CHAPTER 39
Judgments, Costs, Appeals

ARTICLE 1
Judgments

39-1-1. [Judgments and decrees; interlocutory orders; period of control over final judgment.]

Any judgment, or decree, except in cases where trial by jury is necessary, may be rendered by the judge of the district court at any place where he may be in this state, and the district courts, except for jury trials, are declared to be at all times in session for all purposes, including the naturalization of aliens. Interlocutory orders may be made by such judge wherever he may be in the state, on notice, where notice is required, which notice, if outside of his district, may be enlarged beyond the statutory notice, for such time as the court shall deem proper. Final judgments and decrees, entered by district courts in all cases tried pursuant to the provisions of this section shall remain under the control of such courts for a period of thirty days after the entry thereof, and for such further time as may be necessary to enable the court to pass upon and dispose of any motion which may have been filed within such period, directed against such judgment; provided, that if the court shall fail to rule upon such motion within thirty days after the filing thereof, such failure to rule shall be deemed a denial thereof; and, provided further, that the provisions of this section shall not be construed to amend, change, alter or repeal the provisions of Sections 4227 or 4230, Code 1915.

History: Laws 1897, ch. 73, § 103; C. L. 1897, § 2685 (103); Code 1915, § 4185; Laws 1917, ch. 15, § 1; C. S. 1929, § 105-801; 1941 Comp., § 19-901; 1953 Comp., § 21-9-1.

ANNOTATIONS

Cross references. — For rules concerning judgments, *see* Rules 1-054 to 1-070 NMRA.

For motion for new trial, *see* Rules 1-059 and 5-614 NMRA.

For motion to amend findings and conclusions, *see* Rule 1-052 NMRA.

Compiler's notes. — Sections 4227 and 4230 of Code 1915, referred to in this section, were superseded by Rules 60(c) and (d), N.M.R. Civ. P. respectively. The 1949 amendment to Rule 60, N.M.R. Civ. P. (now see Rule 1-060) substituted a rewritten division (b) for former divisions (b), (c) and (d).

I. GENERAL CONSIDERATION.

Motion to enforce a judgment. — Neither Section 39-1-1 NMSA 1978 nor Rule 1-060B NMRA preclude the district court from considering a wife's motion to enforce a final decree regarding survivor benefit annuity of civil service retirement and the court had jurisdiction to grant relief to wife by approving the stipulated qualified civil service order and it also had jurisdiction to consider attorney fees. Palmer v. Palmer, 2006-NMCA-112, 140 N.M. 383, 142 P.3d 971.

Motion to alter or amend a judgment. — Rule 1-059E NMRA supersedes Section 39-1-1 NMSA 1978, and according to the plain language of Rule 1-059E NMRA, post-judgment motions are not subject to automatic denial. Albuquerque Redi-Mix, Inc. v. Scottsdale Ins. Co., 2007-NMSC-051, 142 N.M. 527, 168 P.3d 99.

Effect of civil rules. — The 2006 amendment to Rule 1-054.1 NMRA, providing that civil courts have sixty days to enter a judgment or order after submission, superseded that portion of Section 39-1-1 NMSA 1978 which states that many post-judgment motions are automatically denied if not granted within thirty days of filing. State v. Moreland, 2008-NMSC-031, 144 N.M. 192, 185 P.3d 363.

Express contract. — An express contract is to be enforced as written in regard to contractual obligations of the parties unless the court has determined that equity should override the express contract because of fraud, real hardship, oppression, mistake, unconscionable results, and the other grounds of righteousness, justice and morality. Arena Res., Inc. v. OBO, Inc., 2010-NMCA-061, 148 N.M. 483, 238 P.3d 357.

Judgment granting equitable relief in action based on express contract. — Where plaintiff, who was the operating-interest owner, redeveloped an oilfield unit and sought reimbursement from defendant, who was a working-interest owner; plaintiff unilaterally redeveloped the unit without obtaining the consent of defendant as was required by the operating agreement of the parties; the redevelopment project increased oil and gas production, enhanced the unit, and netted favorable revenue consequences for defendant; although the district court concluded that plaintiff had breached the operating agreement, the court granted judgment for plaintiff based on unjust enrichment; plaintiff's action was for breach of contract and to enforce a contractual lien; plaintiff never asserted a claim for unjust enrichment, the case was not tried on the theory of unjust enrichment, and plaintiff did not request findings of fact and conclusions of law on unjust enrichment; and the court never mentioned the existence of any evidence or entered any findings of fact that supported its conclusion of unjust enrichment or otherwise provided any basis for invoking the unjust enrichment theory in the face of the parties' express contract, the court was not permitted to exercise its equitable powers to grant plaintiff relief under the equitable unjust enrichment theory of recovery. Arena Res., Inc. v. OBO, Inc., 2010-NMCA-061, 148 N.M. 483, 238 P.3d 357.

Oral ruling on a motion within thirty days. — Where the district court orally ruled on a motion within thirty days after the motion was filed, but did not actually enter a final order disposing of the motion within thirty days, the court ruled on the motion within

thirty days and the motion was not automatically denied. Chapel v. Nevitt, 2009-NMCA-017, 145 N.M. 674, 203 P.3d 889.

Order relating to values and recommendation of distribution of community property assets was not a final order. — In a divorce proceeding, where the court refused to adopt findings of fact specifying the amount of the wife's community property share and entered an order which divided the parties' assets and debt and which provided that if the husband did not accept the proposed distribution of assets and debts, the court would appoint a receiver to liquidate the family business, the proceeds would first be paid to satisfy the wife's share of the community assets, and if that share was not satisfied, the husband's separate property would be used to make the wife whole, and where the court did not retain jurisdiction to reconsider the amount of the wife's community share, the court had jurisdiction to subsequently enter an order in which the court determined the specific amount of the wife's community share entitlement. Muse v. Muse, 2009-NMCA-003, 145 N.M. 451, 200 P.3d 104.

Motion filed after notice of appeal. — The filing of a notice of appeal divests the district court of jurisdiction to rule on a motion directed to the judgment or order subject to the appeal that was filed after the notice of appeal. State v. McClaugherty, 2007-NMCA-041, 141 N.M. 468, 157 P.3d 33, *aff'd*, 2008-NMSC-044, 144 N.M. 483, 188 P.3d 1234.

Section applies only to bench trials, thus, when cases are decided by a jury this section is not applicable. State v. Neely, 1994-NMSC-057, 117 N.M. 707, 876 P.2d 222.

This section only applies to nonjury trials, as its plain language suggests. Valley Bank of Commerce v. Hilburn, 2005-NMCA-004, 136 N.M. 741, 105 P.3d 294.

Application in criminal cases. — This section applies to non-jury trials in criminal proceedings. State v. Roybal, 2006-NMCA-043, 139 N.M. 341, 132 P.3d 598, cert. denied, 2006-NMCERT-003, 139 N.M. 353, 132 P3d 1039.

Word "deemed", as used in this section, is synonymous with the words "considered," "determined" and "adjudged". King v. McElroy, 1933-NMSC-035, 37 N.M. 238, 21 P.2d 80.

Distinction between judgment and decree. — The code (compilation) still preserves, or at least recognizes, the distinction between a judgment and a decree. Crowell v. Kopp, 1919-NMSC-065, 26 N.M. 146, 189 P. 652.

Rule 52(B)(b), N.M.R. Civ. P. (now see Rule 1-052B(2)), is not applicable to case where no findings of fact were made by the court. Gilmore v. Baldwin, 1955-NMSC-003, 59 N.M. 51, 278 P.2d 790.

Section not in conflict with Rule 1-060B. — This section does not conflict with the right to grant relief from judgments under Rule 60(b), N.M.R. Civ. P. (now see Rule 1-

060B), since that statute only restored to district courts the absolute control they had over their judgments during the term at which they were entered. Laffoon v. Galles Motor Co., 1969-NMCA-006, 80 N.M. 1, 450 P.2d 439; Martin v. Leonard Motor-El Paso, 1965-NMSC-060, 75 N.M. 219, 402 P.2d 954; In re Will of Bourne, 1983-NMCA-046, 99 N.M. 694, 662 P.2d 1361; Gengler v. Phelps, 1976-NMCA-114, 89 N.M. 793, 558 P.2d 62.

Section not invalidated by Rule 5-802 NMRA. — This section was not in any way invalidated by Rule 5-802 NMRA, which governs the procedure for filing a writ of habeas corpus. State v. Peppers, 1990-NMCA-057, 110 N.M. 393, 796 P.2d 614, cert. denied, 110 N.M. 260, 794 P.2d 734.

