penalty which may be imposed exceeds the jurisdictional limits of the authority of a magistrate, the court thereby loses jurisdiction to try the person accused. To do otherwise would be to lessen the penalties which the legislature has deemed assessable for the named offense. 1960 Op. Att'y Gen. No. 60-188.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 47 Am. Jur. 2d Justices of the Peace § 35.

35-3-5. Jurisdiction; venue of actions.

A. Venue of actions in the magistrate court lies:

(1) in civil actions, in any magistrate district where the plaintiff or defendant resides or may be found or where the cause of action arose; and

(2) in criminal actions, in the magistrate district where the crime is alleged to have been committed.

B. The provisions of Section 35-3-6 or 35-3-7 NMSA 1978, supersede this section whenever they become applicable.

History: 1953 Comp., § 36-3-5, enacted by Laws 1968, ch. 62, § 50.

ANNOTATIONS

Repeals. — Laws 1968, ch. 62, § 171, repealed former 36-3-5, 1953 Comp., relating to petition and affidavits for change of venue, effective January 1, 1969.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 47 Am. Jur. 2d Justices of the Peace §§ 21, 74.

Construction and effect of statutes providing for jurisdiction of criminal case in either county, where crime is committed partly in one county and partly in another, 30 A.L.R.2d 1265, 73 A.L.R.3d 907, 100 A.L.R.3d 1174, 11 A.L.R.4th 704.

22 C.J.S. Criminal Law § 178; 51 C.J.S. Justices of the Peace § 61.

35-3-6. Jurisdiction; territorial limits.

A. The territorial jurisdiction of a magistrate is coextensive with the magistrate district in which the magistrate serves. A magistrate also has jurisdiction in any criminal action involving violation of a law relating to motor vehicles arising in a magistrate district adjoining at any point that in which the magistrate serves and within magistrate trial jurisdiction; provided that the defendant is entitled to a change of venue to the district where the cause of action arose if the defendant so moves at, or within fifteen days after, arraignment.

B. A magistrate has jurisdiction to sit in any action arising in any other magistrate district when designated for a specific period of time by a district judge because of the unavailability of a magistrate in that magistrate district. A magistrate acting in another magistrate district by designation pursuant to this subsection shall include the cases heard by designation in the magistrate's own reports to the administrative office of the courts, indicating on the reports that the magistrate's jurisdiction is by designation.

C. In a criminal action in which a magistrate has territorial jurisdiction over the offense pursuant to this section, the magistrate court has personal jurisdiction over the defendant for the purpose of service of process upon the defendant wherever the defendant resides or may be found within the state.

D. In a civil action arising within the magistrate's territorial jurisdiction, the magistrate court has personal jurisdiction over the defendant for the purpose of service of process upon the defendant wherever the defendant resides or may be found within the state.

E. The territorial limitations of magistrate court jurisdiction shall not apply to actions to enforce judgments entered in the magistrate district and writs issued in aid of those actions.

History: 1953 Comp., § 36-3-6, enacted by Laws 1968, ch. 62, § 51; 1985, ch. 59, § 2; 1989, ch. 65, § 2; 1991, ch. 82, § 1; 1999, ch. 95, § 2; 2007, ch. 251, § 1.

ANNOTATIONS

Repeals. — Laws 1968, ch. 62, § 171, repealed former 36-3-6, 1953 Comp., relating to application and proof for, and granting of, change of venue, effective January 1, 1969.

Cross references. — For civil actions in district court, *see* 38-3-1 NMSA 1978.

For designation of magistrate before whom case is to be tried, *see* Rule 2-105 NMRA.

The 2007 amendment, effective June 15, 2007, allowed a magistrate sitting by designation to collect fees and costs in a magistrate district in which he has been designated to sit.

The 1999 amendment, effective July 1, 1999, substituted "designated for a specific period of time" for "designated to hear the action" in the first sentence of Subsection B.

The 1991 amendment, effective June 14, 1991, in Subsection A, substituted the proviso at the end of the subsection for "unless the defendant requests trial by jury" and made a stylistic change; rewrote Subsection D which read "A magistrate has jurisdiction over the defendant wherever he resides or may be found within the state in any civil action when the complaint is to collect a debt for less than one thousand five hundred dollars ($1,500), exclusive of interest and costs, which arose in the magistrate district"; and added Subsection E.

The 1989 amendment, effective June 16, 1989, added Subsection D.

Section is consistent with present constitutional and statutory provisions regarding place of prosecution. 1979 Op. Att'y Gen. No. 79-12.

Motor vehicle violations. — This section simply extends or enlarges the territorial jurisdiction of the magistrate in criminal actions involving motor vehicle violations from the adjoining magistrate district without stating when or upon what conditions such extra-territorial jurisdiction may be exercised. 1979 Op. Att'y Gen. No. 79-12.

This section does not permit persons who have been cited for motor vehicle violations to be heard as a matter of right in a magistrate district other than where the offense occurred. 1979 Op. Att'y Gen. No. 79-12.

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.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 47 Am. Jur. 2d Justices of the Peace § 19.

51 C.J.S. Justices of the Peace § 41.

35-3-7. Jurisdiction; disqualification of magistrate.

A. Whenever a party to any civil or criminal action or proceeding of any kind files a statement of disqualification, the magistrate's jurisdiction over the cause terminates immediately. The statement is effective only if filed no later than fifteen days after the date the answer is filed in a civil action or no later than fifteen days after the date the defendant is arraigned in a criminal action.

B. Upon receipt of a notice of disqualification, the magistrate or clerk of the magistrate court shall give written notice to the other parties to the action. Upon failure of counsel for all parties to file a stipulation within ten days of the filing of a statement of disqualification naming another magistrate judge in the district to try the cause, the presiding magistrate judge of the district shall as chosen by random selection designate another judge to try the cause. In the event all magistrates in the district are disqualified under the provisions of this section the disqualified magistrate shall, on the eleventh day thereafter, certify the fact by letter to the district court of the county in which the action is pending, and the district court shall designate another magistrate to conduct any further proceedings. The district court shall send notice of its designation to the parties or their counsel, to the disqualified magistrate and to the designated magistrate.

C. Any magistrate who willfully attempts or presumes to act as magistrate in an action after disqualification is guilty of a petty misdemeanor and shall be removed from office.

History: 1953 Comp., § 36-3-7, enacted by Laws 1968, ch. 62, § 52; 1983, ch. 88, § 1.

ANNOTATIONS

Repeals. — Laws 1968, ch. 62, § 171, repealed former 36-3-7, 1953 Comp., relating to transcripts and papers certified to another justice who resumes proceedings, effective January 1, 1969.

Cross references. — For disqualification or disability of magistrate, *see* Rule 2-106 NMRA.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 47 Am. Jur. 2d Justices of the Peace § 43.

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 self 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, 73 A.L.R.2d 1238.

Intervenor's right to disqualify judge, 92 A.L.R.2d 1110.

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 of 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 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.

Disqualification of judge for having decided different case against litigant - state cases, 85 A.L.R.5th 547.

51 C.J.S. Justices of the Peace §§ 43, 44.

35-3-8. Jurisdiction; recusal.

A. Except by consent of all parties, no magistrate shall sit in any action in which:

(1) either of the parties is related to him by affinity or consanguinity within the degree of first cousin;

(2) he was counsel for either party in that action; or

(3) he has an interest.

B. Whenever one or more of the conditions of Subsection A exists, or whenever any other reason deemed sufficient by the magistrate exists, the magistrate before whom the action is pending shall recuse himself from sitting in the action by giving notice to all parties. Upon recusal, another magistrate shall be designated to conduct any further proceedings in the action in the same manner as provided in the case of disqualification.

History: 1953 Comp., § 36-3-8, enacted by Laws 1968, ch. 62, § 53.

ANNOTATIONS

Repeals. — Laws 1968, ch. 62, § 171, repealed former 36-3-8, 1953 Comp., relating to costs and expenses attending change of venue because of disqualification of justice, effective January 1, 1969.

Cross references. — For disqualification for interest on relationship, *see* N.M. Const., art. VI, § 18.

For recusal of magistrate, *see* Rule 2-106 NMRA.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 47 Am. Jur. 2d Justices of the Peace § 43.

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 self 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.

Prior representation or activity as prosecuting attorney as disqualifying judge from sitting or acting in criminal case, 85 A.L.R.5th 471.

51 C.J.S. Justices of the Peace §§ 44, 49.

35-3-9. Jurisdiction; contempt.

A magistrate has jurisdiction to punish for contempt only for disorderly behavior or breach of the peace tending to interrupt or disturb a judicial proceeding in progress before the magistrate or for disobedience of any lawful order or process of his court. No person shall be punished for contempt of the magistrate court until given an opportunity to be heard in his defense. Any person convicted under this section may appeal to the district court in the same manner as in other criminal actions in the magistrate court.

History: 1953 Comp., § 36-3-9, enacted by Laws 1968, ch. 62, § 54; 1975, ch. 242, § 3; 1991, ch. 82, § 2.

ANNOTATIONS

Repeals. — Laws 1968, ch. 62, § 171, repealed former 36-3-9, 1953 Comp., relating to officers' fees for carrying removed justice's papers to another justice, effective January 1, 1969.

Cross references. — For procedures governing appeals to the district court from magistrate courts in trial de novo cases, *see* Rule 1-072 NMRA.

For contempt, *see* Rules 2-110 and 2-502E NMRA.

For applicability of Rules of Evidence to contempt proceedings, *see* Rule 11-1101 NMRA.

The 1991 amendment, effective June 14, 1991, deleted the former third sentence which read "After hearing, any person found guilty of contempt shall be punished by a fine not exceeding twenty-five dollars ($25.00) or by imprisonment for not more than three days, or both."

Six-day contempt sentence. — Defendant's six-day sentence by the metropolitan court for criminal contempt upon failure to pay fines or do community service in lieu of the fines was not in excess of the court's authority, as the power to punish for contempt is inherent in the courts and the magistrate and metropolitan (which is a magistrate) court rules governing contempt control over this section. *State v. Jones*, 1987-NMCA-004, 105 N.M. 465, 734 P.2d 243, cert. denied, 105 N.M. 395, 733 P.2d 364.

An appeal from a finding of direct criminal contempt shall be tried de novo in the district court. — Where the magistrate court filed an order finding that defendant committed direct criminal contempt during a video arraignment, and where defendant appealed to the district court, the district court did not have jurisdiction to conduct an on-the-record review; the magistrate court is not a court of record, and therefore appeals from the magistrate court shall be tried de novo in the district court. The district court was required to hold a trial de novo, in which the state was required to prove beyond a reasonable doubt that defendant committed direct criminal contempt of the magistrate court. *State ex rel. Bevacqua-Young v. Steele*, 2017-NMCA-081, cert. denied.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 47 Am. Jur. 2d Justices of the Peace § 104.

Right to punish for contempt for failure to obey court order or decree either beyond power or jurisdiction of court or merely erroneous, 12 A.L.R.2d 1059.

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.

Court's power to punish for contempt a child within age group subject to jurisdiction of juvenile court, 77 A.L.R.2d 1004.

Separate contempt punishments on successive refusals to respond to same or similar questions, 94 A.L.R.2d 1246.

Delay in adjudication of contempt committed in the actual presence of court as affecting court's power to punish contemnor, 100 A.L.R.2d 439.

Allowance of attorney's fees in civil contempt proceedings, 43 A.L.R.3d 793.

Contempt: state court's power to order indefinite coercive fine or imprisonment to exact promise of future compliance with court's order - anticipatory contempt, 81 A.L.R.4th 1008.

Lack of notice to contemnor at time of contemptuous conduct of possible criminal contempt sanctions as affecting prosecution for contempt in federal court, 76 A.L.R. Fed. 797.

35-3-10. Jurisdiction; failure to exercise; unlawful exercise; remedy.

If a magistrate before whom an action is pending is for any reason unable, unavailable or unwilling to preside in an action, or fails to recognize a properly filed statement of disqualification or fails to recognize grounds for refusal [recusal], any party may proceed in the manner specified by the Rules of Civil Procedure or the Rules of Criminal Procedure for the Magistrate Courts. The district court of the county in which the action is pending shall thereafter take action as provided in those rules.

History: 1953 Comp., § 36-3-10, enacted by Laws 1975, ch. 242, § 2.

ANNOTATIONS

Repeals. — Laws 1968, ch. 62, § 171, repealed former 36-3-10, 1953 Comp., relating to transmittal of papers in justice courts.

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

Cross references. — For Rules of Civil Procedure for the Magistrate Court, *see* Rule 2-101 NMRA et seq.

For Rules of Criminal Procedure for the Magistrate Courts, *see* Rule 6-101 NMRA et seq.

ARTICLE 4
Magistrate Court; Civil Actions

35-4-1. Civil actions; receipts for money.

Every magistrate shall, on a form prescribed by the administrative office of the courts:

A. immediately give a written itemized receipt to any person paying money to the court in connection with any civil action; and

B. require a written itemized receipt from the payee before making any disbursement authorized by law.

History: 1953 Comp., § 36-4-7, enacted by Laws 1968, ch. 62, § 61; 1991, ch. 82, § 3.

ANNOTATIONS

Repeals. — Laws 1968, ch. 62, § 171, repeals former 36-4-7, 1953 Comp., relating to civil penalty for failure to execute or make return of process, effective January 1, 1969.

The 1991 amendment, effective June 14, 1991, redesignated former Paragraphs (1) and (2) as Subsections A and B; substituted "immediately" for "forthwith" at the beginning of Subsection A; deleted former Subsection B which read "Any magistrate who violates this section is guilty of a petty misdemeanor and shall be removed from office"; and made a related stylistic change.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 51 C.J.S. Justices of the Peace §§ 43, 60.

35-4-2. Civil actions; exemptions.

A. Exemptions of personal property provided in Sections 24-5-1 through 24-5-13 New Mexico Statutes Annotated, 1953 Compilation, apply to all executions in civil actions in the magistrate court, and to attachment, garnishment, replevin and forcible entry or detainer. The person entitled to the exemption or his agent or attorney shall claim the exemption by filing as a part of the action pending in the magistrate court a list of the particular property claimed to be exempt and a statement of the grounds for the exemption. The list may be filed at any time before sale of the property or before money garnished is paid to the plaintiff.

B. Upon the filing of a list of claimed exemptions, the magistrate shall notify the plaintiff in the action that claim of exemption has been made for the property specified in the list, and notify both parties of a time set for hearing on the claim of exemption. At the

time set for hearing, the magistrate shall receive evidence, determine the issues and enter judgment on the claim of exemption.

C. If judgment on the claim of exemption is rendered after expiration of the time for appeal on the main issue in the action, either party aggrieved by the judgment on the claim of exemption may appeal from that judgment to the district court in the same manner as other appeals from final judgments of the magistrate court are taken. If judgment on the claim of exemption is rendered before judgment on the main issue in the cause, the judgment on the claim of exemption shall be deemed interlocutory and included within any appeal taken on the main issue in the action.

History: 1953 Comp., § 36-4-12, enacted by Laws 1968, ch. 62, § 66.

ANNOTATIONS

Compiler's notes. — Sections 24-5-1 to 24-5-8, 1953 Comp., are presently compiled as 42-10-1 to 42-10-7 NMSA 1978. Laws 1971, ch. 215, § 10, repealed 24-5-9 to 24-5-13, 1953 Comp., relating to exemption of fire equipment, excepting taxes and purchase price from exemption and providing for appraisal of exempt property.

Cross references. — For appeals from magistrate court, *see* 35-13-1 NMSA 1978.

For rules governing garnishment and writs of execution in the district, magistrate, and metropolitan courts, *see* Rules 1-065.1, 1-065.2, 2-801 et seq., and 3-801 NMRA et seq., respectively.

For procedures governing appeals to the district court from magistrate courts in trial de novo cases, *see* Rule 1-072 NMRA.

For exemptions, *see* Rule 2-803 NMRA.

For form for claim of exemptions on executions, *see* Rule 4-803 NMRA.

For form for order on claim of exemption and order to pay in execution proceedings, *see* Rule 4-804 NMRA.

For form for application for writ of garnishment and affidavit, *see* Rule 4-805 NMRA.

For form for notice of right to claim exemptions from execution, *see* Rule 4-808A NMRA.

For form for claim of exemption from garnishment, *see* Rule 4-809 NMRA.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Proceeds of life insurance left with insurer after maturity of policy as subject to claims of creditors of beneficiary, 164 A.L.R. 914.

Exemptions of proceeds as available to assignee of insurance policy, 1 A.L.R.2d 1031.

Right with respect to exempt proceeds of life insurance of one whose funds have been wrongfully used to pay premiums, 24 A.L.R.2d 672.

Retirement or pension proceeds or annuity payments under group insurance as subject to attachment or garnishment, 28 A.L.R.2d 1213.

Endowment policy as life insurance within exemption law, 30 A.L.R.2d 751.

Exemption of motor vehicle from seizure for debt, 37 A.L.R.2d 714.

Wife as head of family within property exemption provision, 67 A.L.R.2d 779.

51 C.J.S. Justices of the Peace §§ 11, 27, 77, 78, 153.

35-4-3. Civil actions; distribution of supplies.

The administrative office of the courts shall:

A. prescribe by regulation the form, size and content of civil dockets and other administrative forms for use in civil actions in the magistrate court; and

B. have all forms prescribed by law or by regulation of the administrative office for use in civil actions reproduced and distribute them to each magistrate court.

History: 1953 Comp., § 36-5-4, enacted by Laws 1968, ch. 62, § 71; 1991, ch. 82, § 4.

ANNOTATIONS

Repeals. — Laws 1968, ch. 62, § 171, repealed former 36-5-4, 1953 Comp., relating to time for appearance after service of process, effective January 1, 1969.

The 1991 amendment, effective June 14, 1991, redesignated former Paragraphs (1) and (2) of Subsection A as Subsections A and B; inserted "administrative" in Subsection A; deleted former Subsection B which made it a misdemeanor to print or reproduce or have unauthorized possession of blank forms of the administrative office; and made a related stylistic change.

ARTICLE 5
Magistrate Court; Criminal Actions

35-5-1. Criminal actions; arrest followed by complaint.

Whenever a peace officer makes an arrest without warrant for a misdemeanor within magistrate trial jurisdiction, he shall take the arrested person to the nearest available magistrate court without unnecessary delay. In such cases, a complaint shall be filed forthwith by the peace officer and a copy given to the defendant at or before the time he is brought before the magistrate.

History: 1953 Comp., § 36-6-5, enacted by Laws 1968, ch. 62, § 76.

ANNOTATIONS

Repeals. — Laws 1968, ch. 62, § 171, repealed former 36-6-5, 1953 Comp., relating to unsatisfied executions and renewal, effective January 1, 1969.

Cross references. — For arrest followed by complaint, *see* Rule 6-201D NMRA.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 21 Am. Jur. 2d Criminal Law § 408, 421.

Peace officer's delay in making arrest without a warrant for misdemeanor or breach of peace, 58 A.L.R.2d 1056.

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.

Accused's right to assistance of counsel at or prior to arraignment, 5 A.L.R.3d 1269.

Admissibility of confession as affected by delay in arraignment of prisoner, 28 A.L.R.4th 1121.

35-5-2. Criminal actions; preparation of forms.

The complaint, summons, warrant, final orders on complaints, receipt for fines and costs and receipt for bail in criminal actions in the magistrate court shall be executed on forms provided by the court administrator and approved by the supreme court.

History: 1953 Comp., § 36-7-6.1, enacted by Laws 1973, ch. 204, § 1.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 21 Am. Jur. 2d Criminal Law §§ 408 to 410, 421, 422.

22 C.J.S. Criminal Law §§ 321, 324 to 336, 340.

35-5-3. Criminal actions; disposition of complaint, summons and warrant.

In every criminal action in the magistrate court, the original criminal complaint shall be served on the defendant along with the original summons or warrant in the action. Following service of a warrant, the arresting officer shall complete the returns on the other copies of the warrant. The magistrate shall file and retain the second copy of the complaint and summons or warrant with the completed return.

History: 1953 Comp., § 36-7-7, enacted by Laws 1968, ch. 62, § 87; 1991, ch. 82, § 5.

ANNOTATIONS

Repeals. — Laws 1968, ch. 62, § 171, repealed former 36-7-7, 1953 Comp., relating to defendant not summoned and notice by publication, effective January 1, 1969.

Cross references. — For filing of original papers with court, *see* Rule 6-201 NMRA.

The 1991 amendment, effective June 14, 1991, in the third sentence, inserted "and retained", deleted "with his standardized monthly report, and the third copy shall be retained by the magistrate" at the end, and made a minor stylistic change.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 21 Am. Jur. 2d Criminal Law §§ 408 to 410, 421, 422.

Private citizen's right to institute mandamus to compel a magistrate or other appropriate official to issue a warrant, or the like, for an arrest, 49 A.L.R.2d 1285.

22 C.J.S. Criminal Law §§ 321, 324 to 336, 340.

35-5-4. Criminal actions; disposition of final order and fine receipt.

A. Upon disposition of any criminal action in the magistrate court, the magistrate shall complete the final order on criminal complaint and deliver the original to the defendant. Whenever fines or costs are received by a magistrate in any criminal action, he shall complete the criminal fine receipt, require the defendant's acknowledgment of receipt of the form on all copies and deliver the original to the defendant. The magistrate shall file and retain the second copies of the final order and fine receipt.

B. If any person refuses to accept the original fine receipt, the magistrate shall note the circumstances of the refusal on the form.

History: 1953 Comp., § 36-7-8, enacted by Laws 1968, ch. 62, § 88; 1991, ch. 82, § 6.

ANNOTATIONS

Repeals. — Laws 1968, ch. 62, § 171, repealed former 36-7-8, 1953 Comp., relating to time of notice, effective January 1, 1969.

The 1991 amendment, effective June 14, 1991, in the third sentence in Subsection A, inserted "and retained" and deleted "with his standardized monthly report, and the third copies shall be retained by the magistrate" and, in Subsection B, deleted "and mail the original to the administrative office of the courts for filing with other records of the case" at the end.

35-5-5. Criminal actions; disposition of bail receipt.

Whenever bail is received in any criminal action, the magistrate or person designated by the magistrate to accept bail shall complete the criminal bail receipt, require the defendant's acknowledgment of receipt of the form on all copies and deliver the original to the defendant. The magistrate shall file the second copy of the bail receipt with his standardized monthly report, and the third copy shall be retained by the magistrate.

History: 1953 Comp., § 36-7-9, enacted by Laws 1968, ch. 62, § 89.

ANNOTATIONS

Repeals. — Laws 1968, ch. 62, § 171, repealed former 36-7-9, 1953 Comp., relating to default judgment, effective January 1, 1969.

35-5-6. Criminal actions; distributions of supplies.

The administrative office of the courts shall:

A. prescribe by regulation the form, size and content of criminal dockets and other forms for use in criminal actions in magistrate courts; and

B. have all forms prescribed by law or by regulation of the administrative office for use in criminal actions reproduced and distribute them to each magistrate court, obtaining receipts for them by serial number.

History: 1953 Comp., § 36-7-10, enacted by Laws 1968, ch. 62, § 90; 1973, ch. 204, § 2.

ANNOTATIONS

Repeals. — Laws 1968, ch. 62, § 171, repealed former 36-7-10, 1953 Comp., relating to dissolution of attachment, effective January 1, 1969.

35-5-7. Repealed.

ANNOTATIONS

Repeals. — Laws 1991, ch. 82, § 15 repealed 35-5-7 NMSA 1978, as enacted by Laws 1968, ch. 62, § 91, relating to unauthorized forms or misuse of forms in criminal actions, effective June 14, 1991. For provisions of former section, *see* the 1990 NMSA 1978 on *NMOneSource.com*.

35-5-8. Magistrate court; indigency standard; fee schedule; reimbursement.

A. The magistrate court shall use a standard adopted by the public defender department to determine indigency of persons accused of crimes carrying a possible jail sentence.

B. The magistrate court shall use a fee schedule adopted by the public defender department when appointing attorneys to represent defendants who are financially unable to obtain private counsel.

C. The magistrate court shall order reimbursement from each person who has received or desires to receive legal representation or another benefit under the Public Defender Act [Chapter 31, Article 15 NMSA 1978] after a determination is made that he was not indigent according to the standard for indigency adopted by the public defender department.

D. Any amounts recovered pursuant to this section shall be paid to the state treasurer for credit to the general fund.

History: 1978 Comp., § 35-5-8, enacted by Laws 1987, ch. 20, § 5.

ANNOTATIONS

Cross references. — For defense of indigents, *see* 31-16-1 to 31-16-10 NMSA 1978.

ARTICLE 6
Magistrate Court; Fees and Costs

35-6-1. Magistrate costs; schedule; definition of "convicted".

A. Magistrate judges, including metropolitan court judges, shall assess and collect and shall not waive, defer or suspend the following costs:

docket fee, criminal actions under Section 29-5-1 NMSA 1978 $ 1.00;

docket fee, to be collected prior to docketing any other criminal action, except as provided in Subsection B of Section 35-6-3 NMSA 1978 20.00.
Proceeds from this docket fee shall be transferred to the administrative office of the courts for deposit in the court facilities fund;

docket fee, twenty dollars ($20.00) of which shall be deposited in the court automation fund and fifteen dollars ($15.00) of which shall be deposited in the civil legal services fund, to be collected prior to docketing any civil action, except as provided in Subsection A of Section 35-6-3 NMSA 1978 72.00;

jury fee, to be collected from the party demanding trial by jury in any civil action at the time the demand is filed or made 25.00;

copying fee, for making and certifying copies of any records in the court, for each page copied by photographic process 0.50.
Proceeds from this copying fee shall be transferred to the administrative office of the courts for deposit in the court facilities fund; and

copying fee, for computer-generated or electronically transferred copies, per page 1.00.
Proceeds from this copying fee shall be transferred to the administrative office of the courts for deposit in the court automation fund.

Except as otherwise specifically provided by law, docket fees shall be paid into the court facilities fund.

B. Except as otherwise provided by law, no other costs or fees shall be charged or collected in the magistrate or metropolitan court.

C. The magistrate or metropolitan court may grant free process to any party in any civil proceeding or special statutory proceeding upon a proper showing of indigency. The magistrate or metropolitan court may deny free process if it finds that the complaint on its face does not state a cause of action.

D. As used in this subsection, "convicted" means the defendant has been found guilty of a criminal charge by the magistrate or metropolitan judge, either after trial, a plea of guilty or a plea of nolo contendere. Magistrate judges, including metropolitan court judges, shall assess and collect and shall not waive, defer or suspend the following costs:

(1) corrections fee, to be collected upon conviction from persons convicted of violating any provision of the Motor Vehicle Code [66-1-1 NMSA 1978] involving the operation of a motor vehicle, convicted of a crime constituting a misdemeanor or a petty misdemeanor or convicted of violating any ordinance that may be enforced by the imposition of a term of imprisonment as follows:

in a county with a metropolitan court $10.00;

in a county without a metropolitan court 20.00;

(2) court automation fee, to be collected upon conviction from persons convicted of violating any provision of the Motor Vehicle Code involving the operation of a motor vehicle, convicted of a crime constituting a misdemeanor or a petty misdemeanor or convicted of violating any ordinance that may be enforced by the imposition of a term of imprisonment 10.00;

(3) traffic safety fee, to be collected upon conviction from persons convicted of violating any provision of the Motor Vehicle Code involving the operation of a motor vehicle 3.00;

(4) judicial education fee, to be collected upon conviction from persons convicted of operating a motor vehicle in violation of the Motor Vehicle Code, convicted of a crime constituting a misdemeanor or a petty misdemeanor or convicted of violating any ordinance punishable by a term of imprisonment 3.00;

(5) jury and witness fee, to be collected upon conviction from persons convicted of operating a motor vehicle in violation of the Motor Vehicle Code, convicted of a crime constituting a misdemeanor or a petty misdemeanor or convicted of violating any ordinance punishable by a term of imprisonment 5.00;

(6) brain injury services fee, to be collected upon conviction from persons convicted of violating any provision of the Motor Vehicle Code involving the operation of a motor vehicle
5.00;
and

(7) court facilities fee, to be collected upon conviction from persons convicted of violating any provision of the Motor Vehicle Code involving the operation of a motor vehicle, convicted of a crime constituting a misdemeanor or a petty misdemeanor or convicted of violating any ordinance that may be enforced by the imposition of a term of imprisonment as follows:

in a county with a metropolitan court 24.00;

in any other county 10.00.