Appearance of defendant at post-conviction hearing. — It is implicit from the language of this section that it is within the sound discretion of the trial court whether to direct that a defendant be physically present before the court at a hearing to reconsider or modify a prior sentence. Construing the pertinent rules and statutes together, a defendant need not be present at a hearing to reconsider a sentence, except where the hearing results in the terms of the sentence being made more onerous. State v. Sommer, 1994-NMCA-070, 118 N.M. 58, 878 P.2d 1007.

Rule authorizing appeals is to be construed in conjunction with rule permitting district court to vacate an order, judgment or decree (including order allowing appeal), when it interferes with powers granted under this section. Fairchild v. United Serv. Corp., 1948-NMSC-048, 52 N.M. 289, 197 P.2d 875.

Section applicable when case tried. — When there is a judicial examination of the issues both of law and fact, as made up by the pleadings, a case is tried so that this section applies. Board of Cnty. Comm'rs v. Wasson, 1933-NMSC-076, 37 N.M. 503, 24 P.2d 1098.

Section not applicable in case of fraud. — Statutes limiting time for opening or vacating final judgments do not apply in cases of extrinsic fraud or collusion. Kerr v. Southwest Fluorite Co., 1930-NMSC-104, 35 N.M. 232, 294 P. 324.

Court retained jurisdiction for final accounting. — Where the court in determining that the liquor license was an asset of the partnership functioned under its retained jurisdiction for the purpose of a final accounting and dissolution of the partnership, this section did not deprive the court of jurisdiction. Cantrell v. Curnutt, 1969-NMSC-114, 80 N.M. 519, 458 P.2d 594.

Authority to issue order in other district. — An order signed by the associate justice of the territorial supreme court, in a district other than his own, reciting that such judge was acting in the absence of the presiding judge, sufficiently disclosed his authority. Mayes v. Bassett, 1912-NMSC-021, 17 N.M. 193, 125 P. 609.

Court may enter judgment when in other county. — This statute gives the court jurisdiction to enter a judgment in a cause pending in Rio Arriba county when in any other county in the state. Peisker v. Chavez, 1942-NMSC-004, 46 N.M. 159, 123 P.2d 726.

Including default judgment. — A default judgment may be rendered by a judge of the district court at any place where he may be in this state. Hoffman v. White, 1932-NMSC-046, 36 N.M. 250, 13 P.2d 553; Singleton v. Sanabrea, 1931-NMSC-034, 35 N.M. 491, 2 P.2d 119.

Setting aside default judgment. — With the exception of judgments still under the court's control pursuant to this section, judgments by default must be set aside in accordance with Rule 1-060 NMRA. Marinchek v. Paige, 1989-NMSC-019, 108 N.M. 349, 772 P.2d 879.

Terms of court. — A term of the district court begun and held by any judge, as required by law, for a county in the district, continues in existence until the day fixed by law for the beginning of another term of that court for the same county, unless same adjourned sine die, although another term of the same court for another county has been held, in the meantime, by the same judge. Territory ex rel. Hubbell v. Armijo, 1907-NMSC-013, 14 N.M. 205, 89 P. 267.

Court open at all times for nonjury cases. — The fact that the district court is open at all times for the trial of nonjury cases has reference to the court (not the judge alone) sitting at an authorized place for trying an action. Peisker v. Chavez, 1942-NMSC-004, 46 N.M. 159, 123 P.2d 726.

Since section covers nonjury cases only, the motion in this case was not denied by operation of law 30 days after it was filed. Scofield v. J.W. Jones Constr. Co., 1958-NMSC-091, 64 N.M. 319, 328 P.2d 389.

Section covers non-jury cases only. — When prisoner commenced serving his sentence for forgery in the state penitentiary, the court sentencing him lost jurisdiction, and its order vacating sentence is void, for this section applies only to nonjury cases. 1931-32 Op. Att'y Gen. No. 31-144.

Taking of appeal divests jurisdiction to change judgment. — The taking of an appeal from a judgment in a civil case completely divests the district court of jurisdiction except for the purpose of perfecting the appeal to an appellate court and for the purpose of passing upon motions pending when the appeal is taken, or for the timely vacating of an order granting appeal; therefore, trial court had no jurisdiction to set aside, allow the information to be amended and then enter new judgment. State v. Clemons, 1972-NMCA-052, 83 N.M. 674, 496 P.2d 167.

The trial court loses jurisdiction of the case upon the filing of the notice of appeal, except for the purposes of perfecting such appeal, or of passing upon a motion directed

to the judgment pending at the time. Wagner Land & Inv. Co. v. Halderman, 1972-NMSC-019, 83 N.M. 628, 495 P.2d 1075.

After notice of appeal from judgment in workmen's compensation case was filed, trial court lost jurisdiction of the cause and acted properly in refusing to set aside its judgment. Ledbetter v. Lanham Constr. Co., 1966-NMSC-058, 76 N.M. 132, 412 P.2d 559.

II. INTERLOCUTORY ORDERS.

Thirty-day limitation not applicable. — Where a default judgment was only for compensatory damages, and the issues of punitive damages and costs were left open or pending, the default judgment was interlocutory, and consequently the 30-day limitation of this section was not applicable. Gengler v. Phelps, 1976-NMCA-114, 89 N.M. 793, 558 P.2d 62.

III. FINAL JUDGMENTS AND CONTROL.

Final order must dispose of the merits of the case. — Where the district court denied the defendant's motion to extend the redemption period in a foreclosure action, the order denying the motion was a final order even though the order did not dispose of two collateral issues that remained to be decided concerning the precise amount required to redeem the property from the purchaser and the disposition of the debtor's personal property. Chapel v. Nevitt, 2009-NMCA-017, 145 N.M. 674, 203 P.3d 889.

Claim of exemptions on execution as a motion challenging a final foreclosure decree. — Where the defendant asserted the defendant's right to a homestead exemption in response to the foreclosure of a money judgment on the defendant's property and where, subsequent to the entry of the final foreclosure decree, the defendant filed a claim of exemptions on execution pursuant to Rule 1-065.1 NMRA in which the defendant claimed that the defendant was entitled to a homestead exemption, the defendant's claim of exemptions on execution was a motion challenging the foreclosure decree and tolled the time for filing of a notice of appeal until the district court disposed of the claim of exemptions. Grygorwicz v. Trujillo, 2009-NMSC-009, 145 N.M. 650, 203 P.3d 865, *rev'g* 2008-NMCA-040, 143 N.M. 704, 181 P.3d 696.

Right of control over judgments is not absolute and there are restraints on its exercise. The action of a district court must always be supported by a good reason. Laffoon v. Galles Motor Co., 1969-NMCA-006, 80 N.M. 1, 450 P.2d 439.

District court's power under this section is discretionary. However, the discretion vested in the trial courts in the exercise of control over their judgments is extremely broad. Nichols v. Nichols, 1982-NMSC-071, 98 N.M. 322, 648 P.2d 780.

Court has full control of its judgment, jurisdiction and authority even upon its own motion to make any change, modification or correction thereof which it deems proper

under the circumstances. Desjardin v. Albuquerque Nat'l Bank, 1979-NMSC-052, 93 N.M. 89, 596 P.2d 858.

Post-trial motions. — Motion for reconsideration not ruled on by judge was deemed denied by operation of law. Bank of N.Y. v. Regional Hous. Auth., 2005-NMCA-116, 138 N.M. 389, 120 P.3d 471.

Where one of the parties files post-trial motion for judgment as a matter of law, the time for filing a notice of appeal does not begin to run until the district court enters an order ruling on the motion. Valley Bank of Commerce v. Hilburn, 2005-NMCA-004, 136 N.M. 741, 105 P.3d 294.

Common-law control over judgments. — The control which district courts formerly had over their judgments was the common-law control which courts had over their judgments during term time, and this control was a plenary power to vacate, set aside, modify and annul. This power was based upon the theory that until the term closed the whole matter of the determination of the rights of the litigant rested in the breast of the court, and, theoretically at least, all judgments became final as of the last day of the term. Laffoon v. Galles Motor Co., 1969-NMCA-006, 80 N.M. 1, 450 P.2d 439.

Control restored after abolition of terms of court. — Under this section control which district courts had over their judgments during term time but which had been destroyed as a result of abolition of terms of court except in jury cases was restored to the courts. Fairchild v. United Serv. Corp., 1948-NMSC-048, 52 N.M. 289, 197 P.2d 875.

Section is applicable to all final judgments unless by statute otherwise excepted. Board of Cnty. Comm'rs v. Wasson, 1933-NMSC-076, 37 N.M. 503, 24 P.2d 1098.

Court had discretion to consider new material as part of motion for reconsideration as long as the delay in presenting the new material was not just for strategic reasons, and its relevance outweighed any prejudice; further, if the trial court considered the new material, the appellate court could review the materials de novo. In re Estate of Keeney, 1995-NMCA-102, 121 N.M. 58, 908 P.2d 751, cert. denied, 120 N.M. 828, 907 P.2d 1009.

Oral judgments not final. — Oral rulings are not final and therefore not a proper basis for an appeal. There was no final order denying reinstatement until the judge issued a written order on November 23, 1992. Nor was worker's motion for reinstatement deemed denied by operation of law this section. Worker's motion for reinstatement was not filed pursuant to this section; it was filed pursuant to Rule 1-041E NMRA, which does not contain a provision saying that motions filed pursuant to it are deemed denied if not acted upon within a certain amount of time. Vigil v. Thriftway Mktg. Corp., 1994-NMCA-009, 117 N.M. 176, 870 P.2d 138.

Conditional dismissal not final judgment. — An order dismissing an action without prejudice but providing that if the parties failed to seek reinstatement within 60 days the

dismissal would be deemed with prejudice was not a final order, since the condition was not satisfied. Universal Constructors, Inc. v. Fielder, 1994-NMCA-112, 118 N.M. 657, 884 P.2d 813.

Section does not provide for increased sentence. — A valid sentence imposed in accordance with a plea bargain approved by the district court could not be altered to the defendant's detriment by enhancing the penalty under this section. State v. Sisneros, 1981-NMCA-085, 98 N.M. 279, 648 P.2d 318, *aff'd*, 1984-NMSC-085, 101 N.M. 679, 687 P.2d 736, *overruled on other grounds*, State v. Saavedra, 1988-NMSC-100, 108 N.M. 38, 766 P.2d 298.

Habitual defender act prevails over this section. — Habitual offender charge was brought two months after final judgment. Specific provision of former 40A-29-6 NMSA 1953, permitting charges "at any time either after sentence or conviction", prevails over general 30 day rule of this section. State v. Padilla, 1978-NMCA-060, 92 N.M. 19, 582 P.2d 396, cert. denied, 92 N.M. 180, 585 P.2d 324.

Not error to refuse findings after jurisdiction lost. — An appellant cannot predicate error upon the refusal of the court to make findings or exceptions filed to findings made after the trial court has lost jurisdiction of the case. Frostenson v. Marshall, 1919-NMSC-010, 25 N.M. 215, 180 P. 287; Norment v. First Nat'l Bank, 1917-NMSC-042, 23 N.M. 198, 167 P. 731.

Court has authority to vacate final judgment during period of 30 days after its entry. Laffoon v. Galles Motor Co., 1969-NMCA-006, 80 N.M. 1, 450 P.2d 439.

Order permitting movants leave to file objections to will's probate not "final". — An order which does not grant Rule 60(b), N.M.R. Civ. P. (now Rule 1-060B), relief, but simply permits movants leave to file their objections to the probate of a will, is not an appealable final order. In re Will of Bourne, 1983-NMCA-046, 99 N.M. 694, 662 P.2d 1361.

Judgment disposing of separate cause as final. — In this state there are no terms of court except for jury trials, and a judgment which disposes of all, or one or more, of the separate and independent causes of action in the case becomes final upon rendition, and passes from the control of the court, except a default judgment or an irregularly entered judgment, and except for such purposes as all courts always retain control over their judgments. State ex rel. Baca v. Board of Comm'rs, 1916-NMSC-091, 22 N.M. 502, 165 P. 213.

A judgment which disposes of all, or one or more, of the separate and independent causes of action becomes a final judgment upon its rendition and entry, with certain exceptions. Coulter v. Board of Comm'rs, 1916-NMSC-040, 22 N.M. 24, 158 P. 1086; Fullen v. Fullen, 1915-NMSC-091, 21 N.M. 212, 153 P. 294.

Appointing receiver final judgment. — Judgment appointing receiver, issuing injunction and finding corporation to be insolvent was a final judgment. Upon its rendition, the matter passed from the control of the court, except for the 30-day period of additional control specified herein. Jones v. Page, 1920-NMSC-094, 26 N.M. 440, 194 P. 883, cert. denied, 256 U.S. 696, 41 S. Ct. 536, 65 L. Ed. 1176 (1921).

Judgments containing obvious errors not controlling. — The statutes give courts absolute control over their judgments for a period of 30 days, and limit their control over default judgments and irregularly entered judgments, but do not regulate their control over judgments containing palpable or obvious errors. De Baca v. Sais, 1940-NMSC-006, 44 N.M. 105, 99 P.2d 106.

Jurisdiction to reinstate case on docket. — Where district court dismissed complaint without prejudice for lack of prosecution and reinstated complaint by order of court, district court acted within its jurisdiction in reinstating the case on the docket. Martin v. Leonard Motor-El Paso, 1965-NMSC-060, 75 N.M. 219, 402 P.2d 954.

Where a case was dismissed with prejudice and the state filed a motion to reconsider, the district court had authority to reconsider and reverse its original dismissal. State v. Gonzales, 1990-NMCA-040, 110 N.M. 218, 794 P.2d 361, *aff'd*, 111 N.M. 363, 805 P.2d 630.

Opening or vacating final judgment after 60 days unauthorized. — The opening or vacating of a final judgment regularly entered on motion filed more than 60 days after rendition is unauthorized. Kerr v. Southwest Fluorite Co., 1930-NMSC-104, 35 N.M. 232, 294 P. 324.

Control not nullified by appeal. — It was never intended that the control which the district court holds over its orders, decrees and judgments for 30 days after their entry should be nullified by an appeal to the supreme court. Fairchild v. United Serv. Corp., 1948-NMSC-048, 52 N.M. 289, 197 P.2d 875.

Review time never from original judgment where amendment mere restatement. — When an amendment of the judgment does no more than restate what had been decided by the original judgment, so that there is no material change of substance, the time for review starts to run from the date of the original judgment. Rice v. Gonzales, 1968-NMSC-125, 79 N.M. 377, 444 P.2d 288.

Or subsequent judgment inharmonious. — Where a final judgment no longer remains under the control of the court for the purpose of considering or correcting alleged errors urged against it, a subsequent inharmonious judgment must be regarded as inadvertent and not a modification of the earlier judgment. Shortle v. McCloskey, 1935-NMSC-043, 39 N.M. 273, 46 P.2d 50.

Court may act on own motion. — The district court is authorized to change, modify, correct or vacate a judgment on its own motion. Nichols v. Nichols, 1982-NMSC-071, 98 N.M. 322, 648 P.2d 780.

Court may set aside on own motion without notice. — District court is authorized to set aside its judgment on its own motion, without notice to either party. Arias v. Springer, 1938-NMSC-025, 42 N.M. 350, 78 P.2d 153.

Court without authority where motion untimely. — Where motion to vacate judgment of dismissal was filed more than 17 months after the cause was dismissed, the court was without authority to render further judgment in the case. Chavez v. Ade, 1934-NMSC-054, 38 N.M. 389, 34 P.2d 670.

Motion for new trial terminates running of appeal time. — To terminate the running of the time for appeal, the timely motion pursuant to this section must be one seeking a new trial. Rice v. Gonzales, 1968-NMSC-125, 79 N.M. 377, 444 P.2d 288.

Defendant's negligent failure to appear held not to defeat discretion to vacate. — The granting of a motion to vacate a default judgment under the provisions of this section is a matter within the discretion of the trial court, and that discretion is not defeated by the fact that defendant's failure to appear was negligent. Laffoon v. Galles Motor Co., 1969-NMCA-006, 80 N.M. 1, 450 P.2d 439; Gilbert v. N.M. Constr. Co., 1930-NMSC-120, 35 N.M. 262, 295 P. 291.

Granting of a motion to vacate a default judgment and permit the interposition of a defense is a matter within the discretion of the trial court, even though defendant's failure to appear was negligent. Ambrose v. Republic Mortg. Co., 1934-NMSC-051, 38 N.M. 370, 34 P.2d 294.

A defendant's negligent failure to appear does not necessarily bar his right to have default set aside upon application filed within 30 days following its entry; and where court declined to set default aside and made no findings, this court will remand for hearing and evidence on the facts. Dyne v. McCullough, 1932-NMSC-019, 36 N.M. 122, 9 P.2d 385.

Discretion of court extremely broad. — The discretion vested in the trial courts in the exercise of control over their judgments under this section is extremely broad. The granting of a motion to vacate a judgment, although there may have been negligence in failing to appear and answer, does not necessarily constitute an abuse of this discretion. Laffoon v. Galles Motor Co., 1969-NMCA-006, 80 N.M. 1, 450 P.2d 439.

When dismissal sustained but vacate motion filed before judgment. — Where motion to dismiss was sustained, but, before entry of judgment of dismissal, plaintiff filed motion to vacate the order of dismissal, and to reopen the case, the entry of the judgment of dismissal, pending the motion to vacate, was not irregular, and court was without jurisdiction to vacate the judgment of dismissal several months after its entry,

because the motion to vacate was ineffective either because filed against a nonexisting judgment or because overruled by operation of law as not ruled upon within 30 days after it was filed. Garcia v. Anderson, 1937-NMSC-054, 41 N.M. 517, 71 P.2d 686.