E. Metropolitan court judges shall assess and collect and shall not waive, defer or suspend as costs a mediation fee not to exceed five dollars ($5.00) for the docketing of small claims and criminal actions specified by metropolitan court rule. Proceeds of the mediation fee shall be deposited into the metropolitan court mediation fund.

History: 1953 Comp., § 36-8-1, enacted by Laws 1968, ch. 62, § 92; 1977, ch. 164, § 1; 1983, ch. 134, § 2; 1984, ch. 118, § 1; 1986, ch. 16, § 2; 1987, ch. 32, § 1; 1987, ch. 251, § 2; 1988, ch. 121, § 2; 1989, ch. 245, § 2; 1990, ch. 57, § 4; 1991, ch. 82, § 7; 1992, ch. 118, § 17; 1993, ch. 273, § 3; 1996, ch. 41, § 5; 1997, ch. 242, § 3; 1997, ch.

247, § 1; 1998 (1st S.S.), ch. 6, § 3; 2000, ch. 5, § 6; 2001, ch. 277, § 2; 2001, ch. 279, § 2; 2003, ch. 424, § 2; 2009, ch. 245, § 2; 2011, ch. 173, § 2.

ANNOTATIONS

Repeals. — Laws 1968, ch. 62, § 171, repealed former 36-8-1, 1953 Comp., relating to exemption laws, filing, content, time, effective January 1, 1969.

Cross references. — For reports of fines, forfeitures and costs, *see* 35-7-3 NMSA 1978.

For remittances of fines, forfeitures and costs collected, *see* 35-7-4 NMSA 1978.

For penalty for demanding illegal fees, *see* 30-23-1 NMSA 1978.

For crime laboratory fee, *see* 31-12-7 NMSA 1978.

For crime laboratory fund, *see* 31-12-9 NMSA 1978.

For domestic violence offender treatment fund, *see* 31-12-12 NMSA 1978.

For metropolitan court judges, *see* 34-8A-4 NMSA 1978.

For court automation fund, *see* 34-9-10 NMSA 1978.

For civil legal services fund, *see* 34-14-1 NMSA 1978.

For jury and witness fee fund, *see* 34-9-11 NMSA 1978.

For judicial education fund, *see* 34-13-1 NMSA 1978.

For payment of costs of court ordered screening and treatment program, *see* 66-8-102 NMSA 1978.

For fees for caring for animals impounded in irrigation district, *see* 77-14-20 NMSA 1978.

For costs in civil actions, *see* Rule 2-701 NMRA.

The 2011 amendment, effective July 1, 2011, made a stylistic change.

The 2009 amendment, effective July 1, 2009, in Subsection A, changed the docket fee to be deposited in the court automation fund from $10 to $20; and added Paragraph (5) of Subsection D.

The 2003 amendment, effective July 1, 2003, in Paragraph D(1), deleted "in any county without a metropolitan court" following "corrections fee" in the introductory paragraph and added the two fee alternatives at the end.

The 2001 amendment, effective July 1, 2001, in the third paragraph of Subsection A inserted "and fifteen dollars ($15.00) of which shall be deposited in the civil legal services fund", and substituted "62.00" for "47.00".

The 2000 amendment, effective February 15, 2000, near the beginning of Subsection D(1), inserted "in any county without a metropolitan court", inserted "constituting a" in Subsection D(4), and substituted "24.00" for "14.00" in Subsection D(6).

The 1998 amendment, effective July 1, 1998, in Subsection A, inserted the sentences at the end of the first docket fee entry and at the end of the first copying fee entry, and substituted "court facilities fund" for "general fund" at the end of the second copying fee entry; in Subsection D, substituted "assess and collect and shall not waive, defer or suspend" for "collect" near the end of the introductory paragraph, added Paragraph D(6), and made minor related stylistic changes; and substituted "assess and collect and shall not waive, defer or suspend" for "collect" in the first sentence of Subsection E.

The 1997 amendment, effective July 1, 1997, added Paragraph D(5).

The 1996 amendment, effective May 15, 1996, in Subsection A, substituted "Magistrate judges" for "Each Magistrate" at the beginning of the subsection, inserted "ten dollars ($10.00) of which shall be deposited in the court automation fund" in the third paragraph, substituted "47.00" for "37.00" at the end of the third paragraph, and added the fourth paragraph; in Subsection D, substituted "Magistrate judges" for "Each Magistrate" in the second sentence, and inserted the closing phrase beginning with "convicted of" and substituted "10.00" for "3.00" in Paragraph (2).

The 1993 amendment, effective July 1, 1993, added Paragraph (4) to Subsection D, making a related grammatical change.

The 1992 amendment, effective July 1, 1992, substituted "37.00" for "25.00" near the middle of Subsection A, added the last sentence of that subsection, and substituted "that" for "which" near the end of Subsection D(1).

The 1991 amendment, effective June 14, 1991, in Subsection A, added the copying fee for computer-generated or electronically-transferred copies and the provision for disposition of the proceeds from the fee.

The 1990 amendment, effective July 1, 1990, substituted " 'convicted' " for " 'conviction' " in the section heading, added Paragraph (3) of Subsection D, and made a minor stylistic change.

The 1989 amendment, effective July 1, 1989, in Subsection E deleted "Subject to approval of the supreme court" at the beginning of the first sentence, substituted "five dollars ($5.00)" for "three dollars ($3.00)" near the middle of that sentence, and added the second sentence.

The 1988 amendment, effective March 8, 1988, substituted "by law" for "in Subsections D and E of this section" in Subsection B, inserted "or metropolitan" following "magistrate" in Subsections B and C, added the first sentence of the introductory paragraph of Subsection D, designated the former undesignated second paragraph of Subsection D as Subsection D(1), and added Subsection D(2).

The 1987 amendment, effective June 19, 1987, added all of the language beginning with "convicted of a crime" and preceding the fee amount in Subsection D.

Subsection B construed. — Subsection B should be construed to read that no other costs or fees shall be charged or collected in the magistrate court except those established by former Section 35-8-6 NMSA 1978, as amended. 1975 Op. Att'y Gen. No. 75-11 (statute repealed).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 47 Am. Jur. 2d Justices of the Peace § 2 et seq.

Abatement of state criminal case by accused's death pending appeal of conviction - modern cases, 80 A.L.R.4th 189.

51 C.J.S. Justices of the Peace §§ 15 to 17.

35-6-2. Magistrate costs; posting of schedule.

The administrative office of the courts shall furnish, and each magistrate shall keep posted at all times in a conspicuous place in his courtroom, a plain and legible:

A. statement of costs required by law to be collected by magistrate courts; and

B. a notice in letters at least two inches high reading as follows: "NOTICE TO PUBLIC -- The magistrate court is required to forthwith give official receipts itemizing all money paid to the court. Secure your receipt when payment is made."

History: 1953 Comp., § 36-8-2, enacted by Laws 1968, ch. 62, § 93; 1991, ch. 82, § 8.

ANNOTATIONS

Repeals. — Laws 1968, ch. 62, § 171, repealed former 36-8-2, 1953 Comp., relating to issuing notice of hearing on exemption claim, effective January 1, 1969.

The 1991 amendment, effective June 14, 1991, redesignated former Paragraphs (1) and (2) as Subsections A and B; deleted former Subsection B which read "Any magistrate who violates this section is guilty of a petty misdemeanor and shall be removed from office"; and made a related stylistic change.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 47 Am. Jur. 2d Justices of the Peace § 2 et seq.

24B C.J.S. Criminal Law §§ 125(3), 421, 1622, 1702, 1770(2); 51 C.J.S. Justices of the Peace §§ 16, 27, 43.

35-6-3. Magistrate costs; advance payment.

A. Except for parties granted free process because of indigency, any party filing any civil action or requesting services from the magistrate court shall pay in advance the costs required by law to be collected by magistrates.

B. Any person filing a complaint in a criminal action in the magistrate court shall pay in advance the costs required by law to be collected by magistrates, except that no costs shall be collected from a person filing a complaint in a criminal action alleging domestic violence, a campus security officer, a municipal police officer, an Indian tribal or pueblo law enforcement officer or from a full-time, salaried county or state law enforcement officer filing the complaint.

History: 1953 Comp., § 36-8-3, enacted by Laws, 1968, ch. 62, § 94; 1969, ch. 198, § 2; 1977, ch. 164, § 2; 1991, ch. 82, § 9; 1995, ch. 176, § 2.

ANNOTATIONS

Repeals. — Laws 1968, ch. 62, § 171, repealed former 36-8-3, 1953 Comp., relating to service of notice, effective January 1, 1969.

Cross references. — For costs of criminal processes associated with domestic abuse offenses, *see* 40-13-3.1 NMSA 1978.

The 1995 amendment, effective July 1, 1995, inserted "a person filing a complaint in a criminal action alleging domestic violence" in Subsection B.

The 1991 amendment, effective June 14, 1991, deleted former Subsection C which read "Except for persons granted free process because of indigency, any magistrate who dockets any civil or criminal action or performs any service without collecting the required costs in advance is guilty of a petty misdemeanor and shall be removed from office."

Scope of department of agriculture exemption. — No docket fee is to be paid by the state department of agriculture for filing complaints in magistrate courts provided the

complaint is filed by a full-time, salaried, county or state law enforcement officer, a campus security officer, an Indian tribal or Pueblo law enforcement officer or a municipal police officer. 1969 Op. Att'y Gen. No. 69-66.

Full-time, salaried county sanitarian is a law enforcement officer as that term is used here. 1970 Op. Att'y Gen. No. 70-68.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 47 Am. Jur. 2d Justices of the Peace § 43 et seq.

Power of justice to require payment in advance of fees for trying case, 117 A.L.R. 1393.

24 C.J.S. Criminal Law §§ 408 to 418; 51 C.J.S. Justices of the Peace §§ 4, 16, 23, 27, 43.

35-6-4. Magistrate costs; witness fees; reimbursement.

A. If the plaintiff prevails in a civil action in the magistrate court, the amount of costs collected by the magistrate in the action shall be added to the judgment entered against the defendant. Fees actually paid by the prevailing party in a civil action in the magistrate court for service of the complaint and summons and for service of subpoenas shall be taxed against the losing party. Witness fees as provided by law for proceedings in the district courts shall be taxed against the losing party in the action, subject to the limitations of the Rules of Civil Procedure for the Magistrate Courts.

B. As used in this subsection, "convicted" means the defendant has been found guilty of a criminal charge by the magistrate, either after trial, a plea of guilty or a plea of nolo contendere. If the defendant is convicted in any criminal action in the magistrate court, the magistrate shall attempt to collect from the defendant the docket fee and other fees established by law as costs in criminal actions. If the defendant chooses not to contest a penalty assessment misdemeanor pursuant to Section 66-8-116 NMSA 1978, the magistrate shall not collect the docket fee, but shall collect other costs as provided in Section 35-6-1 NMSA 1978. Any costs so collected from the defendant shall be paid by the magistrate to the administrative office of the courts, except that, if the complaining witness in the action paid such costs upon filing the complaint in the action, the magistrate shall refund the costs paid by the complaining witness.

History: 1953 Comp., § 36-8-4, enacted by Laws 1968, ch. 62, § 95; 1975, ch. 242, § 4; 1981, ch. 272, § 1; Laws 1983, ch. 134, § 3; 1988, ch. 121, § 3.

ANNOTATIONS

Repeals. — Laws 1968, ch. 62, § 171, repealed former 36-8-4, 1953 Comp., relating to controverting exemption affidavit, stay of execution or process, effective January 1, 1969.

Cross references. — For per diem and mileage of witnesses, *see* 38-6-4 NMSA 1978.

For Rules of Civil Procedure for the Magistrate Courts, *see* Rule 2-101 NMRA et seq.

The 1988 amendment, effective March 8, 1988, in Subsection B, added the present first sentence and rewrote the former first and second sentences so as to constitute the present second and third sentences.

Effect of suspension or waiver of costs. — Since it is mandatory to assess and attempt to collect costs in criminal trials, the suspension or waiver of those costs must be regarded as an act of misfeasance on the part of the magistrate. 1969 Op. Att'y Gen. No. 69-84.

Coverage of magistrate's bond. — The proper assessment and collection of costs are among those duties the performance of which is intended to be insured by the magistrate's bond. 1969 Op. Att'y Gen. No. 69-84.

Magistrates are personally liable for trial costs, where the assessment of such costs is required by statute. 1969 Op. Att'y Gen. No. 69-84.

Magistrates are without authority to suspend costs after a conviction, regardless of the court's action in suspending or deferring sentence. 1969 Op. Att'y Gen. No. 69-84.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 47 Am. Jur. 2d Justices of the Peace § 2 et seq.

51 C.J.S. Justices of the Peace §§ 16, 17, 93, 125(10), 125(13).

35-6-5. Magistrate court warrant enforcement fund; fee; administration; use of money in fund.

A. There is created in the state treasury the "magistrate court warrant enforcement fund" to be administered by the administrative office of the courts.

B. Upon issuance of a bench warrant, a magistrate court shall assess a fee of one hundred dollars ($100) against the individual whose arrest is commanded by the bench warrant. Money collected pursuant to the fee assessment authorized by this subsection shall be deposited in the magistrate court warrant enforcement fund.

C. All balances in the magistrate court warrant enforcement fund are appropriated to the administrative office of the courts for the primary purpose of employing personnel and purchasing equipment and services to aid in the collection of fines, fees or costs owed to the magistrate courts. After satisfaction of the primary purpose, any money remaining in the fund may, to the extent deemed necessary by the director of the administrative office of the courts, be used for the secondary purpose of partially

reimbursing law enforcement agencies for the expense of serving bench warrants issued by the magistrate courts, pursuant to an intergovernmental agreement entered into between the law enforcement agency and the administrative office of the courts.

D. Payments from the magistrate court warrant enforcement fund shall be made upon warrants drawn by the secretary of finance and administration pursuant to vouchers issued and signed by the director of the administrative office of the courts.

E. Any balance remaining in the magistrate court warrant enforcement fund at the end of a fiscal year shall not revert to the state general fund.

History: 1978 Comp., § 35-6-5, enacted by Laws 1993, ch. 261, § 7.

35-6-6. Collection of fines, fees or costs.

A judgment and sentence issued by a magistrate court that includes an assessment of fines, fees or costs shall constitute a money judgment that may be enforced in the same manner as a civil judgment in the district court. The money judgment may be assigned by the court to a public or private agency or business for collection purposes, pursuant to the terms and conditions of a written agreement entered into by the court and the agency or business.

History: 1978 Comp., § 35-6-6, enacted by Laws 1993, ch. 261, § 8.

35-6-7. Magistrate court; drug court fee; monthly remittances.

A. A magistrate court that has an adult drug court program may assess and collect from participants a "drug court fee" of fifty dollars ($50.00) a month. Program fee requirements may be satisfied by community service at the federal minimum wage. Proceeds from the drug court fee shall be deposited in the magistrate drug court fund.

B. Each magistrate court shall pay monthly to the administrative office of the courts, not later than the date established by rule of the director of the administrative office, the amount collected pursuant to Subsection A of this section, which shall be credited to the magistrate drug court fund. The administrative office shall return to each magistrate a written receipt itemizing all money received and credited to the fund.

History: Laws 2003, ch. 240, § 3.

ANNOTATIONS

Effective dates. — Laws 2003, ch. 240, § 4 made Laws 2003, ch. 240, § 3 effective July 1, 2003.

35-6-8. Magistrate court mediation fund created; administration; distribution.

A. The "magistrate court mediation fund" is created in the state treasury. The fund shall be administered by the administrative office of the courts.

B. All balances in the magistrate court mediation fund are subject to appropriation for payment to magistrate courts for the purpose of funding and administering voluntary mediation programs. The mediation programs shall be established by supreme court rule for the efficient disposition of civil complaints.

C. Payments from the magistrate court mediation fund shall be made upon vouchers signed by the director of the administrative office of the courts upon warrants drawn by the secretary of finance and administration.

D. Any balance remaining in the magistrate court mediation fund at the end of a fiscal year shall not revert to the general fund.

History: Laws 2003, ch. 407, § 1.

ANNOTATIONS

Effective dates. — Laws 2003, ch. 407, § 3 made Laws 2003, ch. 407, § 1 effective July 1, 2003.

35-6-9. Magistrate costs; mediation fee.

A. Magistrate judges shall collect as costs a mediation fee not to exceed five dollars ($5.00) for the docketing of civil actions, except as provided in Subsection A of Section 35-6-3 NMSA 1978.

B. The magistrate court shall pay to the administrative office of the courts the costs collected pursuant to this section in accordance with the procedures provided for in Section 35-7-4 NMSA 1978. The amount of costs collected shall be credited to the magistrate court mediation fund.

History: Laws 2003, ch. 407, § 2.

ANNOTATIONS

Effective dates. — Laws 2003, ch. 407, § 3 made Laws 2003, ch. 407, § 2 effective July 1, 2003.

35-6-10. Magistrate court; electronic services fee.

A magistrate court may charge and collect from persons who use electronic services an electronic services fee in an amount established by supreme court rule. Proceeds from the electronic services fee shall be remitted to the administrative office of the courts for deposit in the electronic services fund.

History: Laws 2009, ch. 112, § 6.

ANNOTATIONS

Effective dates. — Laws 2009, ch. 112 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 19, 2009, 90 days after the adjournment of the legislature.

ARTICLE 7
Magistrate Court; Magistrate Administration

35-7-1. Magistrate courts; supervision by the supreme court.

The magistrate courts shall operate under the direction and control of the supreme court. The director of the administrative office of the courts shall provide administrative support to the magistrate courts, under the supervision of the supreme court.

History: 1978 Comp., § 35-7-1, enacted by Laws 1997, ch. 53, § 1.

ANNOTATIONS

Repeals and reenactments. — Laws 1997, ch. 53, § 1 repealed 35-7-1 NMSA 1978, as enacted by Laws 1968, ch. 62, § 96, and enacted a new section, effective July 1, 1997.

Cross references. — For administrative office of the courts, *see* 34-9-1 to 34-9-10 NMSA 1978.

35-7-2. Repealed.

ANNOTATIONS

Repeals. — Laws 1997, ch. 53, § 2 repealed 35-7-2, as enacted by Laws 1968, ch. 62, § 97, relating to magistrate administration and suspension of certificate, effective July 1, 1997. For provisions of former section, *see* the 1996 NMSA 1978 on *NMOneSource.com*.

35-7-3. Magistrate administration; standardized monthly reports.

Each magistrate court shall file a standardized monthly report with the administrative office of the courts not later than the date each month established by regulation of the director of the administrative office. The report shall itemize all fines, forfeitures and costs imposed, received and disbursed by the magistrate during the previous month or indicate that none were imposed, received or disbursed. One copy of the report shall be retained by the magistrate. The administrative office shall audit and adjust each report in accordance with the facts and file the reports in its office for a period of five years.

History: 1953 Comp., § 36-9-3, enacted by Laws 1968, ch. 62, § 98; 1979, ch. 160, § 1; 1991, ch. 82, § 10.

ANNOTATIONS

Repeals. — Laws 1968, ch. 62, § 171, repealed former 36-9-3, 1953 Comp., relating to survival of right to bring action, effective January 1, 1969.

The 1991 amendment, effective June 14, 1991, deleted former Subsection B which read "Any magistrate who fails to comply with the provisions of this section is guilty of a petty misdemeanor and shall be removed from office" and made a related stylistic change.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 51 C.J.S. Justices of the Peace § 9.

35-7-4. Magistrate administration; monthly remittances.

Each magistrate court shall pay to the administrative office of the courts, not later than the date each month established by regulation of the director of the administrative office, the amount of all fines, forfeitures and costs collected by the court during the previous month, except for amounts disbursed in accordance with law. The administrative office shall return to each magistrate court a written receipt itemizing all money received. The administrative office shall deposit the amount of all fines and forfeitures with the state treasurer for credit to the current school fund. The administrative office shall deposit the amount of all costs, except all costs collected pursuant to Subsections D and E of Section 35-6-1 NMSA 1978, for credit to the general fund. The amount of all costs collected pursuant to Subsections D and E of Section 35-6-1 NMSA 1978 shall be credited as follows:

A. the amount of all costs collected pursuant to Paragraph (1) of Subsection D of Section 35-6-1 NMSA 1978 for credit to the local government corrections fund;

B. the amount of all costs collected pursuant to Paragraph (2) of Subsection D of Section 35-6-1 NMSA 1978 for credit to the court automation fund;

C. the amount of all costs collected pursuant to Paragraph (3) of Subsection D of Section 35-6-1 NMSA 1978 for credit to the traffic safety education and enforcement fund;

D. the amount of all costs collected pursuant to Paragraph (4) of Subsection D of Section 35-6-1 NMSA 1978 for credit to the judicial education fund;

E. the amount of all costs collected pursuant to Paragraph (5) of Subsection D of Section 35-6-1 NMSA 1978 for credit to the jury and witness fee fund;

F. the amount of all costs collected pursuant to Paragraph (6) of Subsection D of Section 35-6-1 NMSA 1978 for credit to the brain injury services fund;

G. the amount of all costs collected pursuant to Paragraph (7) of Subsection D of Section 35-6-1 NMSA 1978 for credit to the court facilities fund; and

H. the amount of all costs collected pursuant to Subsection E of Section 35-6-1 NMSA 1978 for credit to the metropolitan court mediation fund.

History: 1953 Comp., § 36-9-4, enacted by Laws 1968, ch. 62, § 99; 1979, ch. 160, § 2; 1983, ch. 134, § 4; 1986, ch. 16, § 3; 1990, ch. 57, § 5; 1991, ch. 82, § 11; 1993, ch. 273, § 4; 2009, ch. 245, § 3.

ANNOTATIONS

Repeals. — Laws 1968, ch. 62, § 171, repealed former 36-9-4, 1953 Comp., relating to notice to quit, effective January 1, 1969.

Cross references. — For state general fund, *see* 6-4-2 NMSA 1978.

For current school fund, *see* 22-8-32 NMSA 1978.

For petty misdemeanors, *see* 30-1-6 NMSA 1978.

For local government corrections fund, *see* 33-3-25 NMSA 1978.

For metropolitan court mediation fund, *see* 34-8A-10 NMSA 1978.

For administrative office of the courts, *see* 34-9-1 NMSA 1978.

For court automation fund, *see* 34-9-10 NMSA 1978.

For judicial education fund, *see* 34-13-1 NMSA 1978.

For traffic safety education and enforcement fund, *see* 66-7-512 NMSA 1978.

The 2009 amendment, effective July 1, 2009, added Subsections E through G.

The 1993 amendment, effective July 1, 1993, added present Subsection D, redesignating former Subsection D as present Subsection E and making a related grammatical change.

The 1991 amendment, effective June 14, 1991, redesignated former Paragraphs (1) to (4) of Subsection A as Subsections A to D; deleted former Subsection B which read "Any magistrate who fails to comply with the provisions of this section is guilty of a petty misdemeanor and shall be removed from office"; and made a related stylistic change.

The 1990 amendment, effective July 1, 1990, in Subsection A, deleted "the amount of all costs, except all costs collected pursuant to Subsections D and E of Section 35-6-1 NMSA 1978, for credit to the state general fund; the amount of all costs collected pursuant to Subsection D of Section 35-6-1 NMSA 1978 for credit to the local government corrections fund; and the amount of all costs collected pursuant to Subsection E of that section for credit to the metropolitan court mediation fund" at the end of the third sentence and added the fourth and final sentences and Paragraphs (1) to (4).

County retention of penalty assessments. — A county did not have the power to alter the comprehensive funding and allocation system of the magistrate court and, therefore, did not have the authority to retain collected penalty assessments for violations of its traffic ordinances. *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. — 51 C.J.S. Justices of the Peace § 9.

35-7-5. Magistrate administration; public money; commingling; trust fund bank account.

A. All money collected by a magistrate court in connection with civil and criminal actions is public money of the state held in trust by the magistrate until received by the administrative office of the courts or disbursed in accordance with law. Public money shall not be commingled with personal funds of the magistrate or any other funds.

B. Every magistrate court shall open a special trust fund checking account in a convenient bank insured by the federal deposit insurance corporation, shall deposit all public money into the account within four banking days after its receipt and shall make all remittances to the administrative office, as required by law, by check on this account.

C. Any magistrate who violates any provision of this section, or who is the maker of a check representing an amount required by law to be remitted to the administrative office, which check is not honored by the bank upon which it is drawn when first presented for payment for reason of lack of funds, is guilty of a misdemeanor and shall be punished by a fine of not more than one thousand dollars ($1,000), or by imprisonment for not more than one year, or both. Any conviction under this section

operates as an automatic removal from office and forfeiture of the right to hold any public office for a period of four years from the date of conviction.

History: 1953 Comp., § 36-9-5, enacted by Laws 1968, ch. 62, § 100; 1979, ch. 160, § 3.

ANNOTATIONS

Repeals. — Laws 1968, ch. 62, § 171, repealed former 36-9-5, 1953 Comp., relating to oath to complaint, effective January 1, 1969.

Cross references. — For audit of accounts, *see* 12-6-1 NMSA 1978.

County retention of penalty assessments. — A county did not have the power to alter the comprehensive funding and allocation system of the magistrate court and, therefore, did not have the authority to retain collected penalty assessments for violations of its traffic ordinances. *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. — 51 C.J.S. Justices of the Peace § 9.

35-7-6. Repealed.

History: 1953 Comp., § 36-9-6, enacted by Laws 1968, ch. 62, § 101; repealed by Laws 2019, ch. 74, § 10.

ANNOTATIONS

Repeals. — Laws 2019, ch. 74, § 10 repealed 35-7-6 NMSA 1978, as enacted by Laws 1968, ch. 62, § 101, relating to magistrate administration, current statutes, effective May 3, 2019. For provisions of former section, see the 2018 NMSA 1978 on NMOneSource.com.

35-7-7. Magistrate administration; conflict of interest.

No magistrate shall, directly or indirectly:

A. buy or be interested in buying any evidence of indebtedness or cause of action for the purpose of bringing any action before any court;

B. either before or after suit, lend or advance or procure to be lent or advanced any money or other valuable thing to any person in consideration of, or as a reward or inducement for, placing any cause of action for prosecution or collection in any court;

C. operate or be interested in a collection agency;

D. with or without suit, collect, attempt to collect or become interested in collecting any claim where he received any commission, percentage, fee or charge other than those allowed by law;

E. institute or influence any other person to institute any suit in any magistrate court;

F. publish advertising relating to his office;

G. operate or be interested in a bail or appeal bond business; or

H. serve as surety on any bond posted in any court.

History: 1953 Comp., § 36-9-7, enacted by Laws 1968, ch. 62, § 102; 1991, ch. 82, § 12.