Setting aside decree held not to set aside findings of fact. — District court's setting aside of its decree did not operate to set aside the findings of facts upon which it was based, and on appeal from subsequently entered decree, those facts were the facts upon which the case should be determined. Arias v. Springer, 1938-NMSC-025, 42 N.M. 350, 78 P.2d 153.

Setting aside decree held as though no decree had been entered. — When district court set aside its decree, the status of the case was as though no decree had been entered, but evidence theretofore taken was not set aside or canceled by reason of the cancellation of the decree. Arias v. Springer, 1938-NMSC-025, 42 N.M. 350, 78 P.2d 153.

No new vacate motion upon overruling set aside motion, without appeal. — In moving to set aside a judgment on a cognovit note, the mover must urge all grounds tending to show bias in judgment, since the law does not look favorably on trying issues piecemeal. On overruling of the motion, without appeal, the mover cannot again file another motion to vacate. Hot Springs Nat'l Bank v. Kenney, 1935-NMSC-066, 39 N.M. 428, 48 P.2d 1029.

Motion to dismiss not abandoned by taking appeal. — Defendant did not abandon its motion to dismiss one of the plaintiffs as a party on the basis that he had no financial interest in the litigation and was not a real party in interest by taking an appeal before the trial court ruled on the motion, since defendant raised the issue in its requested findings and conclusions; the issue never having been decided by the trial court, the cause was remanded for such a ruling. Jesko v. Stauffer Chem. Co., 1976-NMCA-117, 89 N.M. 786, 558 P.2d 55.

Where two judgments former treated as vacated. — In eminent domain proceedings, where two judgments are entered, and the latter is made in lieu of the former, then the court will treat the former judgment as vacated. State ex rel. State Hwy. Comm'n v. Marquez, 1960-NMSC-099, 67 N.M. 353, 355 P.2d 287.

Court could correct error in foreclosure judgment months later. — Where judgment of foreclosure, through error or mistake, ordered only a part of the property described in the mortgage to be sold to satisfy the judgment, trial court had jurisdiction, five months after entry of the judgment, to correct and amend it to speak the truth, and erred in denying bill of review. De Baca v. Sais, 1940-NMSC-006, 44 N.M. 105, 99 P.2d 106.

Foreclosure actions. — In a foreclosure action, that part of the decree that directs the manner and terms of the sale of the mortgaged property does not become a final

judgment until the judicial confirmation of the sale, whereupon it becomes final. Plaza Nat'l Bank v. Valdez, 1987-NMSC-105, 106 N.M. 464, 745 P.2d 372.

When intervention denied money judgment may be entered. — In suit upon promissory note, where intervention was denied on writ of error, there was no obstacle to the entry of the money judgment; and the time within which the court could entertain any motion directed to the modification of the judgment having elapsed, there is no longer jurisdiction over it. Clark v. Rosenwald, 1925-NMSC-062, 31 N.M. 443, 247 P. 306.

Denial of motion not suspend operation of judgment. — This section and the proceedings thereunder respecting motions "directed against the judgment" which result in denial of the motion do not have the effect of suspending the operation of the judgment after the date of its entry, so far as the running of the six months from entry of final judgment limited for appeal or writ of error is concerned. King v. McElroy, 1933-NMSC-035, 37 N.M. 238, 21 P.2d 80.

Modification of division of property in divorce decree. — Apart from the exceptions to the general rule contained in 40-4-7 NMSA 1978 and Rule 60(b), N.M.R. Civ. P. (now Rule 1-060B), once the time has lapsed within which an appeal may be taken from a divorce decree, a court cannot change the original division of the property as an exercise of its continuing jurisdiction. Higginbotham v. Higginbotham, 92 N.M. 412, 589 P.2d 196 (1979).

IV. THIRTY-DAY LIMITATION.

The automatic denial provision of Section 39-1-1 NMSA 1978 does not apply in civil cases. Rosales v. N.M. Taxation & Revenue Dep't, MVD, 2012-NMCA-098, 287 P.3d 353, cert. denied, 2012-NMCERT-008.

The automatic denial provision did not apply. — Where defendant filed a motion for reconsideration of the district court’s order reinstating plaintiff’s driving privileges and the district court failed to rule on the motion within thirty days, the motion was not deemed denied solely by the passage of time and the district court did not lose jurisdiction to consider the motion thirty days after the motion was filed. Rosales v. N.M. Taxation & Revenue Dep't, MVD, 2012-NMCA-098, 287 P.3d 353, cert. denied, 2012-NMCERT-008.

Workers' compensation appeals. — The Workers' Compensation Act, Sections 52-5-1 et seq. NMSA 1978 incorporates Section 39-1-1 NMSA 1978. Bianco v. Horror One Prods., 2009-NMSC-006, 145 N.M. 551, 202 P.3d 810.

Motion to modify an order to permit an interlocutory appeal was a motion to reconsider. — Where the defendant filed a motion to modify the district court’s order, which denied the defendant’s motion to extend the redemption period in a foreclosure action, to include language permitting an interlocutory appeal more than ten days, but

less than thirty days, after the entry of the order, the motion asked the district court to reconsider its order and determine if an appeal was necessary and the motion should be deemed to be a motion for reconsideration, not a motion to alter or amend a judgment under Rule 1-059 NMRA. Chapel v. Nevitt, 2009-NMCA-017, 145 N.M. 674, 203 P.3d 889.

The thirty-day time limit is not triggered by the filing of a motion after a notice of appeal has been filed. State v. McClaugherty, 2008-NMSC-044, 144 N.M. 483, 188 P.3d 1234, affirming 2007-NMCA-041, 141 N.M. 468, 157 P.3d 33.

Thirty days to file and to rule. — The aggrieved party has 30 days to prepare and file a motion "directed against such judgment," after entry thereof, which time may be employed in preparation of such motion and for its presentation to the court; and, after the filing of the motion, the court has 30 days to rule thereon. King v. McElroy, 37 N.M. 238, 21 P.2d 80 (1933)(see now Rule 1-054.1 NMRA).

Time to file and rule. — Where motion to amend judgment was filed within 30 days after judgment was rendered, and the motion was sustained within 30 days after it was filed, the court acted within its authority and had full control over the judgment and authority to amend it. Pugh v. Phelps, 37 N.M. 126, 19 P.2d 315 (1932).

Not applicable to collateral matters. — The necessity for further proceedings to carry the judgment into effect or otherwise to dispose of a matter that does not entail alteration or revision of decisions embodied in the judgment does not prevent finality of the judgment and the court does not lose jurisdiction, after 30 days have passed or an appeal has been taken, to dispose of such matters. Determining the amount of an attorney's fee award is one such matter. Kelly Inn No. 102, Inc. v. Kapnison, 113 N.M. 231, 824 P.2d 1033 (1992)(see now Rule 1-054.1 NMRA).

Effect of motions authorized by other statutes. — The time limits set by this section for a district court ruling do not apply to a motion authorized pursuant to another provision of law, at least when the other provision ordinarily permits more time within which to file the motion than does this section. Archuleta v. New Mexico State Police, 108 N.M. 543, 775 P.2d 745 (Ct. App.), cert. denied, 108 N.M. 384, 772 P.2d 1307 (1989).

The time limit for a court's ruling under this section does not apply to a motion that another statute authorizes to be brought within a period of time longer than 30 days. Crown Life Ins. Co. v. Candlewood, Ltd., 112 N.M. 633, 818 P.2d 411 (1991).

Applicability to Rule 1-059 NMRA motion. — A motion brought under Paragraph D of Rule 1-059 NMRA was subject to the provisions of this section that a court's failure to rule on a motion within 30 days of its filing is deemed a denial thereof. Beneficial Fin. Corp. v. Morris, 120 N.M. 228, 900 P.2d 977 (Ct. App. 1995), overruled by Albuquerque Redi-Mix, Inc. v. Scottsdale Ins. Co., 2007-NMSC-051, 142 N.M. 527, 168 P.3d 99 (see now Rule 1-054.1 NMRA).

Timeliness of motion authorized by this section and Rule 1-060 NMRA. — When, after paying a judgment to avoid a foreclosure sale, a party decided he had paid more than the judgment required and sought relief by a motion filed in the same proceeding, if the motion was of a type authorized by both this section and Rule 1-060 NMRA, the court could consider the motion if it was timely filed under the rule, even if it was not timely under this section. Century Bank v. Hymans, 120 N.M. 684, 905 P.2d 722 (Ct. App. 1995).