ANNOTATIONS

Compiler's notes. — Laws 1968, ch. 62, § 171, repealed former 36-9-7, 1953 Comp., relating to time for appearance and pleading, effective January 1, 1977.

Cross references. — For disqualification of magistrate, *see* N.M. Const., art. VI, § 18, 35-3-7, 35-3-8 NMSA 1978, Rule 2-106 NMRA and Rule 6-106 NMRA.

The 1991 amendment, effective June 14, 1991, redesignated former Paragraphs (1) to (8) of Subsection A as Subsections A to H; deleted former Subsection B which read "Any magistrate violating any provision of this section is guilty of a petty misdemeanor and shall be removed from office"; and made a related stylistic change.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 51 C.J.S. Justices of the Peace § 9.

35-7-8. Repealed.

ANNOTATIONS

Repeals. — Laws 1991, ch. 82, § 15 repealed 35-7-8 NMSA 1978, as enacted by Laws 1968, ch. 62, § 103, relating to official bond for magistrate and administration, effective June 14, 1991. For provisions of former section, *see* the 1990 NMSA 1978 on *NMOneSource.com*.

35-7-9. Magistrate administration; court facilities.

The administrative office of the courts shall provide facilities for each magistrate court. Counties and municipalities shall cooperate and assist wherever possible.

History: 1953 Comp., § 36-9-9, enacted by Laws 1968, ch. 62, § 104.

ANNOTATIONS

Repeals. — Laws 1968, ch. 62, § 171, repealed former 36-9-9, 1953 Comp., relating to finding defendant guilty, judgment and warrant of removal, effective January 1, 1969.

35-7-10. Magistrate administration; clerical assistants.

Within appropriations and budgetary limitations, each magistrate, or the presiding magistrate of a multi-magistrate court, may select, and the administrative office of the courts may employ clerical assistants for magistrates.

History: 1953 Comp., § 36-9-10, enacted by Laws 1968, ch. 62, § 105; 1972, ch. 45, § 5; 1979, ch. 160, § 4.

ANNOTATIONS

Repeals. — Laws 1968, ch. 62, § 171, repealed former 36-9-10, 1953 Comp., relating to titles and boundaries not to be determined, effective January 1, 1969.

35-7-11. Magistrate administration; finances.

Except as otherwise specifically provided by law, all salaries and expenses of the magistrate court shall be paid by the state treasurer upon warrants of the secretary of finance and administration, supported by vouchers approved by the director of the administrative office of the courts and in accordance with budgets approved by the state budget division of the department of finance and administration.

History: 1953 Comp., § 36-9-11, enacted by Laws 1968, ch. 62, § 106; 1977, ch. 247, § 149.

ANNOTATIONS

Repeals. — Laws 1968, ch. 62, § 171, repealed former 36-9-11, 1953 Comp., relating to joinder of actions, setoff, effective January 1, 1969.

35-7-12. Magistrate administration; rules of pleading, practice and procedure.

A. The supreme court of New Mexico shall, by rules promulgated by it from time to time, regulate pleading, practice and procedure in judicial proceedings in the magistrate court for the purpose of simplifying and promoting the speedy determination of litigation upon its merits. Such rules shall not abridge, enlarge or modify the substantive rights of any litigant.

B. The supreme court shall cause all rules to be printed and distributed to all magistrates and to all members of the bar and no rule shall become effective until thirty days after it has been so printed and distributed.

History: 1953 Comp., § 36-9-12, enacted by Laws 1968, ch. 62, § 107.

ANNOTATIONS

Repeals. — Laws 1968, ch. 62, § 171, repealed former 36-9-12, 1953 Comp., relating to warrant for removal executed in daytime, effective January 1, 1969.

Cross references. — For Rules of Civil Procedure for the Magistrate Courts, *see* Rule 2-101 NMRA et seq.

For Rules of Criminal Procedure for the Magistrate Courts, *see* Rule 6-101 NMRA et seq.

35-7-13. Repealed.

History: Laws 2010, ch. 7, § 1; repealed by Laws 2010, ch. 7, § 4.

ANNOTATIONS

Repeals. — Laws 2010, ch. 7, § 4 repealed 35-7-13 NMSA 1978, as enacted by Laws 2010, ch. 7, § 1, relating to the magistrate courts operation fund, effective July 1, 2014. For provision of former section, *see* the 2013 NMSA 1978 on *NMOneSource.com*.

ARTICLE 8
Magistrate Court; Juries and Jurors

35-8-1. Magistrate jury; right to trial by jury.

Except for contempt of the magistrate court, penalty assessment misdemeanors or offenses that do not prescribe incarceration as a penalty, the right to trial by jury exists in all actions in the magistrate court that are within magistrate trial jurisdiction.

History: 1953 Comp., § 36-10-1, enacted by Laws 1968, ch. 62, § 108; 1975, ch. 242, § 5; 2009, ch. 133, § 1.

ANNOTATIONS

Repeals. — Laws 1968, ch. 62, § 171, repealed former 36-10-1, 1953 Comp., relating to right of action of replevin, effective January 1, 1969.

Cross references. — For right to jury trial, *see* N.M. Const., art. II, § 12.

For rules thereto, *see* Rules 2-602 to 2-605, Rules 6-505, 6-602, 6-603, 6-605, 6-609 and 6-610 NMRA.

The 2009 amendment, effective April 7, 2009, added "penalty assessment misdemeanors or offenses that do not prescribe incarceration as a penalty".

Am. Jur. 2d, A.L.R. and C.J.S. references. — 47 Am. Jur. 2d Jury § 24 et seq.

Constitutional provision prohibiting local or special legislation as applied to statutes relating to juries, 155 A.L.R. 789.

Mandamus or prohibition as remedy to enforce right to jury trial, 41 A.L.R.2d 780.

Indoctrination by court of persons summoned for jury service, 89 A.L.R.2d 197.

Right to trial by jury in criminal prosecution for driving while intoxicated or similar offense, 16 A.L.R.3d 1373.

Issues in garnishment as triable to court or to jury, 19 A.L.R.3d 1393.

50 C.J.S. Juries § 12; 51 C.J.S. Justices of the Peace § 99.

35-8-2. Magistrate jury; demand.

A. Either party to an action in the magistrate court within magistrate trial jurisdiction may demand trial by jury. Demand shall be made in the manner specified by the Rules of Civil Procedure or the Rules of Criminal Procedure for the Magistrate Courts.

B. In civil actions, the magistrate shall collect from the party demanding trial by jury the jury fee established by law, but no jury fee shall be assessed against the state. In criminal actions, the magistrate shall not collect a jury fee. If demand is not made as provided in this section, or if the jury fee in any civil action is not paid at the time demand is made, trial by jury is deemed waived.

History: 1953 Comp., § 36-10-2, enacted by Laws 1968, ch. 62, § 109; 1973, ch. 29, § 1; 1975, ch. 242, § 6.

ANNOTATIONS

Repeals. — Laws 1968, ch. 62, § 171, repealed former 36-10-2, 1953 Comp., relating to commencement of replevin by writ, effective January 1, 1969.

Cross references. — For Rules of Civil Procedure for the Magistrate Courts, *see* Rule 2-101 NMRA et seq.

For Rules of Criminal Procedure for the Magistrate Courts, *see* Rule 6-101 NMRA et seq.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 47 Am. Jur. 2d Jury § 24 et seq.

Rule or statute requiring opposing party's consent to withdrawal of demand for jury trial, 90 A.L.R.2d 1162.

50 C.J.S. Juries § 12; 51 C.J.S. Justices of the Peace § 99, 110, 235.

35-8-3. Magistrate jury; selecting and empaneling a jury.

A. A jury in the magistrate court consists of six jurors with the same qualifications as jurors in the district court.

B. The magistrate shall direct the clerk of the district court to draw and assign to that court the number of qualified jurors the magistrate deems necessary for one or more jury panels. Upon the receipt of the direction and in the manner prescribed for the selection of district court jurors, the clerk of the district court shall draw at random from the master jury wheel the number of qualified jurors specified. The names of jurors drawn for magistrate jury service shall be forwarded to the magistrate who shall maintain a record of the names and addresses of the prospective jurors.

C. Whenever a jury is required, the magistrate shall order the sheriff or a responsible person to summon the persons named on the jury list to appear at the time and place set for trial of the action. If a jury is left incomplete because of failure of jurors to appear, excused absences or disqualifications, the magistrate shall direct the sheriff to summon others to complete the jury.

D. No person may be required to remain as a member of a magistrate jury panel for longer than six months following qualification as a juror in any year unless the panel is engaged in a trial.

History: 1953 Comp., § 36-10-3, enacted by Laws 1974, ch. 37, § 1.

ANNOTATIONS

Repeals and reenactments. — Laws 1968, ch. 62, § 171, repealed former 36-10-3, 1953 Comp., relating to affidavit for replevin, effective January 1, 1969, and Laws 1968, ch. 62, § 110, enacted a new 36-10-3, 1953 Comp., relating to magistrate jury and empaneling. Laws 1974, ch. 37, § 1, repealed 36-10-3, 1953 Comp., relating to magistrate jury and empaneling, and enacted a new section.

Cross references. — For jury consisting of six persons, *see* N.M. Const., art. II, § 12.

For juries and jurors generally, *see* 38-5-1 to 38-5-19 NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 47 Am. Jur. 2d Jury § 100 et seq.

Right of consent to trial of criminal case before less than twelve jurors; and effect of consent upon jurisdiction of court to proceed with less than twelve, 70 A.L.R. 279, 105 A.L.R. 1114.

Irregularity in drawing names for a jury panel as ground of complaint by defendant in criminal prosecution, 92 A.L.R. 1109.

Validity of selection of jury in absence of defendant from courtroom, 33 A.L.R.4th 429.

51 C.J.S. Justices of the Peace § 99.

35-8-4. Magistrate jury; trial.

Juries in the magistrate court shall hear the evidence in the action which shall be delivered in public in its presence. After hearing the evidence and being duly charged by the magistrate, the members of the jury shall be kept together until:

A. in civil actions, five members shall agree upon a verdict;

B. in criminal actions, the members unanimously agree upon a verdict; or

C. the members are discharged by the magistrate. The magistrate shall give judgment upon any verdict.

History: 1953 Comp., § 36-10-4, enacted by Laws 1968, ch. 62, § 111; 1975, ch. 242, § 7.

ANNOTATIONS

Repeals. — Laws 1968, ch. 62, § 171, repealed former 36-10-4, 1953 Comp., relating to contents of writ of replevin and obtaining of property, effective January 1, 1969.

Magistrate court has no jurisdiction to set aside a jury verdict. *Jaramillo v. O'Toole*, 1982-NMSC-011, 97 N.M. 345, 639 P.2d 1199.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 75B Am. Jur. 2d Trial § 1493 et seq.

Separation of jury in criminal case, 21 A.L.R.2d 1088.

Separation or dispersal of jury in civil case after submission, 77 A.L.R.2d 1086.

24B C.J.S. Criminal Law §§ 1382 to 1385; 51 C.J.S. Justices of the Peace § 99.

35-8-5. Magistrate jury; discharge upon failure to agree.

Whenever the magistrate is satisfied that a jury cannot agree upon a verdict in the manner provided by law after a reasonable time, or, in the exercise of his discretion the magistrate determines that some necessity exists for discharge of the jury, he may discharge it and summon a new jury unless the parties agree that the magistrate may render judgment.

History: 1953 Comp., § 36-10-5, enacted by Laws 1968, ch. 62, § 112; 1975, ch. 242, § 8.

ANNOTATIONS

Repeals. — Laws 1968, ch. 62, § 171, repealed former 36-10-5, 1953 Comp., relating to bonds of plaintiff and defendant, effective January 1, 1969.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 75B Am. Jur. 2d Trial §§ 1713, 1743, 1744.

Separation of jury in criminal case, 21 A.L.R.2d 1088.

Separation or dispersal of jury in civil case after submission, 77 A.L.R.2d 1086.

Time jury must be kept together on disagreement in criminal case, 93 A.L.R.2d 627.

Separation of jury in criminal case after submission of cause-modern cases, 72 A.L.R.3d 248.

24 C.J.S. Criminal Law §§ 1388 to 1390; 51 C.J.S. Justices of the Peace § 99.

35-8-6. Repealed.

ANNOTATIONS

Repeals. — Laws 1987, ch. 279, § 1 repealed 35-8-6 NMSA 1978, as enacted by Laws 1968, ch. 62, § 113, relating to juror fees in magistrate court, effective June 19, 1987.

35-8-7. Magistrate civil jury fees.

A. In each action in the magistrate court in which a jury is summoned, persons summoned for jury service and jurors shall be compensated for their time in attendance and service at the highest prevailing minimum-wage rate.

B. Those persons shall also be reimbursed for travel in excess of forty miles round trip from their place of actual residence to the court, when their attendance is ordered, at the rate allowed public officers and employees per mile of necessary travel.

C. Those costs shall be charged against the party requesting the jury in a civil action, though no costs shall be charged against the state. All costs collected by the magistrate under this section shall be remitted to the administrative office of the courts, and all jurors shall be paid by the state treasurer in the same manner as other magistrate court expenses are paid."

History: 1978 Comp., § 35-8-6, enacted by Laws 1991, ch. 82, § 13; 2017, ch. 61, § 1.

ANNOTATIONS

Compiler's notes. — Laws 1991, ch. 82, § 13 enacted this section as 35-8-6 NMSA 1978, but, since that code number had already been assigned, this section was compiled as 35-8-7 NMSA 1978.

The 2017 amendment, effective June 16, 2017, reduced mileage reimbursement for certain jurors, allowing a juror to be reimbursed for mileage only if the juror travels more than forty miles round trip from the juror's residence to the courthouse; in Subsection A, after "their time in", deleted "travel"; and in Subsection B, after "reimbursed for travel", added "in excess of forty miles round trip", after "residence to the court", added "when their attendance is ordered", after "necessary travel", deleted "pursuant to the Per Diem and Mileage Act if", and deleted Paragraphs B(1) and B(2).

ARTICLE 9
Magistrate Court; Attachment

35-9-1. Attachment; affidavit and bond; grounds.

A. An attachment may be issued in a civil action in the magistrate court only upon the filing of a civil complaint, accompanied by:

(1) a bond to the defendant in double the sum claimed in the complaint, with sufficient sureties, conditioned that the plaintiff will diligently prosecute the action to final judgment without delay and will pay the defendant all damages and costs sustained from the attachment if no judgment is recovered against the defendant in the action; and

(2) an affidavit of the plaintiff that one or more of the following facts exists:

(a) the defendant is not a resident of this state;

(b) the defendant has concealed himself or left his usual place of abode in this state so that ordinary civil process cannot be served on him;

(c) the defendant is about to remove his personal property out of this state or has concealed or disposed of his property fraudulently so as to defraud, hinder or delay his creditors;

(d) the defendant is about to convey or assign, conceal or dispose of his property fraudulently so as to hinder or delay his creditors;

(e) the debt that is the subject of the action was contracted out of this state, and the defendant has secretly removed his property into this state with the intent to hinder, delay or defraud his creditors;

(f) the defendant is a corporation whose principal office or place of business is out of the state, and the corporation has not designated an agent in this state for service of process against the corporation;

(g) the defendant fraudulently contracted the debt or incurred the obligation that is the subject of the action or obtained credit from the plaintiff by false pretenses; or

(h) the debt that is the subject of the action is for labor, for any services rendered by the plaintiff or his assignor at the instance of the defendant or was contracted for the necessities of life.

B. An attachment may issue upon a demand not yet due in any case where an attachment is authorized, in the same manner as upon demands already due.

History: 1953 Comp., § 36-11-1, enacted by Laws 1968, ch. 62, § 114; 1991, ch. 82, § 14.

ANNOTATIONS

Repeals. — Laws 1968, ch. 62, § 171, repealed former 36-11-1, 1953 Comp., relating to forms for various actions, effective January 1, 1969.

Cross references. — For jurisdictional amount of magistrate court, *see* 35-3-3 NMSA 1978.

The 1991 amendment, effective June 14, 1991, in Paragraph (2) of Subsection A, substituted "concealed or disposed of his property fraudulently" for "fraudulently concealed or disposed of his property" in Subparagraph (c) and substituted "convey or assign, conceal or dispose of his property fraudulently" for "fraudulently convey or assign, conceal or dispose of his property" in Subparagraph (d); deleted former Subsection C which read "Any magistrate who issues an attachment in any civil action except in compliance with the provisions of this section is guilty of a petty misdemeanor and shall be removed from office"; and made minor stylistic changes throughout the section.

Law reviews. — For article, "Attachment in New Mexico - Part I," see 1 Nat. Resources J. 303 (1961).

For article, "Attachment in New Mexico - Part II," see 2 Nat. Resources J. 75 (1962).

For comment, "Attachment and Garnishment - Prejudgment Garnishment - Study and Proposed Revisions," see 9 Nat. Resources J. 119 (1969).

For comment, "Wage Garnishment in New Mexico - Existing Debtor Protections under Federal and State Law and Further Proposals," see 1 N.M. L. Rev. 388 (1971).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 6 Am. Jur. 2d Attachment and Garnishment §§ 218, 254 to 287, 518 to 522; 47 Am. Jur. 2d Justices of the Peace § 29 et seq.

Intent to defraud, sufficiency of affidavit respecting as against objection that it is a mere legal conclusion, 8 A.L.R.2d 578.

Residence of partnership for purposes of statutes authorizing attachment on ground of nonresidence, 9 A.L.R.2d 471.

What is an action for debt within attachment statute, 12 A.L.R.2d 787.

Foreign attachment or garnishment as available in action by nonresidents against nonresident or foreign corporation upon a foreign cause of action, 14 A.L.R.2d 420.

What constitutes a fraudulently contracted debt or fraudulently incurred liability or obligation within purview of statute authorizing attachment on such grounds, 39 A.L.R.2d 1265.

Amendment of attachment bond, 47 A.L.R.2d 971.

What sort of claim, obligation or liability is within contemplation of statute providing for attachment before debt or liability is due, 58 A.L.R.2d 1451.

Interest of spouse in estate by entireties as subject to attachment lien in satisfaction of his or her individual debt, 75 A.L.R.2d 1172.

Family allowance from decedent's estate as exempt from attachment, garnishment, execution, and foreclosure, 27 A.L.R.3d 863.

Potential liability of insurer under liability policy as subject of attachment, 33 A.L.R.3d 992.

Client's funds in hands of his attorney as subject of attachment or garnishment by client's creditor, 35 A.L.R.3d 1094.

Liability of creditor for excessive attachment or garnishment, 56 A.L.R.3d 493.

What constitutes malice sufficient to justify an award of punitive damages in action for wrongful attachment or garnishment, 61 A.L.R.3d 984.

Recovery of damages for mental anguish, distress, suffering or the like, in action for wrongful attachment, garnishment, sequestration or execution, 83 A.L.R.3d 598.

Joint bank account as subject to attachment, garnishment, or execution by creditor of one joint depositor, 86 A.L.R.5th 527.

7 C.J.S. Attachment § 23 et seq.; 51 C.J.S. Justices of the Peace § 77 (1 to 5).

35-9-2. Attachment; execution.

A. The attachment shall order the sheriff or a full-time, salaried deputy sheriff to attach personal property of the defendant within the magistrate district having a value sufficient to satisfy the amount claimed in the complaint in the action, safely to keep the property to satisfy any judgment that might be recovered in the action and to make return of the attachment to the magistrate at the time specified therein not less than five days nor more than fifteen days from the date of issuance.

B. The sheriff or deputy shall comply with the order and:

(1) immediately make an inventory of the property seized; and

(2) serve on the defendant personally, or, if the defendant cannot be found, leave at the defendant's residence, or if the defendant has no residence, leave with the person in whose possession the property is found, the civil complaint and summons and form for answer to civil complaint, along with a copy of the attachment and his inventory.

C. No property attached by the sheriff or deputy shall be removed by him if the person in possession of, or claiming, the property gives him a bond to the plaintiff in double the sum claimed in the complaint in the action, or in double the value of the property attached, whichever is less, conditioned that such property will be produced to satisfy any execution that might be issued upon any judgment which might be obtained by the plaintiff in the action.

History: 1953 Comp., § 36-11-2, enacted by Laws 1968, ch. 62, § 115.

ANNOTATIONS

Cross references. — For applicability of personal property exemptions under 42-10-1 to 42-10-7 NMSA 1978, *see* 35-4-2 NMSA 1978.

For exemption of retirement funds and benefits for public officers and employees, *see* 10-11-135 NMSA 1978.

For exemption of welfare benefits, *see* 27-2-21 NMSA 1978.

For exemption of interest and benefits of state police pension fund, *see* 29-4-10 NMSA 1978.

For executions not to go against lands, *see* 39-4-2 NMSA 1978.

For exemption of unemployment compensation benefits, *see* 51-1-37 NMSA 1978.

For exemption of workers' compensation benefits, *see* 52-1-52 NMSA 1978.

For exemption of occupational disease benefits, *see* 52-3-37 NMSA 1978.

For exemption of minimum membership holdings in cooperative associations, *see* 53-4-28 NMSA 1978.

For exemption of assets of insurance companies undergoing delinquency proceedings, *see* 59A-41-23 NMSA 1978.

For exemption of fraternal benefit societies payments, *see* 59A-44-18 NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 6 Am. Jur. 2d Attachment and Garnishment §§ 288 to 329.

Inclusion or exclusion of first and last days in computing the time for performance of an act or event which must take place a certain number of days before a known future date, 98 A.L.R.2d 1331.

7 C.J.S. Attachment § 170 et seq. 51 C.J.S. Justices of the Peace § 77 (6), (7).

35-9-3. Attachment; hearing; judgment.

A. If the defendant was personally served as provided in Section 35-9-2B NMSA 1978, or if he appears as provided in the civil summons, the magistrate shall proceed to hear and determine the action on its merits as in other civil actions.

B. If the defendant was not personally served as provided in Section 35-9-2B NMSA 1978, but his personal property was seized under the attachment and he does not appear as provided in the summons, the magistrate shall order the sheriff to notify the defendant by newspaper publication or by posting in at least three of the most public places in the county that his property has been attached and that, unless he appears before the magistrate at a time and place mentioned in the notice, not less than twenty days or more than ninety days from the date of the notice, judgment will be rendered against him and his property sold to pay the debt. If the defendant appears when notified as provided in this subsection, the magistrate shall proceed to hear and determine the action on its merits as in other civil actions. If the defendant fails to appear when notified as provided in this subsection, the magistrate shall enter a default judgment against him in the action.

History: 1953 Comp., § 36-11-3, enacted by Laws 1968, ch. 62, § 116.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — What constitutes "appearance" under Rule 55 (b)(2) of Federal Rules of Civil Procedure, providing that if party against whom default judgment is sought has "appeared" in action, that party must be served with notice of application for judgment, 139 A.L.R. Fed. 603.

35-9-4. Attachment; dissolution.

A. An attachment may be dissolved at any time before final judgment if the defendant appears and pleads to the action and posts bond to the plaintiff in double the sum claimed in the complaint, or double the value of the property attached, whichever is less, with sufficient sureties, conditioned that the property will be available to satisfy any judgment which might be entered against him in the action.

B. When an attachment is dissolved, all proceedings touching the property attached are vacated, and the action shall proceed as if the attachment had not been issued.

History: 1953 Comp., § 36-11-4, enacted by Laws 1968, ch. 62, § 117.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 6 Am. Jur. 2d Attachment and Garnishment §§ 523 to 557.

7 C.J.S. Attachment § 247 et seq. 51 C.J.S. Justices of the Peace § 77 (15), (16).

35-9-5. Attachment; suit on bond.

The bond given by the plaintiff or other person in an attachment action in the magistrate court may be sued upon in the name of the state by any party injured, and shall proceed as in other civil actions.

History: 1953 Comp., § 36-11-5, enacted by Laws 1968, ch. 62, § 118.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 6 Am. Jur. 2d Attachment and Garnishment §§ 546 to 549.

Recovery of value of use of property wrongfully attached, 45 A.L.R.2d 1221.

Right to recover attorney's fees for wrongful attachment, 65 A.L.R.2d 1426.

51 C.J.S. Justices of the Peace § 77 (19), (20).

35-9-6. Attachment; special provisions.

All laws and procedures governing magistrate courts apply to attachment actions in the magistrate court except as otherwise provided by law.

History: 1953 Comp., § 36-11-6, enacted by Laws 1968, ch. 62, § 119.

35-9-7. Attachment; form of bond.

Attachment bonds in civil actions in the magistrate court shall be in substantially the following form:

"STATE OF NEW MEXICO

_____ MAGISTRATE DISTRICT, DIVISION _____

(Name), Plaintiff)
)
v.) CIVIL DOCKET NO. _____
)
(Name), Defendant)

ATTACHMENT BOND

We bind ourselves, our heirs, executors and administrators to the state of New Mexico in the sum of _____ ($ _____) on condition that the plaintiff will diligently prosecute this action to final judgment without delay, will pay to the defendant all money found due to him in the action, and will pay all damages that may accrue to the defendant by reason of the attachment, upon completion of which this obligation is void.

_____
Plaintiff (Principal)

_____
Surety

_____
Surety

Approved _____, 19 ___

_____
Magistrate"

History: 1953 Comp., § 36-11-7, enacted by Laws 1968, ch. 62, § 120.

35-9-8. Attachment; form of writ.

Writs of attachment in civil actions in the magistrate court shall be in substantially the following form:

"STATE OF NEW MEXICO

_____ MAGISTRATE DISTRICT, DIVISION _____

(Name), Plaintiff)
)
v.) CIVIL DOCKET NO. _____
)
(Name), Defendant)

WRIT OF ATTACHMENT

THE STATE OF NEW MEXICO
TO: The sheriff or a full-time, salaried deputy sheriff:

You are ordered to attach personal property of the defendant in this action having a value sufficient to satisfy the sum of _____ ($ _____), with interest and costs, wherever the same may be found in the county, safely to keep the property to satisfy any judgment that might be recovered by the plaintiff in this action, and to make return of this writ to me on _____, 19 ___, presenting with your return a copy of your inventory of property attached.

Dated _____, 19 ___ _____
Magistrate"

History: 1953 Comp., § 36-11-8, enacted by Laws 1968, ch. 62, § 121.

ARTICLE 10
Magistrate Court; Forcible Entry or Unlawful Detainer

35-10-1. Forcible entry or detainer; grounds.

A. A civil action for forcible entry or unlawful detainer of real property is commenced by the filing of a civil complaint alleging that one or more of the following facts exists:

(1) the defendant entered and occupied the lands and tenements of another against the will or consent of the owner and refused to vacate the premises after notice by the owner or his agent or attorney;

(2) the defendant holds over after the termination, or contrary to the terms of, his lease or tenancy;

(3) the defendant fails to pay rent at the time stipulated for payment;

(4) the defendant continues in possession after a sale by foreclosure of mortgage or on execution unless the defendant claims by a title paramount to the mortgage under which the sale was made or by title derived from the purchaser at the sale; or

(5) the defendant is a tenant from month to month or a tenant at will and continues in possession of the premises after thirty days' written notice by the owner or his agent or attorney to vacate.

B. The district court of the county in which the real property is located has concurrent original jurisdiction in civil actions for forcible entry or unlawful detainer when the rent contracted for amounts to fifty dollars ($50.00) or more a month or when the reasonable rental value of the premises is fifty dollars ($50.00) or more a month.

History: 1953 Comp., § 36-12-1, enacted by Laws 1968, ch. 62, § 122.

ANNOTATIONS

Repeals. — Laws 1968, ch. 62, § 171, repealed former 36-12-1, 1953 Comp., relating to jurisdiction in criminal cases, effective January 1, 1969.

Cross references. — For jurisdictional amount of magistrate court, *see* 35-3-3 NMSA 1978.

Action for unlawful detainer is purely statutory and is restricted in its operation to the situations specified in the statute. *Ott v. Keller*, 1976-NMCA-124, 90 N.M. 1, 558 P.2d 613.

Unlawful detainer is a summary proceeding; an equitable owner under a real estate contract cannot be ousted from possession by a summary proceeding, and the question of title to land cannot be determined in an unlawful detainer action. *Ott v. Keller*, 1976-NMCA-124, 90 N.M. 1, 558 P.2d 613.

Effect of action. — An action for forcible entry or unlawful detainer settles nothing between the parties, does not determine title to the property or the absolute right to possession, and only places the parties in their original positions prior to the forcible entry or unlawful detainer. Ott v. Keller, 1976-NMCA-124, 90 N.M. 1, 558 P.2d 613.

Sufficiency of complaint. — Substantial compliance with statutory form of complaint in a forcible entry and detainer action was sufficient. *Heron v. Kelly*, 1944-NMSC-007, 48 N.M. 123, 146 P.2d 851; *Puckett v. Walz*, 1937-NMSC-055, 41 N.M. 612, 72 P.2d 623; *Springer v. Wasson*, 1917-NMSC-065, 23 N.M. 277, 167 P. 712 (decided under former law).

Sufficiency of proof. — It is unnecessary to prove a forcible entry, proof of unlawful detainer being sufficient. *Springer v. Wasson*, 1919-NMSC-038, 25 N.M. 379, 183 P. 398 (decided under former law).

Sufficiency of description of land. — In forcible entry and detainer suit, the description should be so definite and certain that the premises may be readily identified, but reasonable and not absolute certainty is all that is required. *Patten v. Balch*, 1910-NMSC-008, 15 N.M. 276, 106 P. 388; *Sanchez v. Luna*, 1857-NMSC-012, 1 N.M. 238 (decided under former law).

Affidavit of jurisdictional amount. — Before a suit in forcible entry and detainer or unlawful detainer can be instituted in the district court, an affidavit must be made showing that the reasonable rental value of the premises is $50.00 or more per month. *Kuykendall v. Ulibarri*, 1952-NMSC-007, 56 N.M. 43, 239 P.2d 731 (decided under former law).

Complaint as whole to be examined. — Where jurisdiction of the district court depends upon the amount in controversy, the complaint as a whole is to be examined to determine whether the requisite jurisdiction exists. *Kuykendall v. Ulibarri*, 1952-NMSC-007, 56 N.M. 43, 239 P.2d 731 (decided under former law).

Action by peaceable possessor. — Where one is in quiet and peaceable possession of land belonging to the United States and is ousted by an intruder, he may maintain an action of forcible entry and detainer, even though his possession and occupation was without authority of law. *Murrah v. Acrey*, 1914-NMSC-051, 19 N.M. 228, 142 P. 143 (decided under former law).

Interference with a tenant's right of ingress and egress is actionable. *Wal-Go Assocs. v. Leon*, 1981-NMSC-022, 95 N.M. 565, 624 P.2d 507.

When suit precluded by 35-10-3 NMSA 1978. — Where defendants purchased ranch four years prior and remained in possession and plaintiff does not claim any possession prior to that, has never been in possession either as owner, tenant or in any other capacity, but bases title on a disputed contract between the parties, the plaintiff's title is so directly and inextricably involved in the action for unlawful detainer that suit is precluded by 35-10-3C NMSA 1978. *Reinhart v. Lindholm*, 1972-NMSC-087, 84 N.M. 546, 505 P.2d 1222.

Enforcement of right of way not permitted either. — Action of forcible entry and detainer did not lie to enforce a right of way. *Roberts v. Trujillo*, 1884-NMSC-005, 3 N.M. (Gild.) 87, 1 P. 855 (decided under former law).

Jurisdiction on Apache reservation. — Despite the fact that the Apache reservation land upon which plaintiff's house is located was fee patent land, presumably granted under the Indian Allotment Act, and that the Mescalero tribal law makes no provision for a wrongful entry and detainer action, nevertheless the state may not assume jurisdiction

without congressional or tribal authorization. *Chino v. Chino*, 1977-NMSC-020, 90 N.M. 203, 561 P.2d 476.

Jurisdiction not ousted by raising of title. — If title to real estate was raised only indirectly, it would not oust the jurisdiction of the justice of the peace (now magistrate). *Wood Garage v. Jasper*, 1937-NMSC-019, 41 N.M. 289, 67 P.2d 1000 (decided under former law).

Effect of default on real estate sales contract. — A real estate sales contract is not a lease or tenancy since it does not involve a landlord-tenant relationship during the existence of the contract, and the contract cannot, after default, transform a vendor-vendee relationship into one of landlord-tenant despite provisions which attempt to do so; thus, an unlawful detainer action does not arise out of a vendor-vendee relationship, the vendee in possession was not a tenant in any sense of the word, his default did not make him a tenant, and consequently, the trial court lacked jurisdiction over the subject matter. *Ott v. Keller*, 1976-NMCA-124, 90 N.M. 1, 558 P.2d 613.

Proceeding inequitable. — A summary unlawful detainer proceeding was inequitable to defendant-vendees, whose counterclaim and demand for a jury were disregarded by the trial court when it terminated defendants' contract, evicted the defendants from their residence, forfeited all sums paid (approximately 25% of the purchase price) and ordered defendants to pay plaintiffs' attorney's fees and costs. *Ott v. Keller*, 1976-NMCA-124, 90 N.M. 1, 558 P.2d 613.

When right of possession arises at foreclosure sale. — The right of possession in a purchaser at a foreclosure sale arises upon the issuance to him of a commissioner's deed. *Minor v. Riebold*, 1974-NMSC-033, 86 N.M. 279, 523 P.2d 14.

Effect of foreclosure decree sale on mortgagor possession. — A mortgagor of real estate is not entitled to retain possession of property after confirmation of sale under decree of foreclosure. *Gunby v. Doughton*, 1924-NMSC-063, 30 N.M. 144, 228 P. 603 (decided under former law).

Waiver of notice to vacate. — In an action of unlawful detainer, notice to vacate may be waived by the defendant. *Board of Educ. v. Astler*, 1914-NMSC-081, 21 N.M. 1, 151 P. 462 (decided under former law).

Law reviews. — For survey, "The Uniform Owner-Resident Relations Act," see 6 N.M. L. Rev. 293 (1976).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 35 Am. Jur. 2d Forcible Entry and Detainer §§ 1 to 27.

Surrender and acceptance of term as affecting right to recover rent or on obligation given for rent, 18 A.L.R. 957, 58 A.L.R. 906.

Criminal offense of forcible detainer where entry was peaceable, 49 A.L.R. 597.

Dispossession without legal process by one entitled to possession of real property as ground of action, other than for recovery of possession or damage to his person, by person dispossessed, 101 A.L.R. 476.

Forcible entry and detainer or unlawful detainer as applicable in case of "lease" of minerals or oil and gas, 107 A.L.R. 661.

Deed or lease of real property as affecting rights and remedies available against tenant at will or by sufferance, 151 A.L.R. 370.

Remedy of tenant against stranger wrongfully interfering with his possession, 12 A.L.R.2d 1192.

Implied duty of lessee to remove his property, debris, buildings, improvements and the like, from leased premises at expiration of lease, 23 A.L.R.2d 655.

Validity and construction of lease provision requiring lessee to pay liquidated sum for failure to vacate premises or surrender possession at expiration of lease, 23 A.L.R.2d 1318.

Relief against forfeiture of lease for nonpayment of rent, 31 A.L.R.2d 321.

Right of landowner who has conveyed property to third person to maintain forcible detainer or similar summary possessory action, 47 A.L.R.2d 1170.

Right of landlord legally entitled to possession to dispossess tenant without legal process, 6 A.L.R.3d 177.

36A C.J.S. Forcible Entry and Detainer §§ 1 to 22.

35-10-2. Limitation of remedy.

The provisions of Sections 35-10-1 through 35-10-6 NMSA 1978 shall not apply to actions by a landlord arising out of a residential tenancy governed by the Uniform Owner-Resident Relations Act [47-8-1 to 47-8-52 NMSA 1978].

History: 1953 Comp., § 36-12-1.1, enacted by Laws 1975, ch. 38, § 53.

ANNOTATIONS

Cross references. — For provision of Uniform Owner-Resident Relations Act on forcible entry and detainer, *see* 47-8-49 NMSA 1978.

Law reviews. — For survey, "The Uniform Owner-Resident Relations Act," see 6 N.M.L. Rev. 293 (1976).

35-10-3. Forcible entry or detainer; special provisions.

A. Except as provided in Section 35-10-1 NMSA 1978, three days' notice in writing to quit must be given to the defendant before a civil action for forcible entry or unlawful detainer may be filed.

B. The return day of the summons in an action for forcible entry or unlawful detainer shall be not less than three, nor more than ten, days from the time of service of the civil complaint and summons on the defendant. Except by consent of the parties, no continuance shall be granted for more than ten days.

C. The questions of title or boundaries of land shall not be investigated in an action for forcible entry or unlawful detainer, but the action does not prevent a party from testing the right of property in any other manner. An action for forcible entry or unlawful detainer may not be brought in connection with any other action, nor may it be made the subject of setoff.

D. The right of a landlord in an action for forcible entry or unlawful detainer is not affected by the underleasing of his tenant.

E. When a lessee has been induced to take a lease by means of force, fraud or intimidation, he may plead a paramount title in himself, an outstanding title or the want of title in the lessor.

F. Legal representatives of a person who, if alive, might have brought an action for forcible entry or unlawful detainer may bring the action after his death.

G. All laws and procedures governing magistrate courts apply to actions for forcible entry or unlawful detainer in the magistrate court except as otherwise provided by law.

History: 1953 Comp., § 36-12-2, enacted by Laws 1968, ch. 62, § 123.

ANNOTATIONS

Repeals. — Laws 1968, ch. 62, § 171, repealed former 36-12-2, 1953 Comp., relating to disqualification of justice by interest or relationship, effective January 1, 1969.

Sufficiency of notice. — The notice to quit should be sufficiently definite to inform the tenant of the meaning of the notice, but the landlord's signature is not indispensable. *Lund v. Ozanne*, 1906-NMSC-001, 13 N.M. 293, 84 P. 710 (decided under former law).

Where sufficient. — Allegation in complaint "that on a certain day, to wit, the 30th day of September, 1949, at said county, demand in writing was duly made by plaintiff of said

defendant for, and requiring the payment, said rent then due, amounting to the said sum of $4000., or the possession of said demised property, but said defendant neglected and refused for the space of three whole days and upward, after demand so made as aforesaid, and still neglects and refuses, to pay said rent, or surrender possession of said premises," sufficiently alleged statutory notice. *Kuykendall v. Ulibarri*, 1952-NMSC-007, 56 N.M. 43, 239 P.2d 731 (decided under former law).

Defenses allowed. — This section allows any defense, whether legal or equitable, to be raised that does not try title or boundaries to the disputed property. *Wal-Go Assocs. v. Leon*, 1981-NMSC-022, 95 N.M. 565, 624 P.2d 507.

Suit precluded by Subsection C. — Where defendants purchased ranch four years prior and remained in possession and plaintiff does not claim any possession prior to that, has never been in possession either as owner, tenant or in any other capacity, but bases title on a disputed contract between the parties, the plaintiff's title is so directly and inextricably involved in the action for unlawful detainer that suit is precluded by 35-10-3C NMSA 1978. *Reinhart v. Lindholm*, 1972-NMSC-087, 84 N.M. 546, 505 P.2d 1222.

Real estate provisions not violated. — Where the title to real estate is drawn in question indirectly or incidentally, statutory and constitutional provisions are not violated. *Brown v. Bigham*, 1958-NMSC-110, 65 N.M. 45, 331 P.2d 1106 (decided under former law).

Question of title resolved previously. — Prohibition in Subsection C against investigation of questions of title in unlawful detainer actions did not mean that magistrate court and district court lacked jurisdiction to decide whether plaintiff was entitled to possession of property which he had purchased at foreclosure sale but which defendant had failed to vacate, since the only question of title, that of the validity of the order of the district court under which the deed was issued to the plaintiff, had previously been resolved against the defendant. *Minor v. Riebold*, 1974-NMSC-033, 86 N.M. 279, 523 P.2d 14.

Trial by jury. — Right to a trial by jury does not exist in an action for forcible entry and detainer in the absence of statutory authority. *Reece v. Montano*, 1943-NMSC-054, 48 N.M. 1, 144 P.2d 461 (decided under former law).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 35 Am. Jur. 2d Forcible Entry and Detainer §§ 6, 34, 35, 37, 42, 43.

Right of landlord legally entitled to possession to dispossess tenant without legal process, 6 A.L.R.3d 177.

36A C.J.S. Forcible Entry and Detainer §§ 23 to 28, 35.

35-10-4. Forcible entry or detainer; judgment.

A. If the defendant is found guilty in a civil action for forcible entry or unlawful detainer, judgment shall be entered against him:

(1) for damages; and

(2) that he be removed from the premises and the plaintiff be put in possession.

B. Execution shall include an order that the sheriff or a full-time, salaried deputy sheriff remove the defendant from the premises.

History: 1953 Comp., § 36-12-3, enacted by Laws 1968, ch. 62, § 124.

ANNOTATIONS

Repeals. — Laws 1968, ch. 62, § 171, repealed former 36-12-3, 1953 Comp., relating to form of dockets in criminal cases, effective January 1, 1969.

Cross references. — For applicability of personal property exemptions under 42-10-1 NMSA 1978, *see* 35-4-2 NMSA 1978.

For exemptions and procedure for claiming in magistrate courts, *see* Rule 2-803 NMRA.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 35 Am. Jur. 2d Forcible Entry and Detainer §§ 47 to 49.

36A C.J.S. Forcible Entry and Detainer §§ 68 to 75.

35-10-5. Forcible entry or detainer; damages on appeal.

A. If the plaintiff recovers judgment in an action for forcible entry or unlawful detainer upon appeal:

(1) to the district court, the damages assessed shall be the actual value of the rent due until entry of judgment by the magistrate court and double the value of all rent accrued thereafter until entry of judgment in the district court; and

(2) to the supreme court or court of appeals, further damages at double the value of all rent accrued from the entry of judgment in the district court until delivery of possession to him.

B. The supersedeas bond required under Section 39-3-22 NMSA 1978, shall contain a condition requiring the defendant appealing or taking a writ of error to the supreme court or court of appeals to pay all damages prescribed in this section if the judgment of the district court is affirmed by the supreme court or court of appeals, and the amount of the bond shall be sufficient to cover all such damages. The bond

operates as a supersedeas to the order of removal as well as to execution for damages and costs. Upon final disposition of the appeal from the district court in his favor, the plaintiff may sue on the supersedeas bond to recover the damages.

History: 1953 Comp., § 36-12-4, enacted by Laws 1968, ch. 62, § 125.

ANNOTATIONS

Repeals. — Laws 1968, ch. 62, § 171, repealed former 36-12-4, 1953 Comp., relating to suspension of sentence in criminal cases, effective January 1, 1969.

Cross references. — For amendments on trial de novo in district court, *see* 35-13-3 NMSA 1978.

Law reviews. — For survey, "The Uniform Owner-Resident Relations Act," see 6 N.M. L. Rev. 293 (1976).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 35 Am. Jur. 2d Forcible Entry and Detainer §§ 50, 51, 56.

36A C.J.S. Forcible Entry and Detainer §§ 58 to 61, 87 to 95.

35-10-6. Forcible entry or detainer; form of execution.

Executions in civil actions for forcible entry or detainer in the magistrate court shall be in substantially the following form:

"STATE OF NEW MEXICO

_____ MAGISTRATE DISTRICT, DIVISION _____

(Name), Plaintiff)
)
v.) CIVIL DOCKET NO. _____
)
(Name), Defendant)

EXECUTION IN FORCIBLE ENTRY OR DETAINER

THE STATE OF NEW MEXICO
To: The sheriff or a full-time, salaried deputy sheriff:

Judgment having been entered for the plaintiff in this action, you are ordered to cause the defendant forthwith to be removed from the premises at: (describe premises as in the judgment) _____ the plaintiff to have possession thereof, and that you levy against the personal property of the defendant, wherever the same may be found in the county, the sum of _____ ($ _____) and your fees hereon, and that you return this writ to me within twenty days.

Dated _____, 19 ___ _____
Magistrate"

History: 1953 Comp., § 36-12-5, enacted by Laws 1968, ch. 62, § 126.

ANNOTATIONS

Repeals. — Laws 1968, ch. 62, § 171, repealed former 36-12-5, 1953 Comp., relating to criminal dockets, effective January 1, 1969.

ARTICLE 11
Magistrate Court; Replevin

35-11-1. Replevin; grounds.

Whenever any personal property is wrongfully taken or detained, the person having a right to immediate possession may bring a civil action of replevin for recovery of the property and for damages sustained from the wrongful taking or detention. However, in replevin actions, magistrate courts shall not issue any writs of replevin or any other orders providing for a seizure of property before judgment.

History: 1953 Comp., § 36-13-1, enacted by Laws 1968, ch. 62, § 127; 1975, ch. 249, § 8.

ANNOTATIONS

Repeals. — Laws 1968, ch. 62, § 171, repealed former 36-13-1, 1953 Comp., relating to forms in criminal cases, effective January 1, 1969.

Cross references. — For jurisdictional amount of magistrate court, *see* 35-3-3 NMSA 1978.

For replevin bond where animals trespassing in irrigation district, *see* 77-14-14 NMSA 1978.

Former versions unconstitutional. — Former versions of 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*, 1972-NMSC-058, 84 N.M. 91, 500 P.2d 176.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 66 Am. Jur. 2d Replevin §§ 61 to 66.

Sufficiency of proof in replevin of defendant's possession at time of commencement of action, 2 A.L.R.2d 1043.

Right of action for conversion as affected by assertion of rights or pursuit of remedies founded on continued ownership of the property, 3 A.L.R.2d 218.

Revocation of license to cut and remove timber as affecting rights in respect of timber cut but not removed, 26 A.L.R.2d 1194.

Availability of replevin or similar possessory action to one not claiming as heir, legatee or creditor of decedent's estate, against personal representative, 42 A.L.R.2d 418.

County that may bring replevin or similar possessory action, 60 A.L.R.2d 487.

Recovery of fees as damages by successful litigant in replevin or detinue action, 60 A.L.R.2d 945.

Maintenance of replevin or similar possessory remedy by cotenant, or security transaction creditor thereof, against other cotenants, 93 A.L.R.2d 358.

Recovery of value of property in replevin or similar possessory action where defendant, at time action is brought, is no longer in possession of property, 97 A.L.R.2d 896.

Modern views as to validity, under Federal Constitution, of state prejudgment attachment, garnishment and replevin procedures, distraint procedures under landlords' or innkeepers' lien statutes, and like procedures authorizing summary seizure of property, 18 A.L.R. Fed. 223, 29 A.L.R. Fed. 418.

77 C.J.S. Replevin § 1 et seq.

35-11-2. Replevin; special provisions.

All laws and procedures governing magistrate courts apply to actions of replevin in the magistrate court except as otherwise provided by law.

History: 1953 Comp., § 36-13-4, enacted by Laws 1968, ch. 62, § 130.

ANNOTATIONS

Repeals. — Laws 1968, ch. 62, § 171, repealed former 36-13-4, 1953 Comp., relating to distribution of forms for criminal cases, effective January 1, 1969.

35-11-3. Judgment.

In any replevin action in the magistrate court, judgment may be entered for the plaintiff granting the plaintiff the property, or its fair market value in case a delivery cannot be made, and damages for the wrongful taking or detention of the property by the defendant.

History: 1953 Comp., § 36-13-7, enacted by Laws 1975, ch. 249, § 9.

ANNOTATIONS

Cross references. — For Rules of Civil Procedure for the Magistrate Courts, *see* Rule 2-101 NMRA et seq.

ARTICLE 12
Magistrate Court; Garnishment

35-12-1. Garnishment; affidavit and bond; grounds.

A. Garnishment may be issued in advance of judgment in a civil action in the magistrate court only upon the filing of a civil complaint, accompanied by:

(1) a bond to the defendant, with sufficient sureties, in double the sum claimed in the complaint, conditioned that the plaintiff will diligently prosecute the action to final judgment without delay, will pay to the defendant all money found due to him in the action and will pay the defendant and the garnishee all damages and costs sustained from the garnishment if no judgment is recovered from the defendant in the action; and

(2) an affidavit of the plaintiff that one or more of the following facts exists:

(a) the defendant has no property in his possession within this state subject to execution to satisfy the amount claimed in the complaint; or

(b) one or more of the grounds for issuance of attachment in the magistrate court, the applicable grounds to be stated in the affidavit.

B. Garnishment may be issued in aid of execution of judgment entered in a civil action in the magistrate court only upon the filing in the action of an affidavit of the plaintiff that the defendant has no property in his possession within this state subject to execution to satisfy the judgment.

C. Garnishment may be issued in the magistrate court in aid of execution of judgment, which was entered in a civil action in some other court in this state and the unpaid balance of which does not exceed the jurisdictional amount of the magistrate court, only upon the filing of a civil complaint together with a certified copy of the judgment and an affidavit of the plaintiff that the defendant has no property in his possession within this state subject to execution to satisfy the judgment.

D. The affidavit under Subsections A through C shall include a statement that the plaintiff believes that a named garnishee:

(1) is indebted to the defendant and that the debt is not exempt from garnishment; or

(2) holds personal property belonging to the defendant.

E. Any magistrate who issues a garnishment in any civil action except in compliance with the provisions of this section is guilty of a petty misdemeanor and shall be removed from office.

History: 1953 Comp., § 36-14-1, enacted by Laws 1968, ch. 62, § 133; 1969, ch. 139, § 3.

ANNOTATIONS

Repeals. — Laws 1968, ch. 62, § 171, repealed former 36-14-1, 1953 Comp., relating to initiation of peace proceedings, effective January 1, 1969.

Cross references. — For jurisdictional amount of magistrate courts, *see* 35-3-3 NMSA 1978.

For rules governing garnishment in the district, magistrate, and metropolitan courts, *see* Rules 1-065.2, 2-802, and 3-802 NMRA, respectively.

For form for claim of exemptions on executions, *see* Rule 4-803 NMRA.

For form for order on claim of exemption and order to pay in execution proceedings, *see* Rule 4-804 NMRA.

For form for application for writ of garnishment and affidavit, *see* Rule 4-805 NMRA.

For form for notice of right to claim exemptions from execution, *see* Rule 4-808A NMRA.

For form for claim of exemption from garnishment, *see* Rule 4-809 NMRA.

Due process not violated. — Due process does not require that a judgment debtor shall be given notice and an opportunity to be heard before issuance of a garnishment to satisfy the judgment, since the judgment debtor would have already been provided with notice and an opportunity to be heard in the proceeding that resulted in the judgment against him; in addition, the plaintiffs had actual notice of the garnishment, were represented by counsel, and made no attempt to claim the exemptions which they alleged were denied them without notice and a hearing. *Moya v. DeBaca*, 286 F. Supp. 606 (D.N.M. 1968), appeal dismissed, 395 U.S. 825, 89 S. Ct. 2136, 23 L. Ed. 2d 740 (1969) (decided under former law).

Reaching of exempt property. — Garnishment was not a device by which exempt property could be reached. *McFadden v. Murray*, 1927-NMSC-039, 32 N.M. 361, 257 P. 999 (decided under former law).

Garnishment proceedings are a statutory remedy which are controlled by this chapter. *Jemko, Inc. v. Liaghat*, 1987-NMCA-069, 106 N.M. 50, 738 P.2d 922.

Garnishment of husband's income for wife's debts. — Since one-half of husband's income is available to satisfy wife's separate debt, because wife has a legally recognized interest in one-half of husband's income, creditor's post-judgment garnishment of one-half of husband's income was garnishment of its judgment debtor's wife's property, not husband's, and husband lacks standing to claim denial of due process. *Cent. Adjustment Bureau, Inc. v. Thevenet*, 1984-NMSC-083, 101 N.M. 612, 686 P.2d 954).

Joinder of spouses jointly obligated on promissory note. — Where husband is judgment debtor and the judgment of the trial court in a garnishment proceeding indicates that garnishee is indebted on a promissory note to husband and wife, if the note is not a community asset, both payees under the note should be joined so as to adjudicate their respective rights under the note, but if the note is a community asset, wife would be considered a proper but not indispensable party. *Jemko, Inc. v. Liaghat*, 1987-NMCA-069, 106 N.M. 50, 738 P.2d 922.

Jurisdiction. — A court has no jurisdiction to proceed in garnishment, even though it is a court of general jurisdiction, unless such jurisdiction is expressly conferred by statute. 1969 Op. Att'y Gen. No. 69-85.

Law reviews. — For comment, "Attachment and Garnishment - Prejudgment Garnishment - Study and Proposed Revisions," see 9 Nat. Resources J. 119 (1969).

For comment, "Wage Garnishment in New Mexico - Existing Debtor Protections under Federal and State Law and Further Proposals," see 1 N.M. L. Rev. 388 (1971).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 6 Am. Jur. 2d Attachment and Garnishment §§ 218, 332 to 334, 518 to 522.

Garnishment of bank in suit against the payee or other holder of a check upon the bank, 5 A.L.R. 589.

Levy upon or garnishment of contents of safety deposit box, 11 A.L.R. 225, 19 A.L.R. 863, 39 A.L.R. 1215.

Garnishment of debt due from a foreign corporation doing business within the state to a nonresident, arising from business outside the state, 27 A.L.R. 1396.

Garnishment of fire insurer, 38 A.L.R. 1072, 53 A.L.R. 724.

Garnishment of debt as affected by previous assignment by principal defendant to a nonresident served constructively, 39 A.L.R. 1465.

Garnishment of goods covered by negotiable warehouse receipt, 40 A.L.R. 969.

Garnishment of note or check, 41 A.L.R. 1003.

Judgment as subject to garnishment in another court of the state in which it was rendered, 43 A.L.R. 190.

Conclusiveness as to merits of judgment of courts of foreign country, in garnishment proceedings, 46 A.L.R. 439, 148 A.L.R. 991.

Garnishment of carrier in respect of goods shipped, 46 A.L.R. 933.

Garnishment of deposit in branch bank, 50 A.L.R. 1340, 136 A.L.R. 471.

Priority of assignment of chose in action over subsequent garnishment as affected by lack of notice to debtor of assignment, 52 A.L.R. 109.

Foreign attachment or garnishment upon which jurisdiction is dependent resting upon property coming into hands of garnishee, or obligations having their inception, after service of the writ, 53 A.L.R. 1022.

Liability of alimony for wife's debts, 55 A.L.R. 361, 10 A.L.R. Fed. 881.