Time of motion for mistake, inadvertence or neglect governed by Rule 1-060B. — Provision in this section that failure by the court to rule on a motion within 30 days shall be deemed a denial thereof, had no application as to the timeliness of an appeal from an order denying motion to set aside default judgment on grounds of mistake, inadvertence or excusable neglect. Such appeal is governed by Rule 60(b) N.M.R. Civ. P. (now see Rule 1-060B), which provides that motions thereunder may be made within a reasonable time, with a one-year limitation as to some of the grounds therein specified. Wooley v. Wicker, 75 N.M. 241, 403 P.2d 685 (1965).

Petition for certificate of redemption. — The 30-day time limit set by this section for the court's ruling on a motion does not apply to a petition for a certificate of redemption. Crown Life Ins. Co. v. Candlewood, Ltd., 112 N.M. 633, 818 P.2d 411 (1991).

Failure to rule deemed denial. — This section provides that if the court fails to rule on a motion directed against a judgment of the court within 30 days after the filing of the motion, such failure to rule shall be deemed a denial thereof. Nat'l Am. Life Ins. Co. v. Baxter, 73 N.M. 94, 385 P.2d 956 (1963), overruled on other grounds, Kelly Inn No. 102, Inc. v. Kapnison, 113 N.M. 231, 824 P.2d 1033 (1992); King v. McElroy, 37 N.M. 238, 21 P.2d 80 (1933).

Under this section, failure to rule on a motion is deemed a denial of the motion. Wagner Land & Inv. Co. v. Halderman, 83 N.M. 628, 495 P.2d 1075 (1972).

Where judgment, announced on September 4, 1931, was entered on September 25, 1931, and motion directed against the judgment was filed September 10, 1931, even if the judgment became effective only upon its entry, the motion was, on October 26, 1931, through failure of the court to rule thereon prior thereto, in legal effect denied, and should thereafter have been so treated by the court, and all parties to the suit. King v. McElroy, 37 N.M. 238, 21 P.2d 80 (1933).

Failure to rule cannot avoid review. — Since the trial court's ruling on the motion prior to the expiration of the 30-day period would be reviewable, the court will hold that its failure to rule cannot avoid review, and will consider a motion for new trial timely filed as having been denied by the court if denied by operation of law. Montgomery Ward v. Larragoite, 81 N.M. 383, 467 P.2d 399 (1970).

Setting of hearing date not ruling. — District court's setting of a date for hearing on motion for rehearing was not a ruling on the motion and the district court lost jurisdiction

to deal further with the motion for rehearing, as it had been denied by operation of law. Nat'l Am. Life Ins. Co. v. Baxter, 73 N.M. 94, 385 P.2d 956 (1963), overruled on other grounds, Kelly Inn No. 102, Inc. v. Kapnison, 113 N.M. 231, 824 P.2d 1033 (1992).

Thirty-day period of jurisdiction does not start anew upon order of remittitur. — Order of remittitur filed within 30 days of the judgment on the verdict does not become a new final judgment so as to give the trial judge a new 30-day period of jurisdiction over the judgment. Salinas v. John Deere Co., Inc., 103 N.M. 336, 707 P.2d 27 (Ct. App. 1984), cert. quashed, 103 N.M. 287, 705 P.2d 1138 (1985).

Judgments under court control for 30 days. — Judgments of the district court remain under control of that court for a period of 30 days under the provisions of this section. Marquez v. Wylie, 78 N.M. 544, 434 P.2d 69 (1967).

The district court retains control of its judgments and decrees for a period of 30 days after the entry thereof, and for such further time as may be necessary to enable the court to pass upon and dispose of any motion directed against such judgment and this statute requires the court to rule upon such motions within 30 days after filing. Wagner Land & Inv. Co. v. Halderman, 83 N.M. 628, 495 P.2d 1075 (1972)(see now Rule 1-054.1 NMRA).

Court can vacate judgment even if not under Rule 60(b). — This court need not enter a discussion whether the trial court correctly vacated the judgment under Rule 60(b), N.M.R. Civ. P., although it had the discretion under that rule to do so as to a judgment entered under the circumstances. But whether it did or not, it certainly had such power under this section giving district courts jurisdiction over judgments and decrees for 30 days after entry thereof. Wakely v. Tyler, 78 N.M. 168, 429 P.2d 366 (1967).

Permissible for court to vacate appeal order if within time. — Within the time in which the trial court retains control over its judgments, orders and decrees it is permissible for the trial court which granted an order allowing appeal to vacate the same by a subsequent order. Fairchild v. United Serv. Corp., 52 N.M. 289, 197 P.2d 875 (1948).

Even if to vacate its judgment. — A trial court could within the 30 days for allowing appeals, in order to permit it to vacate its judgment, vacate the order which it had granted permitting an appeal. Fairchild v. United Serv. Corp., 52 N.M. 289, 197 P.2d 875 (1948).

Court not precluded from ruling after 30 days where statute inapplicable. — Court was not precluded from ruling on a motion to vacate a default judgment after 30 days had passed since filing of the motion because statute stipulating that court's failure to rule within 30 days constituted a denial was held to be inapplicable. McLachlan v. Hill, 77 N.M. 473, 423 P.2d 992 (1967).

Motion to amend complaint. — Trial court lacked jurisdiction to grant a motion to amend the complaint more than thirty days after an order of summary judgment was entered. Corbin v. State Farm Ins. Co., 109 N.M. 589, 788 P.2d 345 (1990).

Court's order after 30 days void. — Trial court's order made after more than 30 days after motion for rehearing was filed was void as court was without jurisdiction to enter order. National Am. Life Ins. Co. v. Baxter, 73 N.M. 94, 385 P.2d 956 (1963), overruled on other grounds, Kelly Inn No. 102, Inc. v. Kapnison, 113 N.M. 231, 824 P.2d 1033 (1992)(see now Rule 1-054.1 NMRA).

Proceedings for reversal commenced within 30 days. — If the judgment is not void or irregular and is rendered after due hearing, and there is no fraud in the cause resulting therein, or is not a default judgment, a proceeding in a district court seeking a reversal of the decree must be commenced within 30 days after the entry of the judgment or decree. Caudill v. Caudill, 39 N.M. 248, 44 P.2d 724 (1935).

When court makes no findings of fact. — Cases in which the court has made no findings of fact would come under this section, which limits the time for modification of judgment to not more than 30 days after the date of its entry, that being the time during which the court retains jurisdiction. Gilmore v. Baldwin, 59 N.M. 51, 278 P.2d 790 (1955)(see now Rule 1-054.1 NMRA).

Appeal taken on motion deemed denied not timely. — Where motion to set aside the judgment was not ruled upon within 30 days thereafter, it was deemed denied by operation of law. Therefore, appeal taken more than five months later was not timely under former version of Rule 3, N.M.R. App. P. (Civ.) N.M. Sav. & Loan Ass'n v. Blueher Lumber Co., 80 N.M. 254, 454 P.2d 268 (1969)(see now Rule 1-054.1 NMRA).

Must show abuse of discretion when appealing after 30 days. — On appeal from refusal to vacate a judgment more than 30 days after its entry, movant must show something more than the motion; there must be evidence and a showing of abuse of discretion. Bd. of Cnty. Comm'rs v. Wasson, 37 N.M. 503, 24 P.2d 1098, followed in Bd. of Cnty. Comm'rs v. Gardner, 37 N.M. 514, 24 P.2d 1104 (1933).

Section 31-18-19 NMSA 1978 controls over this section. - As the provisions of the habitual offender statute are mandatory, the specific provision for filing charges "at any time" in Section 31-18-6 NMSA 1978 (now Section 31-18-19 NMSA 1978) controls over the general provision of this section which gives a trial court jurisdiction over its final judgment in a nonjury trial for 30 days after entry of final judgment. State v. Padilla, 92 N.M. 19, 582 P.2d 396 (Ct. App.), cert. denied, 92 N.M. 180, 585 P.2d 324 (1978).

Jurisdiction over second supplemental judgment. — Although appellate court lost jurisdiction over the first supplemental judgment under this section, it nevertheless still had jurisdiction over second supplemental judgment under Rule 1-060(B), NMRA. English v. English, 118 N.M. 170, 879 P.2d 802 (Ct. App.), cert. denied, 118 N.M. 256, 880 P.2d 867 (1994).

Law reviews. — For article, "The 'New Rules' in New Mexico," see 1 Nat. Resources J. 96 (1961).

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

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

Am. Jur. 2d, A.L.R. and C.J.S. references. — 20 Am. Jur. 2d Courts § 21 et seq.; 46 Am. Jur. 2d Judgments § 71 et seq.

Grounds upon which entry of final decree of divorce may be contested after entry of interlocutory decree, 109 A.L.R. 1005, 174 A.L.R. 519.