Garnishment of debt owing to two or more in an action against less than all, 57 A.L.R. 844.

Right of creditor upon dissolution of his own attachment to garnish custodian of attached property, 59 A.L.R. 526.

Garnishment against executor or administrator by creditor of heir, legatee, distributee or creditor of estate, 59 A.L.R. 768.

Accounts in one's hands for collection as subject of garnishment, 60 A.L.R. 884.

Vendee's interest under conditional sales contract as subject to garnishment, 61 A.L.R. 781.

Indebtedness to partnership as subject of attachment or garnishment by creditor of individual partner, 71 A.L.R. 77.

Garnishment of bank deposit, by depositor's creditor as entitling latter to trust or preference out of assets of insolvent garnishee bank, 83 A.L.R. 1085.

Interest of mortgagor or pledgor in property in possession of mortgagee or pledgee as subject of garnishment, 83 A.L.R. 1383.

Proceedings in one state upon debt or other claim as affected by pendency in another state of proceedings to garnish such debt or claim, 91 A.L.R. 959.

Liability for conversion of property as subject of garnishment by creditor of the owner, 91 A.L.R. 1337.

Property of incompetent or infant under guardianship as subject to execution, attachment or garnishment, 92 A.L.R. 919.

Unliquidated claims of damage in tort as subject of garnishment, 93 A.L.R. 1088.

Withdrawal value of stock in building and loan association as subject to garnishment, 94 A.L.R. 1017.

Giving of check by debtor before garnishment as affecting right to garnish debt, 94 A.L.R. 1391.

Right to garnish amount payable under contract contemplating cash transaction, 95 A.L.R. 1497.

Garnishment by landlord's creditor of tenant's obligation in respect of rent, 100 A.L.R. 307.

Garnishment of bank deposit as affected by bank's right, or waiver of right, to set-off depositor's indebtedness to it against deposit or apply deposit to such indebtedness, 106 A.L.R. 62, 110 A.L.R. 1268.

Bank deposit as subject of garnishment for debt of depositor as affected by previous acts by bank in relation to deposit, 107 A.L.R. 697.

Jurisdiction of justice's court of garnishment proceedings incidentally involving title to land, 115 A.L.R. 540.

Foreign corporation doing business within state as subject to garnishment because of indebtedness to nonresident who in turn is indebted to nonresident principal defendant, 116 A.L.R. 387.

Judgment in tort action as subject of assignment, attachment or garnishment pending appeal, 121 A.L.R. 420.

Situs of corporate stock or stock in joint stock company for purpose of garnishment, 122 A.L.R. 338.

Money or other property taken from prisoner as subject of garnishment, 154 A.L.R. 758.

Garnishment of insurance by creditor or member of class to whom payment may be made under facility of payment clause, 166 A.L.R. 10.

Garnishment of proceeds of policy containing facility of payment clause, 166 A.L.R. 54.

Effect on judgment in garnishment proceedings as between garnishee and principal defendant of disclosure or failure to disclose exemptions, 166 A.L.R. 272.

Form of judgment against garnishee respecting obligation payable in installments, 7 A.L.R.2d 680.

Residence of partnership for purposes of statutes authorizing garnishment on ground of nonresidence, 9 A.L.R.2d 471.

What is an action for "debt" within garnishment statute, 12 A.L.R.2d 787.

Foreign attachment or garnishment as available in action by nonresident against nonresident or foreign corporation upon a foreign cause of action, 14 A.L.R.2d 420.

Removability to federal court of garnishment proceedings, 22 A.L.R.2d 904.

Retirement or pension proceeds or annuity payments under group insurance as subject to attachment or garnishment, 28 A.L.R.2d 1213.

Rights of creditors of life insured as to options or other benefits available to him during his lifetime, 37 A.L.R.2d 268.

Sharecropper's share in crop wholly or partially unharvested as subject to garnishment, 82 A.L.R.2d 858.

Garnishment of salary, wages or commissions where defendant debtor is indebted to garnishee-employer, 93 A.L.R.2d 995.

Attachment and garnishment of funds in branch bank or main office of bank having branches, 12 A.L.R.3d 1088.

Issue in garnishment as triable to court or jury, 19 A.L.R.3d 1393.

Client's funds in hands of his attorney as subject of attachment or garnishment by client's creditor, 35 A.L.R.3d 1094.

Garnishment of funds payable under building and construction contract, 16 A.L.R.5th 548.

Wrongful discharge: employer's liability under state law for discharge of employee based on garnishment order against wages, 41 A.L.R.5th 31.

Joint bank account as subject to attachment, garnishment, or execution by creditor of one joint depositor, 86 A.L.R.5th 527.

Modern views as to validity, under Federal Constitution, of state prejudgment attachment, garnishment and replevin procedures, distraint procedures under landlords' or innkeepers' lien statutes, and like procedures authorizing summary seizure of property, 18 A.L.R. Fed. 223, 29 A.L.R. Fed. 418.

38 C.J.S. Garnishment §§ 71 et seq., 149 et seq.; 51 C.J.S. Justices of the Peace § 78(3).

35-12-2. Garnishment; service on garnishee.

A. The garnishment shall be served on the garnishee within the magistrate district in the manner provided by law for service of a civil summons in the magistrate court and shall order the garnishee in the action to appear before the magistrate within twenty days from the date of service to answer under oath, as of the date the garnishment was served and also as of the date of his answer:

(1) what, if anything, he is indebted to the defendant and on what account;

(2) what, if any, personal property of the defendant is in his possession; and

(3) what other persons, if any, within his knowledge are indebted to the defendant or have personal property of the defendant in their possession.

B. Return on the garnishment shall be made in the manner provided by law for return on a civil summons in the magistrate court.

History: 1953 Comp., § 36-14-2, enacted by Laws 1968, ch. 62, § 134.

ANNOTATIONS

Repeals. — Laws 1968, ch. 62, § 171, repealed former 36-14-2, 1953 Comp., relating to discharge upon giving bond, effective January 1, 1969.

Cross references. — For service of writs of garnishment on state employees, *see* 38-1-17 NMSA 1978.

For Rules of Civil Procedure for the Magistrate Courts, *see* Rule 2-101 NMRA et seq.

Perfection of the writ of garnishment occurred on the date of service of the writ, and the lack of a judgment against the garnishee had no effect, as any judgment would

relate back to the date of service of the writ. *Behles v. Ellermeyer (In re Lucas)*, 107 Bankr. 332 (Bankr. D.N.M. 1989).

Service of the writ of garnishment creates a lien on the property attached, which is a transfer within the meaning of the Federal Bankruptcy Law. *Behles v. Ellermeyer (In re Lucas)*, 107 Bankr. 332 (Bankr. D.N.M. 1989).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 6 Am. Jur. 2d Attachment and Garnishment §§ 339 to 341.

Service of process in garnishment of foreign corporation doing business in state, 113 A.L.R. 140.

Who may serve writ, summons, or notice of garnishment, 75 A.L.R.2d 1437.

United States Postal Service as subject to garnishment, 38 A.L.R. Fed. 546.

38 C.J.S. Garnishment § 174 et seq.; 51 C.J.S. Justices of the Peace § 78(4).

35-12-3. Garnishment; effect on garnishee.

A. Except as otherwise provided in this section, service of a garnishment on the garnishee has the effect of attaching all personal property, money, wages or salary in excess of the amount exempt under Section 35-12-7 NMSA 1978, rights, credits, bonds, bills, notes, drafts and other choses in action of the defendant in the garnishee's possession or under his control at the time of service of the garnishment or which may come into his possession or under his control or be owing by him between the time of service and the time of making his answer. The garnishee is not liable for any judgment in money on account of any bonds, bills, notes, drafts, checks or other choses in action unless they are converted into money after service of the garnishment or he fails to deliver them to the magistrate within the time prescribed by the magistrate.

B. Service of a garnishment issued in advance of judgment does not attach any wages or salary due the defendant from the garnishee.

C. After service of a garnishment on the garnishee, it is unlawful for the garnishee to pay to the defendant in the action any debt or to deliver to him any personal property attached by the garnishment.

History: 1953 Comp., § 36-14-3, enacted by Laws 1968, ch. 62, § 135; 1969, ch. 139, § 4.

ANNOTATIONS

Repeals. — Laws 1968, ch. 62, § 171, repealed former 36-14-3, 1953 Comp., relating to requiring bond for assault or threat in presence of justice, effective January 1, 1969.

The garnishor/judgment creditor acquires the judgment debtor's right of action against the garnishee. — The effect of garnishment is that the garnishor/judgment creditor is subrogated to the rights of the judgment debtor as against the garnishee, and the garnishor/judgment creditor cannot prevail against the garnishee unless the judgment debtor could do so. The primary test for whether garnishment is appropriate is whether the judgment debtor has a valid right of action against the garnishee for the subject sought to be garnished. *Kirby v. Guardian Life Ins. Co. of America*, 2010-NMSC-014, 148 N.M. 106, 231 P.3d 87, *rev'g Kirby v. Long-Term Disability Plan of TAD Resources Int'l, Inc.*, 2008-NMCA-154, 145 N.M. 264, 196 P. 3d 965.

To be garnishable, the subject of garnishment must be mature, and not subject to any contingency or defense. *Kirby v. Guardian Life Ins. Co. of America*, 2010-NMSC-014, 148 N.M. 106, 231 P.3d 87, *rev'g Kirby v. Long-Term Disability Plan of TAD Resources Int'l, Inc.*, 2008-NMCA-154, 145 N.M. 264, 196 P. 3d 965.

Garnishment not preempted by ERISA. — The federal Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001 to 1461 (2000), does not preempt or preclude a state law garnishment action against an ERISA insurer to enforce a judgment entered against an ERISA Plan. *Kirby v. Guardian Life Ins. Co. of America*, 2010-NMSC-014, 148 N.M. 106, 231 P.3d 87, *rev'g Kirby v. Long-Term Disability Plan of TAD Resources Int'l, Inc.*, 2008-NMCA-154, 145 N.M. 264, 196 P. 3d 965.

Garnishment against insurer of long-term disability plan to satisfy a judgment against an insured ERISA plan. — Garnishment is an appropriate mechanism to enforce a money judgment against a plan covered by the federal Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001 to 1461 (2000), where the subject of garnishment is an insurance policy obligating the insurer to pay disability benefits directly to eligible plan beneficiaries. *Kirby v. Guardian Life Ins. Co. of America*, 2010-NMSC-014, 148 N.M. 106, 231 P.3d 87, *rev'g Kirby v. Long-Term Disability Plan of TAD Resources Int'l*, Inc., 2008-NMCA-154, 145 N.M. 264, 196 P. 3d 965.

Garnishment against insurer of long-term disability plan. — Plaintiff's employer established a long-term disability plan that was funded by an insurance policy issued by the defendant; defendant acted as the claims fiduciary of the plan; defendant denied plaintiff's claim for disability benefits under the plan; plaintiff sued the plan and defendant in state court for wrongful denial of benefits; plaintiff's complaint against defendant was dismissed with prejudice on res judicata grounds; plaintiff obtained a default judgment against the plan based on rights accorded under the federal Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001 to 1461 (2000); defendant refused to pay the judgment; plaintiff applied for a writ of garnishment against defendant to satisfy the judgment, describing the subject of garnishment as the insurance policy that funded the plan; the insurance policy required defendant to pay benefits when there was a judicial determination that a beneficiary was eligible; the policy imposed a legally binding obligation on defendant, the violation of which gave the plan a valid right of action against defendant; and the right of action was not subject to any contingency or defense, the insurance policy itself was not a garnishable asset, but the right of action of

the plan against defendant to compel payment of improperly denied disability benefits was an asset of the plan and was properly garnished by plaintiff, standing in the shoes of the plan against defendant, to satisfy the plan's liability to plaintiff. *Kirby v. Guardian Life Ins. Co. of America*, 2010-NMSC-014, 148 N.M. 106, 231 P.3d 87, *rev'g Kirby v. Long-Term Disability Plan of TAD Resources Int'l, Inc.*, 2008-NMCA-154, 145 N.M. 264, 196 P. 3d 965.

Garnishment against insurer of long-term disability plan is not barred by dismissal of action against insurer for wrongful denial of benefits. — Plaintiff's employer established a long-term disability plan that was funded by an insurance policy issued by defendant; defendant acted as the claims fiduciary of the plan; defendant denied plaintiff's claim for disability benefits under the plan; plaintiff sued the plan and defendant in state court for wrongful denial of benefits; plaintiff's complaint against defendant was dismissed with prejudice on res judicata grounds; plaintiff obtained a default judgment against the plan based on rights accorded under the federal Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001 to 1461 (2000); defendant refused to pay the judgment; and plaintiff applied for a writ of garnishment against defendant to satisfy the judgment, the action for a writ of garnishment and the action for wrongful denial of benefits were distinct causes of action and could not have been brought in the same proceeding and the defense of res judicata based on the dismissal of the action for wrongful denial of benefits is not a bar to the action for garnishment to satisfy the judgment against the plan for wrongful denial of benefits. *Kirby v. Guardian Life Ins. Co. of America*, 2010-NMSC-014, 148 N.M. 106, 231 P.3d 87, *rev'g Kirby v. Long-Term Disability Plan of TAD Resources Int'l, Inc.*, 2008-NMCA-154, 145 N.M. 264, 196 P. 3d 965.

Stop payment. — Non-bank garnishee had no legal duty to stop payment on checks that were sent to payee prior to garnishee being served with writ of garnishment. *Cent. Sec. & Alarm Co. v. Mehler*, 1998-NMCA-096, 125 N.M. 438, 963 P.2d 515, cert. denied, 125 N.M. 322, 961 P.2d 167.

Law reviews. — For comment, "Wage Garnishment in New Mexico - Existing Debtor Protections under Federal and State Law and Further Proposals," see 1 N.M. L. Rev. 388 (1971).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 6 Am. Jur. 2d Attachment and Garnishment §§ 91 to 217.

Right of one to summon or charge himself as garnishee, 31 A.L.R. 711, 61 A.L.R. 1458.

Payment of judgment by garnishee without notice of its assignment, 32 A.L.R. 1024.

Reversal of judgment in favor of garnishee as affecting purchase of property involved in suit pending appeal without supersedeas, 36 A.L.R. 424.

Garnishee's duty as to protection of rights of principal defendant or third person, 45 A.L.R. 646.

Waiver or admission by garnishee as affecting principal defendant, 64 A.L.R. 430.

Refusal to render judgment of garnishment in proceedings in rem, because of danger of double liability to garnishee in event of refusal of court of another jurisdiction to recognize or give effect to judgment, if rendered, 69 A.L.R. 609.

Expiration of life of judgment as affecting pending garnishment proceedings by judgment creditor against one indebted to judgment debtor, 75 A.L.R. 1359.

Garnishment by landlord's creditor of rent accruing after service of writ on tenant but before answer or other proceeding, 100 A.L.R. 307.

Effect as between garnishor and principal defendant of judgment against garnishee, 103 A.L.R. 839.

Necessity of pleading estoppel or waiver in garnishment proceeding, 120 A.L.R. 97.

Liability of creditor for excessive attachment or garnishment, 56 A.L.R.3d 493.

United States Postal Service as subject to garnishment, 38 A.L.R. Fed. 546.

38 C.J.S. Garnishment §§ 189 et seq., 228, 230, 239.

35-12-4. Garnishment; answer by garnishee.

A. If the garnishee answers under oath that he is not at the time of answer, and was not, at the time the garnishment was served on him, indebted to the defendant or in possession of any personal property of the defendant, and if the garnishee's answer is not controverted within twenty days after being made, the magistrate shall enter judgment discharging the garnishee.

B. If the garnishee fails to answer the garnishment under oath within twenty days from the date of its service on him, the magistrate may render judgment by default against the garnishee for the full amount of any judgment rendered against the defendant, together with all interest and costs.

C. If the garnishee answers under oath or it appears on trial of the issue that he was, at the time of answer or at the time the garnishment was served, indebted to the defendant or in possession of any personal property of the defendant, the magistrate shall render judgment for the plaintiff against the garnishee for the amount admitted or found due to the defendant or so much thereof as equals the plaintiff's judgment against the defendant. If the garnishee is indebted to the defendant for wages or salary, the magistrate shall render judgment for the plaintiff against the garnishee only for the

amount of wages or salary due the defendant in excess of the amount of wages or salary exempt from garnishment under Section 35-12-7 NMSA 1978 or so much thereof as equals the plaintiff's judgment against the defendant. The magistrate shall order the garnishee to deliver any personal property to the sheriff to be held by him subject to the order of the magistrate for the satisfaction of any judgment that may be rendered against the defendant. If the garnishee fails to deliver the personal property to the sheriff, the sheriff shall notify the magistrate, and, upon motion of the plaintiff, the garnishee shall be cited for contempt. If the garnishee fails to show good cause in the contempt hearing, he shall be punished for contempt, and the magistrate may render judgment against him for the full amount of the plaintiff's judgment against the defendant, together with all interest and costs.

D. If the defendant is employed by the garnishee, the magistrate shall render judgment for the plaintiff against the garnishee for the unpaid balance of the plaintiff's judgment against the defendant and order the garnishee to pay to the plaintiff each pay period the defendant's wages or salary, which are not exempt from garnishment under Section 35-12-7 NMSA 1978 and which come due subsequent to the time of answer, until the judgment is satisfied, or, if the employment relationship is terminated, until the garnishee gives the plaintiff written notice that the employment relationslhip [relationship] has terminated.

History: 1953 Comp., § 36-14-4, enacted by Laws 1968, ch. 62, § 136; 1969, ch. 139, § 5.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

Repeals. — Laws 1968, ch. 62, § 171, repealed former 36-14-4, 1953 Comp., relating to proceedings in district court after giving bond, effective January 1, 1969.

Cross references. — For contempt of court, *see* 34-1-2 to 34-1-5 NMSA 1978.

Many of the following annotations are from cases which were decided under former law.

Duty to discharge not mandatory. — Upon failure of plaintiffs to file a traverse of the answer of the garnishee within 20 days after the filing of such answer, it did not become the fixed and mandatory duty of the court, with no alternative available, to enter judgment discharging the garnishee. *Farmers Ins. Exch. v. Ledesma*, 214 F.2d 495 (10th Cir. 1954).

Duty to discharge discretionary. — When a motion is made to discharge the garnishee under this section, the question whether the court should enter the requested judgment of discharge or enlarge the time within which to file a traverse is one of procedure to be determined by the court in the exercise of its sound judicial discretion,

and its action thereon should not be disturbed on appeal unless there is an abuse of discretion. *Farmers Ins. Exch. v. Ledesma*, 214 F.2d 495 (10th Cir. 1954).

Discharge may be granted. — Where a writ of garnishment is issued and served on appellee, who files an answer to the writ stating it is not indebted to the appellant, which answer does not contain a certificate of service nor a separate instrument so entitled, and appellee files its application to be discharged, this being more than 20 days after the filing of its answer, and appellant files a motion for extension of time to contravene the answer of garnishee, the trial court found that the garnishee's answer was served and was not controverted within the time provided by this section. Also, here, no formal certificate of service was filed, but since there was a letter of transmittal of the answer of garnishee to the clerk which recited that copies had been sent to appellants, and the appellants made no objection to the trial court as to the sufficiency of service, the trial court made a finding that service had been made and denied appellant's motion for an enlargement of time in which to controvert the answer, which was found on appeal not to be an abuse of discretion. *Bullock v. Northern Ins. Co.*, 331 F.2d 431 (10th Cir. 1964).

Stop payment. — Non-bank garnishee had no legal duty to stop payment on checks that were sent to payee prior to garnishee being served with writ of garnishment. *Central Sec. & Alarm Co. v. Mehler*, 1998-NMCA-096, 125 N.M. 438, 963 P.2d 515, cert. denied, 125 N.M. 322, 961 P.2d 167.

Discharge denied. — Where plaintiffs had failed to traverse the answer of the garnishee within 20 days after the filing of an answer under this section, it was a matter of judicial discretion when the court entered an order denying motion to discharge the garnishee and extending until five days after entry of such order the time within which to file a traverse; and the traverse was filed within the extended period. *Farmers Ins. Exch. v. Ledesma*, 214 F.2d 495 (10th Cir. 1954).

Defense by garnishee as to ownership of funds. — If the garnishee's answer raises doubt about who actually owns funds admittedly held by the garnishee for another, the issues must be tried; the garnishor must establish the debtor's right to the fund, but if the garnishee raises an affirmative defense in its answer, which the garnishor controverts, the garnishee has the burden of proving that defense. *Amaya v. Santistevan*, 1992-NMCA-051, 114 N.M. 140, 835 P.2d 856.

Scope of duty to controvert garnishees' denial. — Where garnishees answered interrogatories by saying that debtor worked for them 12 months, that they were paying nothing for his work, that they had never paid for it and they did not owe for it, answers did not amount to a denial requiring plaintiff to prove more than the value of the services, the work, and the identity of garnishees. *Zanz v. Stover*, 1880-NMSC-006, 2 N.M. 29.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 6 Am. Jur. 2d Attachment and Garnishment §§ 346 to 354.

Garnishee's pleading, answering interrogatories or the like as affecting his right to assert court's lack of jurisdiction, 41 A.L.R.2d 1093.

38 C.J.S. Garnishment § 241 et seq.; 51 C.J.S. Justices of the Peace § 78(8).

35-12-5. Garnishment; controverting garnishee's answer.

A. If the plaintiff or defendant is not satisfied with the answer of any garnishee, he may controvert it by stating how he believes it is incorrect, and the issue shall be tried and determined by the magistrate court.

B. Any person claiming personal property, money or any chose in action garnished may intervene in the action, and no judgment shall be rendered against the garnishee until the intervention is tried and determined by the magistrate court.

History: 1953 Comp., § 36-14-5, enacted by Laws 1968, ch. 62, § 137.

ANNOTATIONS

Repeals. — Laws 1968, ch. 62, § 171, repealed former 36-14-5, 1953 Comp., relating to appearance bonds when both parties absent or present, effective January 1, 1969.

Effect of nonnegotiability of note provision. — The insertion of a provision specifying the nonnegotiability of a note cannot circumvent a judgment creditor's right to garnishment. The nonnegotiability of the note does not preclude the underlying debt due from the garnishee to the defendant from being collected by garnishment, as under this section monies due under a chose in action are subject to garnishment. *Jemko, Inc. v. Liaghat*, 1987-NMCA-069, 106 N.M. 50, 738 P.2d 922.

Intervention. — A party claiming an interest in the subject matter of the garnishment should, upon timely application, be permitted to intervene in the garnishment. *Jemko, Inc. v. Liaghat*, 1987-NMCA-069, 106 N.M. 50, 738 P.2d 922.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 6 Am. Jur. 2d Attachment and Garnishment §§ 355, 356.

38 C.J.S. Garnishment § 258 et seq.

35-12-6. Garnishment; unmatured debts.

Debts not yet due to the defendant may be garnished, but no execution shall be awarded against the garnishee for such debts until they become due. The magistrate may order the defendant to deliver the evidence of such indebtedness to the court. If the defendant alleges an endorsement or delivery of the evidence before the court's order came to his knowledge, the court may inquire into the consideration and good faith of the transfer and, if the court determines that the endorsee or transferee holds by

fraudulent endorsement or delivery, it may order delivery of the evidence to the court. When any evidence of indebtedness is delivered to the court under this section, the court shall notify any endorsers of its nonpayment at maturity, and the garnishment proceedings shall remain open until it becomes due.

History: 1953 Comp., § 36-14-6, enacted by Laws 1968, ch. 62, § 138.

ANNOTATIONS

Repeals. — Laws 1968, ch. 62, § 171, repealed former 36-14-6, 1953 Comp., relating to peace bond procedure, effective January 1, 1969.

Effect of nonnegotiability of note provision. — The insertion of a provision specifying the nonnegotiability of a note cannot circumvent a judgment creditor's right to garnishment. The nonnegotiability of the note does not preclude the underlying debt due from the garnishee to the defendant from being collected by garnishment, as under 35-12-5 NMSA 1978, monies due under a chose in action are subject to garnishment. *Jemko, Inc. v. Liaghat*, 1987-NMCA-069, 106 N.M. 50, 738 P.2d 922.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 6 Am. Jur. 2d Attachment and Garnishment § 56.

Garnishment of money due only on further performance of contract by debtor, 2 A.L.R. 506.

Garnishment of money in escrow, 10 A.L.R. 741.

Right of garnishee, other than bank holding deposit, to set off claims not due or certain when garnishment is served, 57 A.L.R.2d 700.

38 C.J.S. Garnishment § 91 et seq.

35-12-7. Garnishment; exemptions.

A. Exempt from garnishment with respect to the enforcement of an order or decree for child support is fifty percent of the defendant's disposable earnings for any pay period. Exempt from garnishment in all other situations is the greater of the following portions of the defendant's disposable earnings:

(1) seventy-five percent of the defendant's disposable earnings for any pay period; or

(2) an amount each week equal to forty times the federal minimum hourly wage rate. The director of the financial institutions division [of the regulation and licensing department] shall provide a table giving equivalent exemptions for pay periods of other than one week.

B. As used in this section:

(1) "disposable earnings" means that part of a defendant's wage or salary remaining after deducting the amounts which are required by law to be withheld; and

(2) "federal minimum hourly wage rate" means the highest federal minimum hourly wage rate for an eight-hour day and a forty-hour week. However, it is immaterial whether the garnishee is exempt under federal law from paying the federal minimum hourly wage rate.

C. The maximum amount which may be taken from a spouse's disposable earnings under both the garnishment procedure and the wage deduction procedure for the enforcement of child support is fifty percent of the spouse's disposable earnings.

History: 1953 Comp., § 36-14-7, enacted by Laws 1969, ch. 139, § 6; 1979, ch. 254, § 1.

ANNOTATIONS

Repeals and reenactments. — Laws 1968, ch. 62, § 171, repealed former 36-14-7, 1953 Comp., relating to penalties of justices under peace bond provisions, effective January 1, 1969, and Laws 1968, ch. 62, § 139, enacted a new 36-14-7, 1953 Comp., relating to garnishment exemptions. Laws 1969, ch. 139, § 6, repealed 36-14-7, 1953 Comp., relating to garnishment exemptions, and enacted a new section.

Compiler's notes. — The financial institutions division, referred to in the second sentence of Subsection A(2), was originally part of the commerce and industry department. This department was abolished by Laws 1983, ch. 297, § 33. Laws 1983, ch. 297, § 20, creates the regulation and licensing department, consisting of several divisions, including the financial institutions division. Laws 1983, ch. 297, § 31, provided that all references in law to the financial institutions division of the commerce and industry department shall be construed to be references to the same division within the regulation and licensing department. *See* 9-16-4 NMSA 1978 and compiler's notes thereto.

Cross references. — For applicability of exemptions under 42-10-1 NMSA 1978, *see* 35-4-2 NMSA 1978.

For exemption of retirement funds and benefits for public officers and employees, *see* 10-11-135 NMSA 1978.

For acknowledgements for wage and salary assignments, *see* 14-13-11 NMSA 1978.

For welfare benefits, *see* 27-2-21 NMSA 1978.

For exemption of state police pension fund interest and benefits, *see* 29-4-10 NMSA 1978.

For executions not to go against lands, *see* 39-4-2 NMSA 1978.

For inapplicability of homestead exemption, *see* 42-10-11 NMSA 1978.

For unemployment compensation benefits, *see* 51-1-37 NMSA 1978.

For workers' compensation benefits, *see* 52-1-52 NMSA 1978.

For occupational disease benefits, *see* 52-3-37 NMSA 1978.

For minimum membership holdings in cooperative associations, *see* 53-4-28 NMSA 1978.

For assets of insurance companies undergoing delinquency proceedings, *see* 59A-41-23 NMSA 1978.

For benefit payments by fraternal benefit societies, *see* 59A-44-18 NMSA 1978.

For the minimum wage provisions of the federal Fair Labor Standards Act, *see* 29 U.S.C. § 206.

For rules governing garnishment and writs of execution in the district, magistrate, and metropolitan courts, *see* Rules 1-065.2, 2-802, and 3-802 NMRA, respectively.

For form for claim of exemptions on executions, *see* Rule 4-803 NMRA.

For form for order on claim of exemption and order to pay in execution proceedings, *see* Rule 4-804 NMRA.

For form for application for writ of garnishment and affidavit, *see* Rule 4-805 NMRA.

For form for notice of right to claim exemptions from execution, see Rule 4-808A NMRA.

For form for claim of exemption from garnishment, *see* Rule 4-809 NMRA.

Law reviews. — For comment, "Attachment and Garnishment - Prejudgment Garnishment - Study and Proposed Revisions," see 9 Nat. Resources J. 119 (1969).

For note, "Municipal Assumption of Tort Liability for Damage Caused by Police Officers," see 1 N.M. L. Rev. 263 (1971).

For comment, "Wage Garnishment in New Mexico - Existing Debtor Protection under Federal and State Law and Further Proposals," see 1 N.M. L. Rev. 388 (1971).

For article, "The Community Property Act of 1973: A Commentary and Quasi-Legislative History," see 5 N.M. L. Rev. 1 (1974).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 6 Am. Jur. 2d Attachment and Garnishment §§ 33, 176 to 183; 31 Am. Jur. 2d Exemptions §§ 1, 35 to 41, 43 to 49, 51 to 53, 55, 56.

Money or other property taken from prisoner as subject to garnishment, 16 A.L.R. 378, 154 A.L.R. 758.

Garnishment of salaries, wages or commissions not expressly exempted by statute, 56 A.L.R. 601.

Exemption of nonresident from garnishment as impairing obligations of existing contracts, 93 A.L.R. 185.

Judgment in garnishment proceedings, effect, as between garnishee and principal defendant, of disclosure or failure to disclose exemptions, 166 A.L.R. 304.

Funds deposited in court as subject of garnishment, 1 A.L.R.3d 936.

Family allowance from decedent's estate as exempt from attachment, garnishment, execution and foreclosure, 27 A.L.R.3d 863.

Effect of anti-alienation provisions of Employee Retirement Income Security Act (29 USCS § 1056(d)) (ERISA) on rights of judgment creditors, 131 A.L.R. Fed. 427.

35 C.J.S. Exemptions §§ 1, 47 to 51; 38 C.J.S. Garnishment § 199 et seq.; 51 C.J.S. Justices of the Peace § 78.

35-12-8. Garnishment; payment of exempt wages and salary.

Any employer charged as a garnishee in any civil action in the magistrate court shall pay to the defendant, when due, the amount of his wages or salary exempt from garnishment under Section 35-12-7 NMSA 1978.

History: 1953 Comp., § 36-14-7.1, enacted by Laws 1969, ch. 139, § 7.

35-12-9. Garnishment; wages and salary; lien; priority.

A. A judgment entered against a garnishee under Section 35-12-4D NMSA 1978 is a lien on the defendant's wages or salary, which are not exempt from garnishment under Section 35-12-7 NMSA 1978 and which come due subsequent to the time of answer, until the judgment against the garnishee is paid or until the employment relationship is terminated.

B. If the defendant's wages or salary are subject to more than one judgment lien, the liens shall be satisfied in the order in which the garnishment is served on the garnishee.

History: 1953 Comp., § 36-14-7.2, enacted by Laws 1969, ch. 139, § 8.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 6 Am. Jur. 2d Attachment and Garnishment §§ 33, 176 to 183; 31 Am. Jur. 2d Exemptions §§ 1, 35 to 41, 43 to 49, 51 to 53, 55, 56.

35 C.J.S Exemptions §§ 1, 47 to 51; 38 C.J.S. Garnishment § 199 et seq.; 51 C.J.S. Justices of the Peace § 78(7).

35-12-10. Garnishment; public officer as garnishee.

A. No public officer of the state or any of its political subdivisions shall be summoned in his official capacity as a garnishee in a civil action in the magistrate court to answer for wages or salaries due to a public officer or employee unless the plaintiff has a judgment in the action against the defendant. Under this condition, wages and salaries due public officials and employees are subject to garnishment.

B. This section does not prevent any available claim of exemption from garnishment.

C. As provided in this section, when any public officer is summoned as garnishee in a civil action in the magistrate court, his answer shall be by statement over his official signature of the amount due the defendant and the statement shall be filed in the action without cost.

History: 1953 Comp., § 36-14-8, enacted by Laws 1968, ch. 62, § 140.

ANNOTATIONS

Cross references. — For service of writs of garnishment on state employees, *see* 38-1-17 NMSA 1978.

Injunction in aid of garnishment not allowed. — Injunction would not lie against the state highway commission [state transportation commission] and members thereof and the state highway engineer (secretary of transportation), the state auditor and treasurer, to restrain them from paying a contractor, pending the efforts of a creditor of such contractor to procure a judgment at law in order that he might summon such officials as garnishees, it being in effect an action against the state. *Looney v. Stryker*, 1926-NMSC-037, 31 N.M. 557, 249 P. 112.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 6 Am. Jur. 2d Attachment and Garnishment §§ 78 to 84.

Right of municipal corporation to waive immunity from garnishment, 2 A.L.R. 1586.

Constitutionality of statute authorizing garnishment of salary or wages of public officials or employees, 22 A.L.R. 760, 123 A.L.R. 903.

County as subject to garnishment, 60 A.L.R. 823.

Municipal funds and credits as subject to garnishment on judgments against municipality, 89 A.L.R. 863.

Redemption money in hands of officer as subject to garnishment, 94 A.L.R. 1049.

38 C.J.S. Garnishment §§ 26, 39 et seq.

35-12-11. Garnishment; execution against garnishee.

Whenever judgment is rendered against the garnishee in any civil action in the magistrate court, execution shall be made as provided by law for executions in other civil actions in the magistrate court.

History: 1953 Comp., § 36-14-9, enacted by Laws 1968, ch. 62, § 141.

ANNOTATIONS

Cross references. — For rules on execution in magistrate courts in civil case, *see* Rules 2-801 to 2-803 NMRA.

35-12-12. Garnishment; defense to claim against garnishee.

In any action by a defendant against a garnishee based on any indebtedness of the garnishee or on possession of any personal property, it is a conclusive defense for the garnishee to show that the indebtedness was paid or the personal property delivered under judgment of the magistrate court in a garnishment proceeding.

History: 1953 Comp., § 36-14-10, enacted by Laws 1968, ch. 62, § 142.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 6 Am. Jur. 2d Attachment and Garnishment §§ 357 to 390.

Estoppel of garnishee or surety on delivery bond to deny indebtedness to principal defendant, by judgment against the latter which garnishee, surety, or latter's reinsurer sought to prevent, 27 A.L.R. 1543.

Liability of garnishee to garnishing creditor for depreciation in value of property pending contest, 32 A.L.R. 572.

Payment under void order in garnishment proceedings as protection to garnishee, 49 A.L.R. 1411.

Liability of garnishee to garnishor where former pays debts or releases property pending defective garnishment proceedings, 89 A.L.R. 975.

38 C.J.S. Garnishment § 230 et seq.

35-12-13. Garnishment; dissolution.

A. At any time before judgment in a civil action in the magistrate court in which a garnishment has been issued, the defendant in the action may obtain a dissolution of the garnishment by filing in the action a bond to the plaintiff in double the sum claimed in the complaint, or double the value of the indebtedness and personal property garnished, whichever is less, with sufficient sureties, conditioned for the payment of any judgment that may be rendered against the garnishee in the action.

B. When a garnishment is dissolved, all proceedings touching the garnished indebtedness or personal property are vacated.

History: 1953 Comp., § 36-14-11, enacted by Laws 1968, ch. 62, § 143.

ANNOTATIONS

Law reviews. — For comment, "Wage Garnishment in New Mexico - Existing Debtor Protections under Federal and State Law and Further Proposals," see 1 N.M.L. Rev. 388 (1971).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 6 Am. Jur. 2d Attachment and Garnishment §§ 408, 518 to 534.

Discharge of garnishment, or bond for its dissolution, by subsequent amendment of pleadings or the writ, 74 A.L.R. 912.

Abatement on ground of prior pending action in same jurisdiction as affected by loss by plaintiff in second action of advantage gained therein by attachment, garnishment, or like process, 40 A.L.R.2d 1111.

Amendment of bond, 47 A.L.R.2d 971.

38 C.J.S. Garnishment § 319; 51 C.J.S. Justices of the Peace § 78(10).

35-12-14. Garnishment; suit on bond.

The bond given by the plaintiff or other person in a garnishment proceeding in the magistrate court may be sued upon in the name of the state by any party injured, and shall proceed as in other civil actions.

History: 1953 Comp., § 36-14-12, enacted by Laws 1968, ch. 62, § 144.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 6 Am. Jur. 2d Attachment and Garnishment §§ 518 to 557.

38 C.J.S. Garnishment § 351 et seq.; 51 C.J.S. Justices of the Peace § 78(13).

35-12-15. Garnishment; special provisions.

All laws and procedures governing magistrate courts apply to garnishment proceedings in the magistrate court except as otherwise provided by law.

History: 1953 Comp., § 36-14-13, enacted by Laws 1968, ch. 62, § 145.

ANNOTATIONS

Cross references. — For the Rules of Civil Procedure for the Magistrate Courts, *see* Rule 2-101 NMRA et seq.

35-12-16. Garnishment; costs; attorney fees.

A. If the plaintiff prevails in a garnishment proceeding, he may be awarded either one or both of the following:

(1) the actual costs of the proceeding, not exceeding ten percent of the judgment entered against the garnishee; or

(2) a reasonable attorney fee not exceeding ten percent of the judgment entered against the garnishee.

B. If the garnishee answers as required by law, the court shall award the garnishee his actual costs and a reasonable attorney fee. The award shall be against the defendant if the plaintiff prevails and against the plaintiff if the garnishee prevails.

History: 1953 Comp., § 36-14-13.1, enacted by Laws 1977, ch. 84, § 1.

ANNOTATIONS

Cross references. — For rules governing garnishment and writs of execution in the district, magistrate, and metropolitan courts, *see* Rules 1-065.2, 2-802, and 3-802 NMRA, respectively.

For form for claim of exemptions on executions, *see* Rule 4-803 NMRA.

For form for order on claim of exemption and order to pay in execution proceedings, *see* Rule 4-804 NMRA.

For form for application for writ of garnishment and affidavit, *see* Rule 4-805 NMRA.

For form for notice of right to claim exemptions from execution, *see* Rule 4-808A NMRA.

For form for claim of exemption from garnishment, *see* Rule 4-809 NMRA.

Award of costs and fee limited. — This section requires that a garnishee be awarded actual costs and a reasonable attorney fee for filing the answer. However, any award is limited to those matters fairly and necessarily litigated as a direct result of the garnishment proceeding. *Bank of N.M. v. Priestley*, 1981-NMSC-025, 95 N.M. 569, 624 P.2d 511.

Attorney fees and costs. — Garnishees are entitled to an award of a reasonable attorney fee and actual costs expended for services rendered in the filing of an answer to the writ of garnishment, and for the trial and appeal of the garnishment proceedings. *Bank of N.M. v. Northwest Power Prods., Inc*., 1980-NMCA-121, 95 N.M. 743, 626 P.2d 280.

Attorney fee on appeal is discretionary. — What constitutes a reasonable attorney fee on appeal is discretionary with the appellate courts. *Vinton Eppsco, Inc. v. Showe Homes, Inc.*, 1981-NMSC-114, 97 N.M. 225, 638 P.2d 1070.

Garnishee held to be "prevailing party". — Garnishee, which defeated garnishor's claim that garnishee violated a legal duty to stop payment on checks sent to payee, was "prevailing party" entitled to attorney's fees and costs at the trial and appellate levels. *Cent. Sec. & Alarm Co. v. Mehler*, 1998-NMCA-096, 125 N.M. 438, 963 P.2d 515, cert. denied, 125 N.M. 322, 961 P.2d 167.

Appellate court can award fee or remand for award. — Appellate courts have authority to either make an allowance of attorney fees on appeal or to remand to the lower court for that purpose. *Vinton Eppsco, Inc. v. Showe Homes, Inc.*, 1981-NMSC-114, 97 N.M. 225, 638 P.2d 1070.

Attorney's fee award upheld. — Garnishee was entitled to an award of attorney's fees out of the monies due the judgment debtor husband based upon the filing of its answer

and its claim that wife was a necessary party to the garnishment proceeding. *Jemko, Inc. v. Liaghat*, 1987-NMCA-069, 106 N.M. 50, 738 P.2d 922.

Award to both plaintiff and garnishee. — Under this section, the trial court could properly award attorney's fees to both plaintiff and the garnishee. *Jemko, Inc. v. Liaghat*, 1987-NMCA-069, 106 N.M. 50, 738 P.2d 922.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 6 Am. Jur. 2d Attachment and Garnishment § 407.

Right upon ground of duress to recover back money paid upon an excessive or unfounded claim to avoid an attachment, 18 A.L.R. 1233.

Right to recover attorney's fees for wrongful attachment, 25 A.L.R. 579, 65 A.L.R.2d 1426.

Injury to credit as element of damages for wrongful attachment, 54 A.L.R. 451.

Constitutionality, construction and application of statutory provisions for recovery of damages by defendant in attachment or garnishment, 125 A.L.R. 1219.

Taxable costs and disbursements as including expenses for bonds incident to steps taken in action, 90 A.L.R.2d 448.

Amount of compensation of attorney for services in absence of contract or statute fixing amount, 57 A.L.R.3d 475.

38 C.J.S. Garnishment § 301 et seq.

35-12-17. Garnishment; form of bond.

Garnishment bonds in civil actions in the magistrate court shall be in substantially the following form:

"STATE OF NEW MEXICO

_____ MAGISTRATE DISTRICT, DIVISION _____

(Name), Plaintiff)
)
v.) CIVIL DOCKET NO. _____
(Name), Defendant)
(Name), Garnishee)

GARNISHMENT BOND

We bind ourselves, our heirs, executors and administrators to the state of New Mexico in the sum of _____ ($ ____) on condition that the plaintiff will diligently

prosecute this action to final judgment without delay, will pay to the defendant all money found due to him in the action, and will pay all damages and costs that may accrue to the defendant and the garnishee by reason of the garnishment or any process or judgment thereon, upon completion of which this obligation is void.

_____
Plaintiff (Principal)

_____
Surety

_____
Surety

Approved _____, 19 ___

_____
Magistrate"

History: 1953 Comp., § 36-14-14, enacted by Laws 1968, ch. 62, § 146.

35-12-18. Garnishment; form of writ.

Writs of garnishment in civil actions in the magistrate court shall state whether the writ is issued in advance of or in aid of execution of judgment and shall be in substantially the following form:

"STATE OF NEW MEXICO

_____ MAGISTRATE DISTRICT, DIVISION _____

(Name), Plaintiff)
)
v.) CIVIL DOCKET NO. _____
(Name), Defendant)
(Name), Garnishee)

WRIT OF GARNISHMENT

THE STATE OF NEW MEXICO to the above-named garnishee:

You are ordered to appear before the magistrate court located at _____ within twenty days from the service of this writ upon you to answer under oath the following questions, as of the date of service and as of the date of your answer:

1. What, if anything, are you indebted to the defendant in this action and on what account?

2. What, if any, personal property of the defendant is in your possession or under your control?

3. What other persons, if any, within your knowledge are indebted to the defendant or have personal property of the defendant in their possession?

Service of this writ upon you has the effect of attaching all personal property, money, rights, credits, bonds, bills, notes, drafts and other choses in action of the defendant in your possession or under your control at the time of service and which may come into your possession or under your control or be owing by you between the time of service and the time of making your answer.

This writ was issued in (advance) (aid of execution) of judgment against the defendant. If this writ was issued in advance of judgment, it does not attach any wages or salary due from you to the defendant. If this writ was issued in aid of execution of judgment, it attaches wages or salary due from you to the defendant in excess of the greater of the following portions of the defendant's disposable earnings:

A. seventy-five percent of the defendant's disposable earnings for any pay period; or

B. an amount each week equal to forty times the federal minimum hourly wage rate. A table giving equivalent exemptions for pay periods of other than one week may be obtained from the commissioner of banking. "Disposable earnings" means that part of the defendant's wage or salary remaining after deducting the amounts which are required by law to be withheld. "Federal minimum hourly wage rate" means the highest federal minimum hourly wage rate for an eight-hour day or a forty-hour week. It is immaterial whether you are exempt under federal law from paying the federal minimum hourly wage rate.

It is unlawful to pay or deliver to the defendant any item attached by this writ. If you fail to appear and answer as directed, or if you unlawfully dispose of any item attached by this writ, judgment may be rendered against you for the full amount of the plaintiff's claim against the defendant in this action.

Dated _____, 19 ___ _____
Magistrate"

History: 1953 Comp., § 36-14-15, enacted by Laws 1968, ch. 62, § 147; 1969, ch. 139, § 9.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — United States Postal Service as subject to garnishment, 38 A.L.R. Fed. 546.

35-12-19. Garnishment; district court; magistrate court; small claims court.

Garnishment may be issued in the district court, magistrate court or small claims court. Sections 35-12-1 through 35-12-18 NMSA 1978 apply to the issuance of garnishment in the district court, magistrate court or small claims court; provided, however, that in the event the district court has jurisdiction, the district court clerk may issue the writ of garnishment. In those cases filed in small claims court, the small claims court may issue the writ of garnishment.

History: 1953 Comp., § 36-14-16, enacted by Laws 1969, ch. 139, § 10; 1973, ch. 24, § 1; 1979, ch. 183, § 1.

ANNOTATIONS

Repeals. — Laws 1979, ch. 346, § 13, repealed 34-8-1 to 34-8-13 NMSA 1978, which provided for the small claims court referred to in this section. Laws 1979, ch. 346, also established metropolitan courts. *See* 34-8A-1 to 34-8A-8 NMSA 1978.

Cross references. — For jurisdictional amount of magistrate court, *see* 35-3-3 NMSA 1978.

For jurisdiction of district courts, *see* N.M. Const., art. VI, § 13.

Purpose of section. — This section expressly invests district courts with jurisdiction to issue writs of garnishment relating to matters pending in their courts in accordance with Sections 35-12-1 to 35-12-18 NMSA 1978. *Jemko, Inc. v. Liaghat*, 1987-NMCA-069, 106 N.M. 50, 738 P.2d 922.

Jurisdiction generally. — A court has no jurisdiction to proceed in garnishment, even though it is a court of general jurisdiction, unless such jurisdiction is expressly conferred by statute. 1969 Op. Att'y Gen. No. 69-85.

ARTICLE 13
Magistrate Court; Appeals

35-13-1. Appeals; right of appeal.

Any party aggrieved by any judgment rendered or final order issued by the magistrate court in any civil action or special statutory proceeding, or the defendant aggrieved by any judgment rendered or final order issued by the magistrate court in any criminal action, may appeal to the district court within fifteen days after judgment is rendered or the final order is issued in the magistrate court.

History: 1953 Comp., § 36-15-1, enacted by Laws 1968, ch. 62, § 148; 1975, ch. 242, § 9.

ANNOTATIONS

Repeals. — Laws 1968, ch. 62, § 171, repealed former 36-15-1 to 36-15-4, 1953 Comp., relating to forfeiture of appearance bonds, summons, service and appeal, effective January 1, 1969.

Cross references. — For constitutional authority to appeal, *see* N.M. Const., art. VI, § 27.

For procedures governing appeals to the district court from magistrate courts in trial de novo cases, *see* Rule 1-072 NMRA.

For appeal from magistrate court, *see* Rule 2-705 NMRA.

Order of dismissal is a final appealable order. — Where, after a hearing pursuant to a "Notice of Probable Cause/Bench Trial", the magistrate court entered an order which dismissed the action due to no probable clause, the order was a final appealable order. *State v. Montoya*, 2008-NMSC-043, 144 N.M. 458, 188 P.3d 1209.

Evidentiary hearing to determine jurisdiction. — Where the defendant pled no contest in magistrate court and appealed the magistrate court sentence to district court, the district court did not err when it conducted an evidentiary hearing concerning the defendant’s plea. *State v. Gallegos*, 2007-NMCA-112, 142 N.M. 447, 166 P.3d 1101, cert. denied, 2007-NMCERT-006, 142 N.M. 15, 162 P.3d 170.

Appeal matter of right. — Appeal from justices' (now magistrates') court to district court was a matter of right. *Lea County State Bank v. McCaskey Register Co.*, 1935-NMSC-069, 39 N.M. 454, 49 P.2d 577 (decided under prior law).

Time for appeal is when order is filed. — The term "entry" as used in Subsection A of Rule 2-705 NMRA and the terms "rendered" and "issued" in Section 35-13-1 NMSA 1978 are synonymous with the time a judgment or decision is "filed" with the court clerk's office. Thus, the time for an appeal begins to run when the order is filed. *Trujillo v. Serrano*, 1994-NMSC-024, 117 N.M. 273, 871 P.2d 369.

Late filing of appeal. — Because timely filing of an appeal is a mandatory precondition rather than an absolute jurisdictional requirement, a trial court may, under unusual circumstances, use its discretion and entertain an appeal even though it is not timely filed. The decision to dismiss an appeal is extreme and must be determined on a case-by-case basis. *Trujillo v. Serrano*, 1994-NMSC-024, 117 N.M. 273, 871 P.2d 369.

Court error may excuse late appeal. — One unusual circumstance which would warrant permitting an untimely appeal is if the delay is a result of judicial error. To deny

a party the constitutional right to an appeal because of a mistake on the part of the court runs against the most basic precepts of justice and fairness. *Trujillo v. Serrano*, 1994-NMSC-024, 117 N.M. 273, 871 P.2d 369.

Appeal by state. — Pursuant to N.M. Const., art. VI, § 27, the state is permitted to appeal to the district court from a final judgment or decision rendered by the magistrate court. This section does not preclude such an appeal by the state. S*tate v. Barber*, 1989-NMCA-058, 108 N.M. 709, 778 P.2d 456, cert. denied, 108 N.M. 713, 778 P.2d 911.

This section does not give the state the right to appeal a magistrate court's suppression order, because such an order is not a final judgment or order. *State v. Heinsen*, 2005-NMSC-035, 138 N.M. 441, 121 P.3d 1040.

Effect on appeal of act or omission by magistrate. — After a party had done all that he reasonably could do and that the law required to perfect his appeal, it could not be defeated by any omission or act on part of justice of the peace (now magistrate) respecting appeal bond. *State ex rel. Heron v. District Court of First Judicial Dist.*, 1942-NMSC-035, 46 N.M. 290, 128 P.2d 451 (decided under former law).

Scope of appeal from final order. — All appeals from a final order issued by the magistrate court are on the merits by trial de novo except as otherwise provided by law. *State v. Heinsen*, 2005-NMSC-035, 138 N.M. 441, 121 P.3d 1040.

Omission by magistrate fatal to appeal. — Failure by plaintiff to make certain magistrate filed the transcript to the district court within statutory time period constituted a failure to prosecute diligently his appeal, warranting dismissal of appeal. *Stripling v. PMC Realtors, Inc.*, 1971-NMSC-096, 83 N.M. 170, 489 P.2d 883.

Omission not fatal. — The district court acquires jurisdiction of inferior court cases through notice of appeal, and the court is not divested of jurisdiction by the failure of the magistrate to submit a transcript of proceedings. *State v. McKee*, 1974-NMCA-103, 86 N.M. 733, 527 P.2d 496, cert. denied, 86 N.M. 730, 527 P.2d 493.

When case beyond control of magistrate. — When appellant had done all that was required of him in perfecting an appeal, the case was beyond the control of the justice (now magistrate). *Lea County State Bank v. McCaskey Register Co.*, 1935-NMSC-069, 39 N.M. 454, 49 P.2d 577 (decided under former law).

Effect on default judgment. — One could appeal from a default judgment rendered and entered against him by a justice of the peace (now magistrate). *State ex rel. Heron v. District Court of First Judicial Dist.*, 1942-NMSC-035, 46 N.M. 290, 128 P.2d 451, writ of prohibition denied, 1942-NMSC-036, 46 N.M. 296, 128 P.2d 454; *M.J. Faggard & Co. v. Cunningham*, 1914-NMSC-008, 18 N.M. 510, 138 P. 264 (decided under former law).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 47 Am. Jur. 2d Justices of the Peace § 82.

Plea of guilty in justice of the peace or similar inferior court as precluding appeal, 42 A.L.R.2d 995.

24 C.J.S. Criminal Law §§ 1668 to 1674; 51 C.J.S. Justices of the Peace §§ 138 to 140.

35-13-2. Appeals; district court proceedings; docket fees; judgment.

A. Appeals from the magistrate courts shall be tried de novo in the district court.

B. The district court docket fee in any criminal appeal is thirty-five dollars ($35.00), ten dollars ($10.00) of which shall be deposited in the court automation fund.

C. If the judgment of the magistrate court in a criminal action is affirmed or rendered against the appellant on appeal or if the appellant fails to appear at the time fixed for hearing in the district court, the district court shall enter judgment imposing the same, a greater or a lesser penalty as that imposed in the magistrate court in the action.

History: 1953 Comp., § 36-15-3, enacted by Laws 1975, ch. 242, § 10; 1981, ch. 271, § 1; 1987, ch. 123, § 2; 1996, ch. 41, § 6.

ANNOTATIONS

Repeals and reenactments. — Laws 1968, ch. 62, § 171, repealed former 36-15-3, 1953 Comp., relating to forfeiture of appearance bonds, summons, service and appeal, and Laws 1968, ch. 62, § 150, enacted a new 36-15-3, 1953 Comp., relating to appeals from magistrate to district courts. Laws 1975, ch. 242, § 10, repealed 36-15-3, 1953 Comp., relating to appeals from magistrate to district courts, and enacted a new section.

Cross references. — For the court automation fund, *see* 34-9-10 NMSA 1978.

For trial de novo on appeal to district court, *see* 39-3-1 NMSA 1978.

For appeal from magistrate to district court, *see* Rule 2-705 NMRA.

The 1996 amendment, effective May 15, 1996, substituted "thirty-five dollars ($35.00), ten dollars ($10.00) of which shall be deposited in the court automation fund" for "twenty-five dollars ($25.00)" at the end of Subsection B.

The 1987 amendment, effective June 19, 1987, substituted "twenty-five dollars ($25.00)" for "two dollars and fifty cents ($2.50)" in Subsection B.

Some of the annotations listed below were decided under former law.

District court required to impose sentence. — When a defendant is convicted in a trial de novo on appeal from magistrate court, the district court is required to impose a sentence prior to remanding the case to the magistrate court for enforcement of the district court's judgment. *State v. Montoya*, 2005-NMCA-005, 136 N.M. 674, 104 P.3d 540, cert. quashed, 2005-NMCERT-011, 138 N.M. 587, 124 P.3d 565.