Form of judgment against garnishee respecting obligation payable in installments, 7 A.L.R.2d 680.

Judgment as res judicata pending appeal or motion for new trial or during time allowed therefor, 9 A.L.R.2d 984.

Entry of final judgment after disagreement of jury, 31 A.L.R.2d 885.

Modern status of state court rules governing entry of judgment on multiple claims, 80 A.L.R.4th 707.

Filing of notice of appeal as affecting jurisdiction of state trial court to consider motion to vacate judgment, 5 A.L.R.5th 422.

49 C.J.S. Judgments §§ 100, 228.

39-1-2. [Judgment rendered subsequent to hearing; notice to attorneys.]

Upon any hearing before the judge of a court, wherein the judgment of the court upon such hearing shall not be rendered at the time of such hearing, but shall be taken under advisement by the judge, no judgment or order relative to the matters pertaining to such hearing shall be entered until notice of the same shall have been given to the attorneys for the respective parties in the action.

History: Laws 1897, ch. 73, § 136; C.L. 1897, § 2685(136); Code 1915, § 4229; C.S. 1929, § 105-845; 1941 Comp., § 19-902; 1953 Comp., § 21-9-2.

ANNOTATIONS

Cross references. — For entry of judgment, *see* Rule 1-058 NMRA.

Failure to notice not error if no motion to vacate is made. — In a divorce proceeding, where the court entered an order determining the wife's specific share of community assets; no notice was given to the husband of the any presentment of the order; no presentment hearing was held; and the husband failed to file a motion to vacate the order when he learned of its entry, the order was not void for want of notice of entry or a presentment hearing. Muse v. Muse, 2009-NMCA-003, 145 N.M. 451, 200 P.3d 104.

Applicability to workmen's compensation. — The provisions of this section are applicable to actions for recovery of compensation under the Workmen's Compensation Act. Moore v. Phillips Petroleum Co., 36 N.M. 153, 9 P.2d 692 (1932).

Duty of court to notify counsel. — It was the duty of the court, having had the cause under advisement, to notify counsel of its proposed judgment and give them an opportunity to present findings and conclusions. Barelas Community Ditch Corp. v. City of Albuquerque, 63 N.M. 25, 312 P.2d 549 (1957).

Order modifying child custody and awarding support, submitted ex parte by wife's counsel, contrary to prior arrangement, required notice to be served on husband's counsel before judgment was entered. Skelton v. Gray, 101 N.M. 158, 679 P.2d 826 (1984).

Notice to opposing counsel. — Judgments and orders must indicate by counsels' signatures that all parties affected have seen them before they are presented for the judge's signature, and the judge shall be satisfied by proof of service that notice of presentation has been given to the attorneys for all parties. Whoever files an order or judgment shall forthwith provide all other parties with a copy showing the date of filing. Montano v. Encinias, 103 N.M. 515, 709 P.2d 1024 (1985).

Court has inherent power to direct manner of service. R.V. Smith Supply Co. v. Black, 43 N.M. 177, 88 P.2d 269 (1939).

Remedy for judgment without notice is motion to vacate. — Where, after taking under advisement, district court makes findings and enters judgment without notice to losing party, the remedy is by motion to vacate judgment. Moore v. Brannin, 33 N.M. 624, 274 P. 50 (1929).

Counsel not consent to judgment though endorsed proposal. — Where defense counsel endorsed proposed judgment by signing his name below the word "submitted," and failed to submit requested findings and conclusion, he did not waive the right of appeal nor consent to entry of the judgment. Barelas Community Ditch Corp. v. City of Albuquerque, 63 N.M. 25, 312 P.2d 549 (1957).

Failure of notice not error if no vacate motion made. — Failure to give notice of the entry of judgment is not available as error if no motion to vacate has been made, particularly if appellant has obtained consideration nunc pro tunc of his objections and

their incorporation in the record. McKinley County Abstract & Inv. Co. v. Shaw, 30 N.M. 517, 239 P. 865 (1925).

Lack of notice not error where jurisdiction lost. — The taking of an appeal within the time provided was jurisdictional and trial court's denial of appellant's motion to correct docket entries to show timely filing of notice of appeal on the basis that it had lost jurisdiction over the cause due to passage of 30 days from time of entry of judgment was not error, even where appellant was not notified of date of entry of judgment. Lopez v. Allied Concord Fin. Corp., 82 N.M. 338, 481 P.2d 700 (1971).

When notice not required. — Where at the time the verdict is rendered the court announced that the motion for new trial would be considered filed and overruled, and judgment entered, no notice is required to be given to counsel of the entering of judgment. Fullen v. Fullen, 21 N.M. 212, 153 P. 294 (1915); Sandell v. Norment, 19 N.M. 549, 145 P. 259 (1914).

Judgment is not automatic lien on personal property. Von Segerlund v. Dysart, 137 F.2d 755 (9th Cir. 1943).

Judge without authority to change judgment after penitentiary commitment. — In the absence of an adjudication by the supreme court to the contrary, a district judge is without authority to change, alter or amend a judgment after issuance of commitment to the penitentiary. 1959-60 Op. Att'y Gen. No. 59-122.

Law reviews. — For annual survey of civil procedure in New Mexico, see 18 N.M.L. Rev. 287 (1988).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Filing of notice of appeal as affecting jurisdiction of state trial court to consider motion to vacate judgment, 5 A.L.R.5th 422.

Authority of court, upon entering default judgment, to make orders for child custody or support that were not specifically requested in pleadings of prevailing party, 5 A.L.R.5th 863.

49 C.J.S. Judgments §§ 102, 112.

39-1-3. [Death of party after verdict.]

If either party to any suit shall die between verdict and judgment, the judgment shall be entered as if both parties were living.

History: Laws 1850-1851, p. 144; C.L. 1865, ch. 27, § 14; C.L. 1884, § 2135-A; C.L. 1897, § 3074; Code 1915, § 3083; C.S. 1929, § 76-115; 1941 Comp., § 19-903; 1953 Comp., § 21-9-3.

39-1-4. [Entry of judgment; execution; motion for new trial.]

Judgment shall be entered and execution may be issued thereon unless a motion for a new trial is made within the time provided by law, and granted or continued during the term at which the case is tried.

History: Laws 1897, ch. 73, § 135; C.L. 1897, § 2685(135); Code 1915, § 4228; C.S. 1929, § 105-844; 1941 Comp., § 19-904; 1953 Comp., § 21-9-4.

ANNOTATIONS

Cross references. — For execution and foreclosure, *see* 39-4-1 NMSA 1978 et seq.

For constitutional provision as to judgments against local officials, *see* N.M. Const., art. VIII, § 7.

For new trials, *see* Rule 1-059 NMRA.

For stay of proceedings to enforce a judgment, *see* Rule 1-062 NMRA.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 46 Am. Jur. 2d Judgments §§ 131, 150; 58 Am. Jur. 2d New Trial §§ 476, 477, 481.

Motion for new trial as suspension or stay of execution or judgment, 121 A.L.R. 686.

Judgment as res judicata pending motion for a new trial or during the time allowed therefor, 9 A.L.R.2d 984.

What constitutes final judgment within provision or rule limiting application for new trial to specified period thereafter, 34 A.L.R.2d 1181.

Time for filing motion for new trial based on jury conduct occurring before, but discovered after, verdict, 97 A.L.R.2d 788.

Incompetence of counsel as ground for relief from state court civil judgment, 64 A.L.R.4th 323.

49 C.J.S. Judgments §§ 113, 115.

39-1-5. [Judgments enforced; duty of judge.]

It shall be the duty of the judge of any court to cause judgment, sentence or decree of the court to be carried into effect, according to law.

History: Laws 1850-1851, p. 144; C.L. 1865, ch. 27, § 16; C.L. 1884, § 1832; C.L. 1897, § 2878; Code 1915, § 1360; C.S. 1929, § 34-107; 1941 Comp., § 19-905; 1953 Comp., § 21-9-5.

ANNOTATIONS

Cross references. — For supplementary judgment proceedings, *see* Rule 1-069 NMRA.

Plaintiff has right to enforce judgment if it has not been superseded. The trial court has a duty to give effect to its judgment. Prudential Ins. Co. of Am. v. Anaya, 78 N.M. 101, 428 P.2d 640 (1967).

Permanent injunction enforceable by the district court. — In an action for negligence, inverse condemnation, injunctive relief and damages, where the parties jointly filed a motion for entry of stipulated permanent injunction and voluntary dismissal with prejudice, and where plaintiff filed suit against defendant, the New Mexico transportation department, seeking enforcement of the permanent injunction, the permanent injunction was a judgment enforceable by the district court and not subject to the arbitration clause contained within the settlement agreement, because despite being the product of a stipulation between the parties, the permanent injunction provided for continued court oversight, and the terms of the permanent injunction comported with the legal rationale supporting injunctive relief. Allred v. N.M. Dep't of Transp., 2017-NMCA-019, cert. denied, 2017-NMCERT-____.