Order of remand not final. — When the district court enters an order of remand to the magistrate court that does not resolve the issue of sentencing, the order is not final and appealable. *State v. Montoya*, 2005-NMCA-005, 136 N.M. 674, 104 P.3d 540, cert. quashed, 2005-NMCERT-011, 138 N.M. 587, 124 P.3d 565.

Jurisdiction of district court. — On appeals from a magistrate court, the district court becomes a court of limited jurisdiction for the purpose of the appeal and the trial de novo. *State v. Lynch*, 1971-NMCA-049, 82 N.M. 532, 484 P.2d 374.

Discussion of right to jury trial for petty offenses. — A defendant is entitled to a jury trial for multiple petty offenses arising out of the same act, transaction or occurrence only if he is actually threatened at the commencement of trial with an aggregate potential penalty of greater than six months imprisonment. *Haar v. Hanrahan*, 708 F.2d 1547 (10th Cir. 1983).

Case dismissed when no jurisdiction. — Where case was begun in justice court (now magistrate court) and appealed to district court, if justice (now magistrate) had no jurisdiction, there was nothing to try de novo, and the case, on proper motion, would be dismissed. *Geren v. Lawson*, 1919-NMSC-048, 25 N.M. 415, 184 P. 216.

If the magistrate court lacks jurisdiction, the district court suffers the same lack of jurisdiction. *State v. Lynch*, 1971-NMCA-049, 82 N.M. 532, 484 P.2d 374.

Dismissal since complaint defective. — The district court could not assume a more enlarged jurisdiction on appeal than was conferred on the justice (now magistrate). Where there was nothing in complaint for assault and battery to show in what county the offense took place, the cause would be dismissed. *Territory v. Valencia*, 1881-NMSC-008, 2 N.M. 108.

Trial to be de novo. — Where appellant interposed a plea to the jurisdiction of a justice of the peace (now magistrate), which was overruled, and he declined to plead further, and judgment was rendered against him, and on appeal to the district court appellant conceded the jurisdiction of the justice of the peace (now magistrate), but appellee's motion for affirmance for that reason was overruled, the latter ruling was proper because under the statute the case was triable de novo in the district court, upon the merits. *Rogers v. Kemp Lumber Co.*, 1913-NMSC-079, 18 N.M. 300, 137 P. 586.

Effect where material allegations admitted. — Defendant actually had a trial de novo on appeal even though evidence was not introduced where the material allegations of

complaint had been admitted. *Butler Paper Co. v. Sydney*, 1943-NMSC-047, 47 N.M. 463, 144 P.2d 170.

Effect on judgment below. — On appeal to district court, case was tried on its merits de novo; if plaintiff's statement in a cause of action was found defective in substance, contrary judgment below would be reversed. *Crolot v. Maloy*, 1882-NMSC-004, 2 N.M. 198.

Trial de novo mandatory. — Trial de novo on appeal from justice court (now magistrate court) was mandatory. *Butler Paper Co. v. Sydney*, 1943-NMSC-047, 47 N.M. 463, 144 P.2d 170.

Procedure on appeal. — If justice court (now magistrate court) had jurisdiction in first instance, then district court would proceed to try case de novo according to district court procedure, and would not follow that of the justice court (magistrate court). *Pointer v. Lewis*, 1919-NMSC-020, 25 N.M. 260, 181 P. 428.

Grant of summary judgment not error. — Where there was nothing to show the trial court failed to consider the matters he was required to consider by Rule 56(c) [now Rule 1-056C NMRA], N.M.R. Civ. P., grant of summary judgment regardless of magistrate's findings was not error. *Southern Union Gas Co. v. Taylor*, 1971-NMSC-067, 82 N.M. 670, 486 P.2d 606).

Accounts or setoffs filed. — Parties can file accounts or setoffs, as if the case had originated in the district court. *Archibeque v. Miera*, 1857-NMSC-003, 1 N.M. 160.

Malicious prosecution. — Where prosecuting witness appealed from judgment of justice (now magistrate) taxing him with costs, district court was required to try the question whether the prosecution was instituted maliciously, or without probable cause, under Laws 1907, ch. 61, § 3 (41-13-5, 1953 Comp., now repealed), de novo, and enter its own independent judgment. *State v. Coats*, 1913-NMSC-082, 18 N.M. 314, 137 P. 597.

Right to jury trial. — District courts were not bound by rules applicable in justice court (now magistrate court) and on a trial de novo no jury trial was necessary unless some other considerations required it. *Reece v. Montano*, 1943-NMSC-054, 48 N.M. 1, 144 P.2d 461.

After jury trial in magistrate court, defendant not entitled to jury in trial de novo in district court. *State v. Haar*, 1980-NMCA-065, 94 N.M. 539, 612 P.2d 1350, cert. denied, 94 N.M. 674, 615 P.2d 991, and 449 U.S. 1063, 101 S. Ct. 787, 66 L. Ed. 2d 606 (1980).

District judge may not enhance sentence received in magistrate court. *State v. Haar*, 1980-NMCA-065, 94 N.M. 539, 612 P.2d 1350, cert. denied, 94 N.M. 674, 615 P.2d 991, and 449 U.S. 1063, 101 S. Ct. 787, 66 L. Ed. 2d 606 (1980).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 47 Am. Jur. 2d Justices of the Peace § 84.

51 C.J.S. Justices of the Peace §§ 185 to 212, 272.

35-13-3. Appeals; amendments on trial de novo.

Upon trial de novo in the district court upon appeal from the magistrate court, the district court shall allow all amendments necessary to the furtherance of justice.

History: 1953 Comp., § 36-15-4, enacted by Laws 1968, ch. 62, § 151.

ANNOTATIONS

Repeals. — Laws 1968, ch. 62, § 171, repealed former 36-15-1 to 36-15-4, 1953 Comp., relating to forfeiture of appearance bonds, summons, service and appeal, effective January 1, 1969.

Meaning of "trial de novo". — Appeals from a magistrate court to the district court shall be determined by trial de novo which means "anew." *Southern Union Gas Co. v. Taylor*, 1971-NMSC-067, 82 N.M. 670, 486 P.2d 606.

Amendment to show jurisdiction allowed. — Former statute called for an affirmative showing on the face of the papers as to jurisdictional matters, and where it did not so appear upon any appeal, and yet the jurisdiction actually existed, it was the duty of district court to allow the necessary amendment to show such fact. *Tietjen v. McCoy*, 1918-NMSC-074, 24 N.M. 164, 172 P. 1144 (decided under former law).

Amendment not sufficient. — Amendment to complaint to show jurisdiction by means of a paper clipped to the complaint was not sufficient. *Bell v. Beck*, 1939-NMSC-035, 43 N.M. 315, 92 P.2d 992 (decided under former law).

Error in refusal to permit amendment. — In action of replevin begun in justice of peace court (now magistrate court) and appealed to district court, district court erred in refusing to permit plaintiff to amend affidavit of replevin in controversy. *Romero v. Luna*, 1892-NMSC-011, 6 N.M. 440, 30 P. 855 (decided under former law).

Leave to amend not to be withheld. — Power of district court to exercise its discretion in giving leave to amend was not to be withheld in cases of appeal, when it appeared that justice of the peace (now magistrate) had jurisdiction of subject matter in controversy and of parties in the case. *Sanchez v. Luna*, 1857-NMSC-012, 1 N.M. 238 (decided under former law).

Grant of summary judgment not error. — Where there was nothing to show the trial court failed to consider the matters he was required to consider by Rule 56(c) [now Rule 1-056C], N.M.R. Civ. P., grant of summary judgment regardless of magistrate's findings

was not error. *Southern Union Gas Co. v. Taylor*, 1971-NMSC-067, 82 N.M. 670, 486 P.2d 606.

Scope of appeal. — Where defendant did not challenge his convictions on appeal and did not claim to be aggrieved, but only challenged constitutionality of a federal statute and its effect on him, defendant lacked the right to appeal his conviction. *State v. Garcia*, 2003-NMCA-045, 133 N.M. 444, 63 P.3d 1164.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 47 Am. Jur. 2d Justices of the Peace § 96.

51 C.J.S. Justices of the Peace §§ 151, 153(8), 154(3), 174, 190, 226.

ARTICLE 14
Municipal Courts

35-14-1. Municipal court; creation.

A. Except for municipalities with a population of fewer than two thousand five hundred or more than five thousand persons in the most recent federal decennial census lying within the boundaries of a class A county with a population of more than two hundred thousand persons in the most recent federal decennial census and municipalities that have adopted an effective ordinance pursuant to Subsection D of this section, there is established a municipal court in each incorporated municipality. The municipal courts shall be presided over by municipal judges. As used in Chapter 35, Articles 14 and 15 NMSA 1978, "municipality" includes H class counties.

B. The governing body of a municipality that is not governed by home rule, territorial or special charter and having a population fewer than ten thousand persons in the most recent federal decennial census, where the municipal court is located twenty-five or fewer miles from the nearest magistrate court, may by resolution express its intent to designate the magistrate court of the county in which the municipality is located as the court having jurisdiction over municipal ordinances. Within fifteen days from the adoption of a resolution pursuant to this section, the governing body of the municipality shall create a "municipal ordinance jurisdiction advisory committee". The municipal ordinance jurisdiction advisory committee shall be composed of the following members, who shall be residents of the municipality:

(1) the mayor;

(2) a member of the governing body;

(3) a municipal judge;

(4) the chief of police; and

(5) three members of the public, each selected by the mayor, the governing body and the municipal judge.

C. A municipal ordinance jurisdiction advisory committee shall:

(1) hold at least one public hearing on the question of designating the magistrate court of the county in which the municipality is located as the court having jurisdiction over municipal ordinances;

(2) hear testimony from all interested persons, including the mayor, the governing body and the municipal judge; and

(3) submit a report, including recommendations directly to the governing body of the municipality, with copies to the mayor and municipal judge.

D. Following receipt of a report from the municipal ordinance jurisdiction advisory committee, the governing body of a municipality may, subject to approval by the supreme court, adopt an ordinance upon a three-fourths' majority vote to designate the magistrate court of the county in which the municipality is located as the court having jurisdiction over municipal ordinances. An ordinance adopted shall become effective only upon supreme court approval and the expiration of the term of the municipal judge in office on the date of the supreme court's approval of the ordinance.

E. Within five days after the effective date of an ordinance adopted pursuant to Subsection D of this section, the governing body of the municipality shall:

(1) forward a copy of the ordinance to the magistrate court and to the administrative office of the courts; and

(2) provide to the magistrate court copies of all municipal ordinances over which the magistrate court will have jurisdiction.

F. A magistrate court designated pursuant to Subsection D of this section shall, with respect to ordinances of the municipality:

(1) follow the rules of procedure for the municipal courts and the procedures provided by Chapter 35, Article 15 NMSA 1978;

(2) impose no fine or sentence greater than that permitted for municipalities;

(3) remit monthly to the state the court automation and judicial education fees collected pursuant to Subsection B of Section 35-14-11 NMSA 1978 as a result of enforcement of municipal ordinances; and

(4) remit monthly to the municipality the corrections fee collected pursuant to Subsection B of Section 35-14-11 NMSA 1978 as a result of the enforcement of municipal ordinances.

G. Any municipality that has passed an ordinance designating the magistrate court of the county in which the municipality is located as the court having jurisdiction over municipal ordinances may re-establish the municipal court as the court having jurisdiction over municipal ordinances through the following procedures:

(1) the governing body of the municipality may pass an ordinance rescinding the designation that was made pursuant to Subsection B of this section; or

(2) following receipt of a petition signed by at least twenty percent of the registered voters who voted in the last municipal election for the office of mayor:

(a) convene a municipal ordinance jurisdiction advisory committee pursuant to Subsection B of this section that shall make a report and recommendation, if any, to the governing body of the municipality; and

(b) the governing body shall indicate its assent to re-establishment of the municipal court by ordinance.

History: 1953 Comp., § 37-1-1, enacted by Laws 1961, ch. 208, § 1; 1967, ch. 215, § 1; 1968, ch. 62, § 152; 1979, ch. 346, § 12; 1984, ch. 30, § 3; 1985, ch. 128, § 2; 1993, ch. 143, § 1; 2019, ch. 246, § 1.

ANNOTATIONS

Cross references. — For classification of counties, *see* 4-44-1 and 4-44-3 NMSA 1978.

For Rules of Procedure for the Municipal Courts, *see* Rule 8-101 NMRA et seq.

The 2019 amendment, effective June 14, 2019, revised procedures regarding the designation by a municipality of the magistrate court of the county in which the municipality is located as the court having jurisdiction over municipal ordinances, provided procedures to re-establish the municipal court as the court having jurisdiction over municipal ordinances, and specified certain court-imposed fees to be remitted to the state; in Subsection A, after "pursuant to Subsection" deleted "B" and added "D"; added new Subsections B through D and redesignated former Subsections B and C as Subsection E and F, respectively; in Subsection E, in the introductory paragraph, deleted "The governing body of a municipality with a population of one thousand five hundred persons or less in the last federal decennial census may designate the magistrate court of the county in which the municipality is located as the court having jurisdiction over municipal ordinances. The designation shall be by adopted ordinance which shall not be effective until the expiration of the term of any incumbent municipal judge.", and after "date of an ordinance", added "adopted pursuant to Subsection D of

this section"; in Subsection F, in the introductory clause, after "Subsection", deleted "B" and added "D", in Paragraph F(3), after "to the state", deleted "all funds" and added "the court automation and judicial education fees", after "collected", added "pursuant to Subsection B of Section 35-14-11 NMSA 1978", and added Paragraph F(4); and added Subsection G.

The 1993 amendment, effective June 18, 1993, substituted "one thousand five hundred" for "five hundred" near the beginning of Subsection B.

When judgment may be vacated. — A police magistrate court does not have authority to vacate a judgment rendered by it in the course of its jurisdiction, absent any question of fraud practiced on said court. 1958 Op. Att'y Gen. No. 58-03 (rendered under former law).

Validity of ordinance regulating officeholding. — A municipal ordinance which provides that a municipal judge shall not hold any other state, county, city or precinct office or position is valid. 1962 Op. Att'y Gen. No. 62-106 (rendered under former law).

Offices not incompatible. — The office of a municipal magistrate is not incompatible with that of the city clerk under 3-12-4 NMSA 1978. There is no inconsistency of function, no subordination and no interference as long as the clerk is not charged with enforcing any municipal ordinance. If either office is full time, however, a physical incompatibility exists. 1967 Op. Att'y Gen. No. 67-74.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 20 Am. Jur. 2d Courts § 12.

21 C.J.S. Courts § 93 et seq.

35-14-2. Jurisdiction.

A. Each municipal court has jurisdiction over all offenses and complaints under ordinances of the municipality and may issue subpoenas and warrants and punish for contempt.

B. Upon written agreement between the board of regents of a state educational institution designated in Article 12, Section 11 of the constitution of New Mexico and the governing body of a municipality contiguous to land under control of the board of regents or within which any portion of such land is located, the municipal court has jurisdiction over violations of campus traffic regulations adopted under Section 29-5-1 NMSA 1978 as to areas under control of the board of regents. Fines and forfeitures collected by the municipal court under campus traffic regulations may be credited to the state educational institution on whose campus the violation occurred.

C. Upon written agreement between a post-secondary educational institution and the governing body of a municipality contiguous to land under control of the institution or within which any portion of such land is located, the municipal court has jurisdiction over

violations of campus traffic regulations adopted pursuant to Section 29-5-4 NMSA 1978 as to areas under control of the institution. Fines and forfeitures collected by the municipal court for violations of campus traffic regulations may be credited to the municipality or to the post-secondary educational institution on whose campus the violation occurred.

D. Each municipal court's personal jurisdiction extends to any defendant who has been properly served with criminal process of the court anywhere in the state if that criminal process arises out of a charge of violation of a municipal ordinance prohibiting driving while under the influence of intoxicating liquor or drugs.

History: 1953 Comp., § 37-1-2, enacted by Laws 1961, ch. 208, § 2; 1969, ch. 131, § 1; 1975, ch. 167, § 1; 1988, ch. 88, § 3; 2011, ch. 53, § 2.

ANNOTATIONS

Repeals. — Laws 1961, ch. 208, § 11, repealed former 37-1-1 to 37-1-9, 1953 Comp., relating to the creation of a police court in cities and towns, defining its jurisdiction, providing for the election of a police judge, providing for statements and the filling of vacancies.

The 2011 amendment, effective July 1, 2011, added Subsection C to authorize post-secondary educational institutions and municipalities to enter into agreements to provide for the enforcement of campus traffic regulations in municipal court and to permit fines and forfeitures collected by the municipal court to be credited to the municipality or to the post-secondary educational institution.

The 1988 amendment, effective May 18, 1988, added Subsection C.

Theft of credit card. — The municipal court had no jurisdiction to hear a felony charge of theft of a credit card. *State v. Rodriguez*, 2005-NMSC-019, 138 N.M. 21, 116 P.3d 92.

Jurisdiction not exclusive. — A municipal court does not have exclusive jurisdiction where driving while intoxicated or acts of domestic violence are alleged to have occurred within the city limits and to violate both state laws and municipal ordinances and a municipal peace officer may refer criminal charges to any prosecutor at any level for evaluation and prosecution in municipal, magistrate or district court. Nothing in the law binds an officer to file charges in municipal court where the charges stem from activities that allegedly violate a municipal ordinance and a state law or a county ordinance. 2008 Op. Att'y Gen. No. 08-06.

Scope of jurisdiction. — A municipal judge is limited in the exercise of his jurisdiction to those offenses arising out of violations or alleged violations of municipal ordinances. In addition, jurisdiction of municipal judges extends only to offenses perpetrated within the limits of the particular municipality. 1962 Op. Att'y Gen. No. 62-141.

Original jurisdiction is exclusive. — Only municipal courts have original jurisdiction to hear violations of municipal ordinances. 1965 Op. Att'y Gen. No. 65-236.

Jurisdiction to issue search warrants. — A municipal judge has the power and authority to issue valid search warrants where the evidence to be seized will be used to prosecute violations of municipal ordinances, but not where the seized evidence will be used to prosecute violations of state laws. 1970 Op. Att'y Gen. No. 70-45.

Jurisdiction at university. — Ordinances of the city of Albuquerque dealing with crimes do not apply to land under the control of the board of regents of the university of New Mexico except for traffic offenses. 1969 Op. Att'y Gen. No. 69-48.

Jurisdiction as to state Motor Vehicle Code. — Unless the town has specifically enacted an ordinance inclusive of the motor vehicle offenses contained in the state traffic code, a municipal judge does not have jurisdiction to hear and try those traffic offenses contained in the state Motor Vehicle Code (66-1-1 NMSA 1978 et seq.) which are not actually covered by the particular town ordinance. 1962 Op. Att'y Gen. No. 62-141.

Other sections supplemented. — This section provides for a waiver of the right to regulate university property under agreement between boards of regents of state educational institutions and municipalities for traffic offenses occurring on the university campus and supplements 29-5-1 and 29-5-2 NMSA 1978. 1969 Op. Att'y Gen. No. 69-48.

No right to trial by jury. — No right of trial by jury exists in municipal court "petty" or "minor" cases arising from the violation of city ordinances. 1964 Op. Att'y Gen. No. 64-37.

Marriage ceremony outside of municipality. — A municipal judge cannot perform a marriage outside of the municipality in which he sits. 1988 Op. Att'y Gen. No. 88-36.

Municipal judge is public officer for purposes of N.M. Const., art. IV, § 27. 1979 Op. Att'y Gen. No. 79-27.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Criminal jurisdiction of municipal or other local court, 102 A.L.R.5th 525.

20 Am. Jur. 2d Courts § 12.

21 C.J.S. Courts § 12 et seq.

35-14-3. Judges; qualifications; bond; salary.

The qualifications of municipal judges, bond required and salary received shall be provided by ordinance of the municipality.

History: 1953 Comp., § 37-1-3, enacted by Laws 1961, ch. 208, § 3.

ANNOTATIONS

Repeals. — Laws 1961, ch. 208, § 11, repealed former 37-1-1 to 37-1-9, 1953 Comp., relating to the creation of a police court in cities and towns, defining its jurisdiction, providing for the election of a police judge, providing for statements and the filling of vacancies.

Constitutionality of section. — This section 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 other 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*, 1976-NMSC-011, 89 N.M. 70, 547 P.2d 553.

Holding of other office permissible. — It is permissible for a police judge to also hold a job in the town administration as traffic violations bureau director, and it is permissible for him to draw compensation for said added duty. 1958 Op. Att'y Gen. No. 58-221 (rendered under former law).

Remuneration of municipal judge generally. — Until such time as a valid ordinance provides for his salary, a municipality may not legally pay remuneration to its magistrate although it may reimburse the judge for his legitimate expenses. 1969 Op. Att'y Gen. No. 69-129.

Municipal judge is public officer for purposes of N.M. Const., art. IV, § 27. 1979 Op. Att'y Gen. No. 79-27.

Effect of arrests and convictions on salary. — Section 66-8-137 NMSA 1978 provides that a municipal magistrate's salary cannot depend upon arrests and convictions for violations under the Motor Vehicle Code (66-1-1 NMSA 1978 et seq.). 1969 Op. Att'y Gen. No. 69-129.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 46 Am. Jur. 2d Judges § 11.

48A C.J.S. Judges § 1 et seq.

35-14-4. Election; term; vacancy.

A. Municipal judges shall be elected, for terms of four years, at a regular municipal election.

B. In municipalities with a population of thirty thousand persons or more, additional judges may be elected if the municipal governing body determines the workload of the court requires more than one judge. Municipalities with a population of less than thirty thousand persons shall have only one municipal judge.

C. The governing body of any municipality may fill vacancies by appointment of a municipal judge to serve until the next regular municipal election.

History: 1953 Comp., § 37-1-4, enacted by Laws 1961, ch. 208, § 4; 1967, ch. 215, § 2; 1973, ch. 208, § 2; 1993, ch. 222, § 1.

ANNOTATIONS

Repeals. — Laws 1961, ch. 208, § 11, repealed former 37-1-1 to 37-1-9, 1953 Comp., relating to the creation of a police court in cities and towns, defining its jurisdiction, providing for the election of a police judge, providing for statements and the filling of vacancies.

The 1993 amendment, effective June 18, 1993, substituted "thirty thousand" for "fifty thousand" in both sentences of Subsection B.

Length of term statutorily mandated. — The city charter of a non-homerule municipality may not provide municipal judges with terms of a different length than those mandated by statute. 1987 Op. Att'y Gen. No. 87-16.

Where no successor chosen. — Where no successor was chosen as provided by law, i.e., no election was held, there now exists by virtue of 10-3-1 NMSA 1978 a "vacancy" which can be filled by appointment under this section. Once he is appointed and qualifies by giving his bond, he takes office from the incumbent who remains in that office under N.M. Const., art. XX, § 2. 1956 Op. Att'y Gen. No. 56-6452 (rendered under former law).

Municipal judge must be a resident of the municipality which he serves. 1969 Op. Att'y Gen. No. 69-11.

Municipal judge is public officer for purposes of N.M. Const., art. IV, § 27. 1979 Op. Att'y Gen. No. 79-27.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 46 Am. Jur. 2d Judges §§ 9, 239, 240.

48A C.J.S. Judges § 12 et seq.

35-14-5. Temporary incapacity or absence of a municipal judge.

Any registered voter of a municipality in which a municipal judge is incapacitated or absent may be appointed to the office of the municipal judge during his temporary incapacity or absence, and he shall hear and determine cases arising under municipal ordinances while sitting as municipal judge. The governing body may establish a procedure by ordinance for appointment.

History: 1953 Comp., § 37-1-5, enacted by Laws 1961, ch. 208, § 5; 1973, ch. 88, § 1.

ANNOTATIONS

Repeals. — Laws 1961, ch. 208, § 11, repealed former 37-1-1 to 37-1-9, 1953 Comp., relating to the creation of a police court in cities and towns, defining its jurisdiction, providing for the election of a police judge, providing for statements and the filling of vacancies.

Separation of powers. — A municipal ordinance establishing a procedure for filling a temporary vacancy on the municipal court did not violate the separation of powers doctrine. *Aguilar v. City Comm'n*, 1997-NMCA-045, 123 N.M. 333, 940 P.2d 181.

Scope of city authority. — City commission acted within its authority in establishing a procedure for filling a temporary vacancy on the municipal court. *Aguilar v. City Comm'n*, 1997-NMCA-045, 123 N.M. 333, 940 P.2d 181.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 46 Am. Jur. 2d Judges §§ 248 et seq.

48A C.J.S. Judges § 161 et seq.

35-14-6. Duties of temporary municipal judge.

The requirements of law relating to money collected, monthly reports, itemized statements and penalties apply to temporary municipal judges.

History: 1953 Comp., § 37-1-6, enacted by Laws 1961, ch. 208, § 6.

ANNOTATIONS

Repeals. — Laws 1961, ch. 208, § 11, repealed former 37-1-1 to 37-1-9, 1953 Comp., relating to the creation of a police court in cities and towns, defining its jurisdiction, providing for the election of a police judge, providing for statements and the filling of vacancies.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 46 Am. Jur. 2d Judges §§ 248 et seq.

48A C.J.S. Judges § 161 et seq.

35-14-7. Monthly reports and remittances.

Each municipal judge shall make monthly written reports to the governing body of all money collected by him; provided he shall account separately for costs collected pursuant to Section 35-14-11 NMSA 1978. The reports shall be filed and the money collected shall be paid to the municipality not later than the tenth day of the month following collection.

History: 1953 Comp., § 37-1-7, enacted by Laws 1961, ch. 208, § 7; 1983, ch. 134, § 5.

ANNOTATIONS

Repeals. — Laws 1961, ch. 208, § 11, repealed former 37-1-1 to 37-1-9, 1953 Comp., relating to the creation of a police court in cities and towns, defining its jurisdiction, providing for the election of a police judge, providing for statements and the filling of vacancies.

35-14-8. Itemized statement.

All required reports shall include an itemized statement showing the different amounts collected, the purpose of collection, the name of the person paying and the date of payment.

History: 1953 Comp., § 37-1-8, enacted by Laws 1961, ch. 208, § 8.

ANNOTATIONS

Repeals. — Laws 1961, ch. 208, § 11, repealed former 37-1-1 to 37-1-9, 1953 Comp., relating to the creation of a police court in cities and towns, defining its jurisdiction, providing for the election of a police judge, providing for statements and the filling of vacancies.

35-14-9. Penalty.

Any municipal judge violating any provision relating to making reports or remitting money collected is guilty of a misdemeanor and shall be fined not more than two hundred dollars ($200) or imprisoned not more than ninety days, or both.

History: 1953 Comp., § 37-1-9, enacted by Laws 1961, ch. 208, § 9.

ANNOTATIONS

Repeals. — Laws 1961, ch. 208, § 11, repealed former 37-1-1 to 37-1-9, 1953 Comp., relating to the creation of a police court in cities and towns, defining its jurisdiction, providing for the election of a police judge, providing for statements and the filling of vacancies.

35-14-10. Municipal judges; training required.

Each municipal judge shall annually as a condition of discharging the duties of that office, successfully complete a judicial training program conducted under the authority, or with the approval of, the court administrator, unless exempted from this requirement by the chief justice of the supreme court. No municipal judge holding office after December 31, 1973 shall receive any salary until he has successfully completed, or been exempted from, the required judicial training program.