Law reviews. — For article, "Tremors: Justice Scalia and Professor Clinton Re-Shape the Debate over the Cross-Boundary Enforcement of Tribal and State Judgments", see 34 N.M.L. Rev. 239 (2004).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 49 C.J.S. Judgments §§ 585, 586.

39-1-6. Money judgment; docketing; transcript of judgment; lien on real estate; supersedeas.

Any money judgment rendered in the supreme court, court of appeals, district court or metropolitan court shall be docketed by the clerk of the court and a transcript or abstract of judgment may be issued by the clerk upon request of the parties. The judgment shall be a lien on the real estate of the judgment debtor from the date of the filing of the transcript of the judgment in the office of the county clerk of the county in which the real estate is situate. Upon approval and filing of a supersedeas bond upon appeal of the cause as provided by law, the lien shall be void. Judgment shall be enforced for not more than fourteen years thereof.

History: Laws 1891, ch. 67, § 1; C.L. 1897, § 3069; Code 1915, § 3079; C.S. 1929, § 76-110; 1941 Comp., § 19-906; Laws 1949, ch. 110, § 1; 1953 Comp., § 21-9-6; Laws 1955, ch. 69, § 1; 1966, ch. 28, § 32; 1973, ch. 25, § 1; 1983, ch. 89, § 1.

ANNOTATIONS

Cross references. — For confessed judgment liens, *see* 39-1-14 NMSA 1978.

For foreclosure suit and sale by one holding judgment lien on real estate, *see* 39-4-13 to 39-4-16 NMSA 1978.

For money allowance in divorce proceeding being lien on real estate, *see* 40-4-13 NMSA 1978.

Judgment lien on real estate is right established by statute and did not exist at common law. Curtis Mfg. Co. v. Barela, 76 N.M. 392, 415 P.2d 361 (1966).

Requirements for lien set by statute. — As the lien for a money judgment provided does not exist at common law, it operates only by reason of statute and does not become applicable until the requirements of the statute have been met. Pugh v. Heating & Plumbing Fin. Corp., 49 N.M. 234, 161 P.2d 714 (1945).

Lien as right while foreclosure as remedy. — The lien created by this section authorizing recordation of a transcript of the docket thereof is a right as distinguished from a remedy, and if the remedy of foreclosure of the judgment lien prayed for in a counterclaim is barred, the lien has been extinguished. Pugh v. Heating & Plumbing Fin. Corp., 49 N.M. 234, 161 P.2d 714 (1945).

Section is directory. Cannon v. First Nat'l Bank, 35 N.M. 193, 291 P. 924 (1930).

Construed in pari materia. — Absence from statute of words to the effect that the judgment liens thereby created shall not bind the real estate of the judgment debtor for a longer period than the same is enforceable is not fatal to a contention that it should be read in pari materia without statute governing limitation on enforcement of mechanics' liens. Pugh v. Heating & Plumbing Fin. Corp., 49 N.M. 234, 161 P.2d 714 (1945).

Existence of valid judgment is prerequisite to existence of lien. — The lien is for the amount of the judgment, secures it and provides a means for its enforcement; moreover, the lien expires with the judgment as a judgment lien is founded on the judgment from which it arises. W. States Collection Co. v. Shain, 83 N.M. 203, 490 P.2d 461 (1971).

Judgment and judgment lien separate causes of action. — The judgment and the judgment lien on real estate being separate rights, they are separate causes of action. Curtis Mfg. Co. v. Barela, 76 N.M. 392, 415 P.2d 361 (1966).

Divorce decree ordering future payments not "money judgment". — A divorce decree ordering future periodic payments is not a "money judgment" sufficient to create a lien; unless a provision in the decree establishes a sum certain that is due immediately and enforceable by execution against the debtor's property, no money judgment exists to which a judgment lien can attach, and there is only a promise to pay future installments which can be secured by a consensual mortgage. Carrillo v. Coors, 120 N.M. 283, 901 P.2d 214 (Ct. App. 1995).

Filing of judgment transcript becomes lien. — Where a transcript of a judgment is filed in the office of the county clerk, it thereupon becomes a lien against all real estate owned by the debtor in that county. Scheer v. Stolz, 41 N.M. 585, 72 P.2d 606 (1937).

Lien exists from filing, not recording, date. — A money judgment does not carry with it a lien against the real estate of a judgment debtor, and a lien exists only from the date of filing the transcript in the office of the county clerk, and not from the date of recording. Kaseman v. Mapel, 26 N.M. 639, 195 P. 799 (1921).

Where judgment not docketed no lien created. — Whether a judgment becomes a lien depends upon whether the required steps of the section are taken, and where the judgment is not docketed, but a transcript only is filed in the office of the county clerk, it does not create a lien. Breece v. Gregg, 36 N.M. 246, 13 P.2d 421 (1932).

Rights of judgment lien creditor fixed when lien credited. — The rights of a judgment lien creditor are fixed by the condition of affairs as they existed when the lien was created, and are not affected by a subsequent conveyance which the debtor could not have been coerced by the courts to make. Sylvanus v. Pruett, 36 N.M. 112, 9 P.2d 142 (1932).

Lien not continued after judgment becomes barred. — The lien of a money judgment does not continue after the judgment on which it is found has become barred, though the statute which provides for creation of the lien is silent as to any limitation upon such lien. Pugh v. Heating & Plumbing Fin. Corp., 49 N.M. 234, 161 P.2d 714 (1945).

Real estate includes equitable interests. — Both this section and 39-4-13 NMSA 1978 broadly refer to "real estate" of the judgment debtor and, therefore, are broad enough to include equitable interests within their purview. Marks v. City of Tucumcari, 93 N.M. 4, 595 P.2d 1199 (1979).

Interest retained by vendor under executory contract of sale is personalty and not real estate. Marks v. City of Tucumcari, 93 N.M. 4, 595 P.2d 1199 (1979).

Debtor's interest in property to which lien attaches, when he holds equitable title under a real estate contract, is the full value of his estate in the property, not just the amount of his payments and the value of improvements. Bank of Santa Fe v. Garcia, 102 N.M. 588, 698 P.2d 458 (Ct. App. 1985).

Effect of recordation of money judgment. — Once the terms of this section have been complied with and the money judgment is recorded, a transferee of the debtor takes the property with constructive notice of the amount of the judgment and the life of the lien. Bank of Santa Fe v. Garcia, 102 N.M. 588, 698 P.2d 458 (Ct. App. 1985).

No standing in quiet title suit based on judgment lien. — A party had no standing before the court in a suit to quiet title, whose right and interest in the premises were

based upon a judgment taken on a lien, acquired under this section. Security Inv. & Dev. Co. v. Capital City Bank, 22 N.M. 469, 164 P. 829 (1917).

No lien attaches on bare legal title as trustee. — Where the former owner of a tract of land conveyed the property to a vendee before judgment against him had been obtained, and the vendee conveyed the property back to the vendor without consideration for the sole purpose of meeting forest service requirements relative to the transfer of grazing permits on the land, and the property was then reconveyed to the vendee, the vendor during that brief period served as trustee for the vendee and had only a bare legal title in the property to which no judgment lien under this section could attach. McCord v. Ashbaugh, 67 N.M. 61, 352 P.2d 641 (1960).

Judgment lien superior to claim under altered deed. — Where a grantee of land had fraudulently substituted another name as grantee in two deeds, and grantor did not discover the fraud until after his judgment lien against the intended grantee had been recorded, his lien was superior to that claimed under the altered deed. Scheer v. Stolz, 41 N.M. 585, 72 P.2d 606 (1937).

Priority of purchaser at execution over subsequent judgment purchaser. — Where execution issued, not once, but four times within five years following recovery of judgment, the lien of such judgment did not become dormant although an order of revivor was procured, and purchaser at execution sale seven years after rendition of the judgment was entitled to priority over one who purchased at a special master's sale under judgment subsequently recovered and docketed. Otero v. Dietz, 39 N.M. 1, 37 P.2d 1110 (1934).

Priority of mortgage lien. — A release or discharge by a mortgagee of his lien, or the surrender of the evidence thereof to the mortgagor, in consideration for a conveyance by the mortgagor of his interests in the mortgaged property, did not operate as an extinguishment of the mortgage lien as against junior or intermediate encumbrances, including liens under this section, and the mortgage lien retained its priority. Fowler v. Carter, 77 N.M. 571, 425 P.2d 737 (1967).