History: 1953 Comp., § 37-1-10, enacted by Laws 1973, ch. 157, § 1.

35-14-11. Municipal ordinance; court costs; collection; purpose.

A. Every municipality shall enact an ordinance requiring assessment of corrections fees, judicial education fees and court automation fees to be collected as court costs and used as provided in this section.

B. A municipal judge shall collect the following costs:

(1) a corrections fee of twenty dollars ($20.00);

(2) a judicial education fee of three dollars ($3.00); and

(3) a court automation fee of six dollars ($6.00).

C. The fees are to be collected upon conviction from persons convicted of violating any ordinance relating to the operation of a motor vehicle or any ordinance that may be enforced by the imposition of a term of imprisonment.

D. All money collected pursuant to Paragraph (1) of Subsection B of this section shall be deposited in a special fund in the municipal treasury and shall be used for:

(1) municipal jailer or juvenile detention officer training;

(2) the construction planning, construction, operation and maintenance of a municipal jail or juvenile detention facility;

(3) paying the cost of housing municipal prisoners in a county jail or detention facility or housing juveniles in a detention facility;

(4) complying with match or contribution requirements for the receipt of federal funds relating to jails or juvenile detention facilities;

(5) providing inpatient treatment or other substance abuse programs in conjunction with or as an alternative to jail sentencing;

(6) defraying the cost of transporting prisoners to jails or juveniles to juvenile detention facilities; or

(7) providing electronic monitoring systems.

E. If a municipality with a population less than ten thousand according to the most recent federal decennial census has a balance in its special fund pursuant to Subsection D of this section that is over the amount projected to be needed for the next fiscal year for the purposes set forth in that subsection, the municipality may transfer the unneeded balance to the municipality's general fund.

F. A municipality may credit the interest collected from fees deposited in the special fund pursuant to Subsection D of this section to the municipality's general fund.

G. All money collected pursuant to Paragraph (2) of Subsection B of this section shall be remitted monthly to the state treasurer for credit to the judicial education fund and shall be used for the education and training, including production of bench books and other written materials, of municipal judges and other municipal court employees.

H. All money collected pursuant to Paragraph (3) of Subsection B of this section shall be remitted monthly to the state treasurer for credit to the municipal court automation fund and shall be used for the purchase, maintenance and operation of court automation systems in the municipal courts. Operation includes staff expenses, temporary or otherwise, and costs as needed to comply with Section 35-14-12 NMSA 1978. The court automation systems shall have the capability of providing, on a timely basis, electronic records in a format specified by the judicial information systems council.

I. As used in this section, "convicted" means the defendant has been found guilty of a criminal charge by a municipal judge, either after trial, a plea of guilty or a plea of nolo contendere.

History: 1978 Comp., § 35-14-11, enacted by Laws 1983, ch. 134, § 6; 1987, ch. 251, § 3; 1988, ch. 121, § 4; 1989, ch. 133, § 1; 1993, ch. 273, § 5; 1994, ch. 69, § 1; 1998, ch. 103, § 1; 2003, ch. 424, § 3; 2006, ch. 28, § 2; 2009, ch. 245, § 4; 2013, ch. 192, § 1; 2015, ch. 87, § 1.

ANNOTATIONS

Repeals and reenactments. — Laws 2001, ch. 102, § 2, effective June 15, 2001, repealed Laws 1994, ch. 69, § 2, which would have repealed Section 35-14-11 NMSA 1978 and enacted a new section, effective July 1, 2001.

Cross references. — For municipal court automation fund, *see* 34-9-12 NMSA 1978.

For payment of costs of any court ordered screening and treatment program by person convicted of driving under the influence, *see* 66-8-102 NMSA 1978.

For funding of local government corrections fund by penalty assessment fees, *see* 66-8-119 NMSA 1978.

The 2015 amendment, effective July 1, 2015, provided for municipalities with a population of less than ten thousand to transfer balances from certain municipal court fees to the municipality's general fund; and in Subsection E, after "population less than", deleted "three" and added "ten".

The 2013 amendment, effective July 1, 2013, provided for the use of municipal court corrections fees for general fund purposes; and added Subsection E.

The 2009 amendment, effective July 1, 2009, in Paragraph (1) of Subsection C, changed the fee from $2.00 to $3.00.

The 2006 amendment, effective May 17, 2006, provides in Subsection G that the municipal court automation fund may be used to operate a court automation system and that operation includes staff expenses and costs as needed to comply with 35-14-12 NMSA 1978.

The 2003 amendment, effective July 1, 2003, moved the definition of "convicted" from the beginning of Subsection B to Subsection H; increased the fees in Paragraphs B(1) and B(2); added Paragraphs (5), (6), and (7) in Subsection D; added Subsection E, and redesignated the remaining subsections accordingly.

The 1998 amendment, effective July 1, 1998, substituted "six dollars ($6.00)" for "three dollars ($3.00)" in Paragraph B(3).

The 1994 amendment, effective July 1, 1994, inserted "and court automation fees" in Subsection A, inserted Paragraph B(3), made related stylistic changes in Subsections A and B, and inserted Subsection F.

The 1993 amendment, effective July 1, 1993, inserted "and judicial education fees" in Subsection A; rewrote the former second sentence of Subsection B as the present second sentence of that subsection, with Paragraphs (1) and (2), and Subsection C; redesignated former Subsection C as present Subsection D; inserted "Paragraph (1) of Subsection B" near the beginning and substituted "facilities" for "facility" at the end, in Subsection D; and added Subsection E.

The 1989 amendment, effective June 16, 1989, made minor stylistic changes throughout the section; and in Subsection C deleted "solely" following "used", and inserted "or juvenile detention officer", "or juvenile detention facility", and "or housing juveniles in a detention facility".

The 1988 amendment, effective March 8, 1988, added the first sentence of Subsection B.

The 1987 amendment, effective June 19, 1987, added all of the language following "vehicle" and preceding the fee amount in Subsection B; in Subsection C, substituted "municipal jailer training, the construction planning, construction, operation and maintenance of a municipal jail" for "the purpose of constructing, operating and maintaining a municipal jail or", and added all of the language beginning with "or complying."

35-14-12. Municipal courts; automation required.

By July 1, 1996, each municipal court shall have the capability of providing on a timely basis electronic records in a format specified by the judicial information system council tracking convictions of violations of municipal ordinances prohibiting driving while under the influence of intoxicating liquor or drugs and prohibiting domestic violence.

History: Laws 1993, ch. 67, § 2.

ARTICLE 15
Violations of Municipal Ordinances

35-15-1. Proceedings to enforce ordinances; plaintiff; appeals.

A. All actions to enforce any ordinance of any municipality shall be brought in the name of the municipality as plaintiff. No prosecution, conviction or acquittal for the violation of an ordinance is a defense to any other prosecution of the same party for any other violation of an ordinance, although different causes of action existed at the same time and, if united, would have exceeded the jurisdiction of the court.

B. The plaintiff or defendant may appeal to the district court from the judgment of any municipal court within fifteen days after judgment and sentence rendered in the municipal court. Failure of either party to appeal within the prescribed time is jurisdictional and an appeal not timely filed shall not be entertained by the district court.

History: Laws 1884, ch. 39, § 17; C.L. 1884, § 1625; C.L. 1897, § 2405; Code 1915, § 3627; C.S. 1929, § 90-907; 1941 Comp., § 39-201; 1953 Comp., § 38-1-1; Laws 1959, ch. 169, § 1; 1961, ch. 208, § 10; 1963, ch. 10, § 1; 1969, ch. 35, § 1.

ANNOTATIONS

No chilling effect on right to 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*, 1977-NMCA-022, 90 N.M. 246, 561 P.2d 945.

Validity of ordinances authorizing commitment. — If a fine is imposed, an order may be made for commitment until the fine and costs are paid; although such proceedings are not criminal, being at most quasi-criminal, ordinances authorizing commitment are valid. *In re Roe Chung*, 1897-NMSC-016, 9 N.M. 130, 49 P. 952.

City attorney may represent municipality. — City attorney may prosecute violations of municipal ordinances in district court without authorization from the district attorney. *City of Roswell v. Smith*, cert. denied, 2006-NMCA-040, 139 N.M. 381, 133 P.3d 271, 2006-NMCERT-004, 139 N.M. 429, 134 P.3d 120.

Docket fee only applicable to appeals brought under this article. — A docket fee is applicable to appeals from the municipal court to the district court only when brought from an action enforcing ordinances under 35-15-1 NMSA 1978 et seq. 1980 Op. Att'y Gen. No. 80-18.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 56 Am. Jur. 2d Municipal Corporations, Counties and Other Political Subdivisions § 414.

62 C.J.S. Municipal Corporations §§ 322, 325, 930.

35-15-2. Pleading existence of ordinance provisions violated.

In all actions brought to enforce any ordinance, it shall be sufficient to state in the complaint or affidavit the number of the section and title of the ordinance violated without stating said section or ordinance in full or the substance thereof.

History: Laws 1884, ch. 39, § 104; C.L. 1884, § 1712; C.L. 1897, § 2517; Code 1915, § 3629; C.S. 1929, § 90-909; 1941 Comp., § 39-202; 1953 Comp., § 38-1-2; Laws 1959, ch. 169, § 2; 1975, ch. 87, § 1.

ANNOTATIONS

Complaint sufficient. — Complaint charging that defendant "did willfully and unlawfully commit the offense of selling intoxicating liquor to wit: whiskey, etc." was sufficient although it did not state it was sold for beverage purposes. *City of Clovis v. Dendy*, 1931-NMSC-007, 35 N.M. 347, 297 P. 141.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 61A Am. Jur. 2d Pleading § 9 et seq.

62 C.J.S. Municipal Corporations §§ 329, 333.

35-15-3. Procedure; commitment.

A. In any action for the violation of any ordinance in which an arrest has not been made, a warrant for the arrest of the defendant may issue in the first instance upon the affidavit of any person making a complaint that he has reasonable grounds to believe

the party charged is guilty. Any person arrested upon such warrant shall, without unnecessary delay, be taken before the proper officer to be tried for the alleged offense or be allowed to post an appropriate bond.

B. Any municipality may provide by ordinance that the first process shall be a citation or summons in cases involving violations of any municipal ordinance not amounting to a breach of the peace, requiring the party charged to appear before the municipal court at a time fixed in the citation or summons. The ordinance may also provide that, upon the failure of the party charged to appear, a warrant for his arrest shall immediately issue by the municipal judge for the offense specified in the citation or summons, commanding that the party charged shall be arrested and proceedings had as in the case when arrest is made upon a warrant issued upon affidavit as provided in Subsection A of this section.

C. Any person upon whom any fine or penalty is imposed may, upon order of the court convicting him, be committed to the county jail, municipal jail, detention facility or other place provided by the municipality for the incarceration of offenders until the fine or penalty is fully paid. The period of incarceration shall not exceed sixty days for any one offense except as authorized in Subsection C of Section 3-17-1 NMSA 1978. The municipal governing body may provide by ordinance that every person so committed shall work for the municipal corporation, at such labor as his strength will permit, within or without the jail or other place provided for the incarceration, not exceeding ten hours each working day. Each offender shall be credited with eight times the federal hourly minimum wage per day in reduction of any fine.

History: Laws 1884, ch. 39, § 19; C.L. 1884, § 1627; C.L. 1897, § 2407; Code 1915, § 3628; C.S. 1929, § 90-908; 1941 Comp., § 39-203; 1953 Comp., § 38-1-3; Laws 1959, ch. 169, § 3; 1961, ch. 209, § 1; 1963, ch. 11, § 1; 1987, ch. 92, § 2; 2001, ch. 170, § 2.

ANNOTATIONS

The 2001 amendment, effective July 1, 2001, in Subsection C, substituted "period of incarceration shall not exceed sixty days" for "imprisonment shall not exceed ninety days" and increased the credit amount from five dollars per day to eight times the federal hourly minimum wage per day.

The 1987 amendment, effective June 19, 1987, in Subsection B, near the end of the first sentence substituted "municipal court" for "municipal magistrate court"; in Subsection C, in the first sentence substituted "detention facility" for "prison farm", in the second sentence made a minor stylistic change and inserted "except as authorized in Subsection C of Section 3-17-1 NMSA 1978" at the end, and in the third sentence substituted "jail" for "prison" preceding "or other place provided for the incarceration."

Validity of ordinances authorizing commitment. — If a fine is imposed, an order may be made for commitment until the fine and costs are paid; although such proceedings

are not criminal, being at most quasi-criminal, ordinances authorizing commitment are valid. *In re Roe Chung*, 1897-NMSC-016, 9 N.M. 130, 49 P. 952.

Forms of proceedings. — This section provides two forms of proceedings for the violation of city ordinances, viz.: one civil in form and providing that the first process shall be a summons; the other a warrant for arrest of the offender, based upon affidavit. It provides for a fine or penalty, and for imprisonment as a means of collecting the same. *City of Tucumcari v. Belmore*, 1913-NMSC-084, 18 N.M. 331, 137 P. 585.

No warrants required. — While this section requires that warrants must be supported by affidavits, if the offense is committed in the immediate presence of the arresting officers, no warrant is required. *City of Clovis v. Archie*, 1955-NMSC-105, 60 N.M. 239, 290 P.2d 1075.

When endorsement by district attorney not needed. — A complaint sworn to and filed upon information and belief by a police officer, which alleges a violation of a municipal ordinance need not be endorsed or approved by the district attorney or his representative. 1968 Op. Att'y Gen. No. 68-115.

"Reasonable grounds to believe" means substantially the same thing as probable cause. 1963 Op. Att'y Gen. No. 63-123.

Law reviews. — For article, "Prisoners Are People," see 10 Nat. Resources J. 869 (1970).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 56 Am. Jur. 2d Municipal Corporations, Counties, and Other Political Subdivisions § 419.

Conviction under state statute held not a bar to prosecution under ordinance, or vice versa, 103 A.L.R. 1249.

Penalties for violations of ordinances, municipal power to impose, 115 A.L.R. 1395.

Interest necessary to maintenance of declaratory determination of validity of ordinance, 174 A.L.R. 549.

Meaning of term "radius" employed in ordinance as descriptive of area, location or distance, 10 A.L.R.2d 605.

Public regulation and prohibition of sound amplifiers or loud speaker broadcasts in streets, 10 A.L.R.2d 627.

Right of municipal corporation to review of an unfavorable decision in an action or prosecution for violation of a municipal ordinance, 11 A.L.R.4th 399.

62 C.J.S. Municipal Corporations §§ 316, 327, 351, 355, 356.

35-15-4. Service of process.

A. In the county in which the municipality whose ordinances are alleged to have been violated is located, a law enforcement officer with jurisdiction in that county may serve any municipal court process or make any arrests authorized by law to be made.

B. In counties adjacent to the county in which the municipality whose ordinances are alleged to have been violated is located, a law enforcement officer with jurisdiction in that county may serve any municipal court process or make any arrests authorized by law to be made, except for any service or arrest emanating from parking violations alleged to have occurred in a municipality located in another county.

History: Laws 1884, ch. 39, § 21; C.L. 1884, § 1629; C.L. 1897, § 2409; Code 1915, § 3631; C.S. 1929, § 90-911; 1941 Comp., § 39-204; 1953 Comp., § 38-1-4; 2017, ch. 27, § 1.

ANNOTATIONS

The 2017 amendment, effective July 1, 2017, rewrote the language of the section to expand the jurisdiction for municipal courts for issuing bench warrants, except for parking violations; added the catchline; deleted the former language in its entirety, which provided that a constable or sheriff could serve any process or make any arrests authorized to be made by any city or town officer; and added Subsections A and B.

35-15-5. Maximum time for commencing proceeding for enforcement or [of] ordinances.

All prosecutions for the commission of any offense made punishable by ordinance shall be commenced within one year after the violation and shall be barred thereafter.

History: Laws 1884, ch. 39, § 22; C.L. 1884, § 1630; C.L. 1897, § 2410; Code 1915, § 3632; C.S. 1929, § 90-912; 1941 Comp., § 39-205; 1953 Comp., § 38-1-5; Laws 1959, ch. 169, § 4.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

Authority of county officer. — The unequivocal language of this section permits a constable of the county to make the same arrests without a warrant that a city or town officer is authorized to make. 1964 Op. Att'y Gen. No. 64-65.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 62 C.J.S. Municipal Corporations § 324.

35-15-6. Custody of prisoners.

In case any such person shall be confined in any county jail it shall be the duty of the sheriff or jailer to deliver him to the appropriate municipal officer whenever such prisoner is to work for such municipality but such prisoner shall be returned to such county jail each night.

History: Laws 1905, ch. 84, § 2; Code 1915, § 3634; C.S. 1929, § 90-914; 1941 Comp., § 39-207; 1953 Comp., § 38-1-7; Laws 1959, ch. 169, § 6.

35-15-7. Appeals; notice of appeals.

A. An appeal from the municipal court is taken by filing with the clerk of the district court a notice of appeal. When the defendant takes an appeal, the notice of appeal shall be accompanied by a bond to the municipality in the sum, and with conditions, fixed by the municipal judge as sufficient to secure the appearance of the defendant, and the judgment and sentence of the municipal court.

B. The clerk of the district court shall docket the appeal on the civil docket upon payment of a docket fee of twenty dollars ($20.00), ten dollars ($10.00) of which shall be deposited in the court automation fund, and shall transmit a copy of the notice of appeal to the municipal court from which the action is appealed and to the municipal attorney.

C. Within ten days after receipt of the notice of appeal from the clerk of the district court under Subsection B of this section, the municipal judge shall file with the clerk of the district court a transcript of all municipal court docket entries in the action, together with all pleadings and other documents relating to the action. After the transcript has been filed, the action may be called for trial in the district court as in other civil actions. The appeal shall be governed by the Rules of Civil Procedure for the District Courts, except that the municipality has the burden of proving violation of an ordinance beyond a reasonable doubt.

D. The docketing of an appeal operates as a supersedeas and stay of execution upon the judgment of the municipal court in the action until final disposition of the appeal.

History: 1953 Comp., § 38-1-8, enacted by Laws 1969, ch. 35, § 2; 1996, ch. 41, § 7.

ANNOTATIONS

Repeals and reenactments. — Laws 1969, ch. 35, § 2, repealed 38-1-8, 1953 Comp., relating to appeals from municipal to district courts and filing of transcripts, and enacted a new section.

Cross references. — For the court automation fund, *see* 34-9-10 NMSA 1978.

For Rules of Civil Procedure for the District Courts, *see* Rule 1-001 NMRA et seq.

For Rules of Criminal Procedure for the District Courts, *see* Rule 5-101 NMRA et seq.

The 1996 amendment, effective May 15, 1996, in Subsection B, inserted "twenty dollars ($20.00)" following "docket fee of" and inserted "of which shall be deposited in the court automation fund" preceding "and shall"; and made minor stylistic changes in Subsection C.

Bonding requirement of Subsection A. — The right of an indigent defendant to an appeal cannot be conditioned upon the bonding requirement of Subsection A. *Mitchell v. County of Los Alamos*, 1991-NMSC-062, 112 N.M. 215, 813 P.2d 1013.

Docket fee only applicable to appeals brought under this article. — A docket fee is applicable to appeals from the municipal court to the district court only when brought from an action enforcing ordinances under 35-15-1 NMSA 1978 et seq. 1980 Op. Att'y Gen. No. 80-18.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 5 Am. Jur. 2d Appellate Review § 274.

Plea of guilty in police, magistrate, municipal or similar inferior court as precluding appeal, 42 A.L.R.2d 995.

62 C.J.S. Municipal Corporations §§ 361 to 379.

35-15-8. Judgment on appeal; recovery on bond.

If the judgment of the municipal court in the action is affirmed or rendered against the defendant on appeal, the district court shall enter judgment imposing the same, a greater or a lesser penalty as that imposed in the municipal court in the action. If the defendant fails to appear at the time set for hearing of the appeal in the district court without a sufficient showing for a continuance, the district court shall affirm the judgment and sentence of the municipal court and render judgment against the defendant and his sureties on the appeal bond. When the municipal court has imposed a jail sentence upon the defendant, the district court shall issue a bench warrant for the immediate arrest and confinement of the defendant.

History: Laws 1919, ch. 112, § 4; C.S. 1929, § 79-525; 1941 Comp., § 39-211; 1953 Comp., § 38-1-11; Laws 1969, ch. 35, § 3; 1975, ch. 212, § 2.

ANNOTATIONS

Sentence increased. — Because the district court did not suspend any of the 30-day jail term it imposed (as had the municipal court), the effect was an increase in the amount of jail time required to be served, which was an increase in the sentence. *City of Farmington v. Sandoval*, 1977-NMCA-022, 90 N.M. 246, 561 P.2d 945.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 62 C.J.S. Municipal Corporations § 378.

35-15-9. [Municipality to have free process; no costs charged to municipality.]

That the municipality shall have free process in the district court in all cases of appeals for violations of municipal ordinances, and in no case shall any costs be assessed against the municipality in such cases.

History: Laws 1919, ch. 112, § 5; C.S. 1929, § 79-526; 1941 Comp., § 39-212; 1953 Comp., § 38-1-12.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

Cross references. — For trial de novo on appeal, *see* 39-3-1 NMSA 1978.

Effect of trial de novo. — A trial de novo is a trial "anew," as if no trial whatever had been had in the municipal court. *City of Farmington v. Sandoval*, 1977-NMCA-022, 90 N.M. 246, 561 P.2d 945.

Constitutionality where greater sentence. — The greater sentence imposed by the district court for violation of certain municipal ordinances after a trial de novo did not deprive defendant of due process, nor did it amount to double jeopardy. *City of Farmington v. Sandoval*, 1977-NMCA-022, 90 N.M. 246, 561 P.2d 945.

Correctness of municipal proceedings not reviewed. — In a de novo trial the district court does not review the correctness of the proceedings in the municipal court. *City of Farmington v. Sandoval*, 1977-NMCA-022, 90 N.M. 246, 561 P.2d 945.

Hazard of greater sentence 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*, 1977-NMCA-022, 90 N.M. 246, 561 P.2d 945.

Defendant not entitled to jury. — In prosecutions under municipal ordinances, defendant is not, on appeal to district court, entitled to jury trial. The constitution does not grant jury trial but preserves such right already existing by statute. *City of Clovis v. Dendy*, 1931-NMSC-007, 35 N.M. 347, 297 P. 141.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 56 Am. Jur. 2d Municipal Corporations, Counties, and Other Political Subdivisions § 420.

62 C.J.S. Municipal Corporations § 379.

35-15-10. Trial de novo without jury.

All trials upon appeals by a defendant from the municipal court to the district court for violations of municipal ordinances shall be de novo and shall be tried before the court without a jury.

History: Laws 1919, ch. 112, § 6; C.S. 1929, § 79-527; 1941 Comp., § 39-213; 1953 Comp., § 38-1-13; Laws 1959, ch. 169, § 8.

ANNOTATIONS

Effect of trial de novo. — A trial de novo resulting in an acquittal precludes a consideration as to what has gone on before. Therefore, for the purposes of a summary judgment motion, it cannot be said that there is still a finding of probable cause in the municipal court below. *Miera v. Waltemeyer*, 1982-NMCA-007, 97 N.M. 588, 642 P.2d 191, cert. quashed, 98 N.M. 51, 644 P.2d 1040.

35-15-11. Municipality may appeal.

The municipality shall have the right to appeal to the district court from the municipal court and to the supreme court from any decision of the district court in every case brought for the violation of an ordinance of said municipality. The municipality shall be allowed an appeal from the municipal court to the district court only when the municipal court has held an ordinance or section thereof invalid or unconstitutional or that the complaint is not legally sufficient.

History: Laws 1935, ch. 28, § 1; 1941 Comp., § 39-214; 1953 Comp., § 38-1-14; Laws 1959, ch. 169, § 9.

ANNOTATIONS

Right of municipality to appeal from municipal court to district court. — N.M. Const., art. VI, § 27 confers upon a municipality a constitutional right to appeal an adverse final judgment or decision from a municipal to district court and the legislature may not abridge that right. *City of Las Cruces v. Sanchez*, 2007-NMSC-042, 142 N.M. 243, 164 P.3d 942.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 56 Am. Jur. 2d Municipal Corporations §§ 386 to 397.

Right of municipal corporation to review of an unfavorable decision in an action or prosecution for violation of a municipal ordinance, 11 A.L.R.4th 399.

62 C.J.S. Municipal Corporations § 364.

35-15-12. Fines and forfeitures in justice court [magistrate court]; collections go to municipal treasury.

Justices of the peace [magistrates] in municipalities of the state of New Mexico, when sitting as municipal judges, shall turn into [in to] the municipality all fines collected for the violation of such municipal ordinances and all moneys collected from forfeited bonds or recognizances in such justice of the peace courts [magistrate courts] when being held as municipal courts shall be turned into [in to] the municipality.

History: Laws 1921, ch. 42, § 1; C.S. 1929, § 79-216; 1941 Comp., § 39-216; 1953 Comp., § 38-1-16; Laws 1959, ch. 169, § 11.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

The office of justice of the peace was abolished and all jurisdiction, powers and duties were transferred to magistrate courts. *See* 35-1-38 NMSA 1978.

Cross references. — For magistrate court as "justice of the peace", *see* 35-1-38 NMSA 1978.

35-15-13. Fines and forfeitures assessed on appeal; collections go to municipal treasury.

All fines assessed in the district court upon appeals from the municipal courts, including such moneys as may be paid into the said district court upon forfeited bonds or recognizances for defendants charged with municipal offenses, shall be turned over to the municipality.

History: Laws 1921, ch. 42, § 2; C.S. 1929, § 79-217; 1941 Comp., § 39-217; 1953 Comp., § 38-1-17; Laws 1959, ch. 169, § 12.

35-15-14. Suspension of sentence; probation.

A. The governing body of any municipality may provide by ordinance that the municipal court may, upon entry of a plea of guilty or judgment of conviction:

(1) suspend in whole or part the execution of sentence; or

(2) place the defendant on probation for a period not exceeding one year on terms and conditions the court deems best; or both. The ordinance shall provide that the court may as a condition of probation require the defendant to serve a period of time in volunteer labor to be known as community service. The type of labor and period of

service shall be at the sole discretion of the court; provided that any person receiving community service shall be immune from any civil liability other than gross negligence arising out of the community service, and any person who performs community service pursuant to court order or any criminal diversion program shall not be entitled to any wages, shall not be considered an employee for any purpose and shall not be entitled to workmen's compensation, unemployment benefits or any other benefits otherwise provided by law. As used in this paragraph, "community service" means any labor that benefits the public at large or any public, charitable or educational entity or institution.

B. The ordinance shall provide that suspension of execution of the sentence or probation, or both, shall be granted only when the municipal judge is satisfied it will serve the ends of justice and of the public, and that the defendant's liability for any fine or other punishment imposed is fully discharged upon successful completion of the terms and conditions of probation.

History: 1953 Comp., § 38-1-18, enacted by Laws 1961, ch. 55, § 1; 1987, ch. 56, § 1.

ANNOTATIONS

The 1987 amendment, effective June 19, 1987, added the second, third and fourth sentences in Subsection A(2).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 56 Am. Jur. 2d Municipal Corporations, Counties, and Other Political Subdivisions § 422.

Inherent power of court to suspend for indefinite period execution of sentence in whole or in part, 73 A.L.R.3d 474.

62 C.J.S. Municipal Corporations § 358.