Where other liens matter of record. — The fact that mortgagee, by examining the public records, could have learned of the existence of the plaintiffs' intervening judgment lien, before he accepted the conveyance of the mortgaged premises from the mortgagors and before he released his mortgage, did not work a merger, and did not cause mortgagee to lose his prior lien. Fowler v. Carter, 77 N.M. 571, 425 P.2d 737 (1967).

Foreclosure of wife's community property to satisfy judgment lien. — A wife's interest in community property may be foreclosed to satisfy a judgment lien against the wife resulting from a tort which occurred during the marriage while she negligently operated a separately owned automobile. McDonald v. Senn, 53 N.M. 198, 204 P.2d 990 (1949).

Wife's interest in community property. — The wife's interest in the community is subject to segregation in order that it may be subjected to a statutory judgment lien. McDonald v. Senn, 53 N.M. 198, 204 P.2d 990 (1949).

Wife's interest in community property subject to liability for her torts. — The fact that a wife's interests in the community should be subject to liability for her torts is not precluded by reason of her husband's control and management of the community property. McDonald v. Senn, 53 N.M. 198, 204 P.2d 990 (1949).

Request of plaintiff. — A money judgment must be docketed by the clerk without a request from the plaintiff, but the making of a transcript must be at the request of the plaintiff. 1919-20 Op. Att'y Gen. No. 20-2511.

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

For article, "Survey of New Mexico Law, 1979-80: Property," see 11 N.M.L. Rev. 203 (1981).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 46 Am. Jur. 2d Judgments § 360 et seq.

Lien of judgment on excess value of homestead, 41 A.L.R.4th 292.

Judgment lien or levy of execution on one joint tenant's share or interest as severing joint tenancy, 51 A.L.R.4th 906.

49 C.J.S. Judgments §§ 463 to 465.

39-1-6.1. Judgment liens; release; penalties.

When any judgment giving rise to a subsisting lien pursuant to Section 39-1-6 NMSA 1978 upon any real estate in the state has been fully satisfied, it is the duty of the judgment creditor to file a release of the lien in the office of the county clerk of the county in which the real estate is situate. The cost of filing the release of lien shall be assessed against the judgment debtor and shall be collected before the release of lien is required to be filed.

History: Laws 1985, ch. 165, § 1.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 46 Am. Jur. 2d Judgments § 408.

49 C.J.S. Judgments § 500.

39-1-6.2. Judgment debts; discharge.

A. All judgments and decrees for payment of money rendered in the courts of this state and which have become final may be satisfied, if the judgment creditor cannot be found after a diligent search, by payment of the full amount of such judgment or decree, with interest thereon to date of payment, plus any post-judgment costs incurred by the judgment creditor which can be determined from the court record and the costs of court for receiving into and paying the money out of the registry of the court.

B. Upon such payment, the clerk, or the judge if there is no clerk, shall issue a receipt therefor and shall enter a satisfaction of such judgment in the record, and shall formally notify the judgment creditor of such judgment or decree, if known; and upon the request therefor, shall pay over to the judgment creditor, or to his order, the full amount of the judgment, costs and interest collected.

C. Full payment of judgments and decrees pursuant to Subsections A and B of this section shall constitute full satisfaction thereof, and any lien created by such judgment or decree shall thereupon be satisfied and discharged.

D. Unclaimed funds in the court registry shall be disposed of pursuant to the Uniform Disposition of Unclaimed Property Act, Sections 7-8-1 through 7-8-34 NMSA 1978.

E. Unclaimed funds in the court registry shall be deposited in an interest-bearing account at an institution acceptable to the court. Interest on such funds shall accrue to the benefit of any person found entitled to claim the funds.

History: Laws 1985, ch. 150, § 1.

ANNOTATIONS

Compiler's notes. — The Uniform Disposition of Unclaimed Property Act, 7-8-1 to 7-8-34 NMSA 1978, referred to in Subsection D, was repealed in 1997. Comparable sections are compiled as Chapter 7, Article 8A NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 47 Am. Jur. 2d Judgments § 1019.

49 C.J.S. Judgments § 551.

39-1-7. Transcript; judgment records.

Transcripts of judgments shall be recorded in the county clerk's records. Any recording method used by a county clerk prior to July 1, 1983 in which transcripts of judgments were officially and properly recorded in the county clerk's records are validated and confirmed.

History: Laws 1891, ch. 67, § 2; C.L. 1897, § 3070; Code 1915, § 3080; C.S. 1929, § 76-111; 1941 Comp., § 19-907; 1953 Comp., § 21-9-7; Laws 1966, ch. 28, § 33; 1983, ch. 89, § 2; 1983, ch. 169, § 1.

ANNOTATIONS

Statute requirements for lien to be met. — As the lien for a money judgment herein provided does not exist at common law it operates only by reason of statute and does not become applicable until the requirements of the statute have been met. Pugh v. Heating & Plumbing Fin. Corp., 49 N.M. 234, 161 P.2d 714 (1945).

Where judgment not docketed no lien created. — Whether a judgment becomes a lien depends upon whether the required steps of the section are taken, and where the judgment is not docketed, but a transcript only is filed in the office of the county clerk, it does not create a lien. Breece v. Gregg, 36 N.M. 246, 13 P.2d 421 (1932).

Lien exists from date of filing not date of recording. — A money judgment does not carry with it a lien against the real estate of a judgment debtor, and a lien exists only from the date of filing the transcript in the office of the county clerk, and not from the date of recording. Kaseman v. Mapel, 26 N.M. 639, 195 P. 799 (1921).

Transcripts of judgment secured from district court clerk can be submitted to the county clerk for recording under the provisions of this section and the county clerk can record the same by making a photostatic copy of said transcript. 1955-56 Op. Att'y Gen. No. 56-6528.

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

Am. Jur. 2d, A.L.R. and C.J.S. references. — 46 Am. Jur. 2d Judgments §§ 121, 368.

Mere rendition or formal entry or docketing of judgment as prerequisite to issuance of valid execution thereon, 65 A.L.R.2d 1162.

49 C.J.S. Judgments §§ 122, 126, 127, 463.

39-1-8. Transcript of judgment; contents; fee for issuance.

A. The transcript of judgment issued by the clerks of the supreme court, court of appeals, district courts and metropolitan courts shall show:

(1) the names of the parties;

(2) the number and nature of the case;

(3) the court in which judgment was rendered;

(4) the date of judgment, amount of damages, amount of costs, total amount of judgment and date of docket;

(5) the attorney for the creditor;

(6) issuance and return of executions, if any; and

(7) satisfaction of judgment when paid.

History: Laws 1891, ch. 67, § 3; C.L. 1897, § 3071; Code 1915, § 3081; C.S. 1929, § 76-113; 1941 Comp., § 19-908; 1953 Comp., § 21-9-8; Laws 1966, ch. 28, § 34; 1983, ch. 89, § 3.

ANNOTATIONS

Compiler's notes. — The title of Laws 1939, ch. 179, provided for the amendment of this section, but the body of the act contained no reference to this provision.

There is no Subsection B in this section as it appears in the 1983 act.

The catchline to this section, as amended in 1983, refers to "fee for issuance," but there is no such provision contained in the section.

Statutory requirements as to docket and record are directory. Cannon v. First Nat'l Bank, 35 N.M. 193, 291 P. 924 (1930).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 46 Am. Jur. 2d Judgments § 144.

49 C.J.S. Judgments § 125.

39-1-9. [Confession of judgments; entry.]

Judgment by confession, without action, may be entered by the clerk of the district courts in this state in term time or in vacation, in the manner hereinafter prescribed.

History: Laws 1889, ch. 20, § 1; C.L. 1897, § 3077; Code 1915, § 3071; C.S. 1929, § 76-102; 1941 Comp., § 19-909; 1953 Comp., § 21-9-9.

ANNOTATIONS

Cross references. — For partner not authorized to confess judgment for partnership, *see* 54-1-9 NMSA 1978.

For prohibition against confessed judgments in retail installment sales, *see* 56-1-5 NMSA 1978.

Cognovit statute held not to abrogate warrant of attorney. — The cognovit statute (39-1-9 to 39-1-15 NMSA 1978) does not cover the same field as that occupied by the common-law practice of taking judgments upon warrant of attorney, and does not impliedly or otherwise abrogate such practice. First Nat'l Bank v. Baker, 25 N.M. 208, 180 P. 291 (1919).

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

Am. Jur. 2d, A.L.R. and C.J.S. references. — 46 Am. Jur. 2d Judgments § 228 et seq.

Necessity that warrant of attorney to confess judgment state amount, 7 A.L.R. 735.

Death or incompetency of principal as affecting existing power of attorney to confess judgment, 44 A.L.R. 1310.

Warrant of attorney to confess judgment signed by two or more as joint, or several, or joint and several, 89 A.L.R. 403.

Validity and effect of cognovit or warrant of attorney to confess judgment in conditional sale contract, 89 A.L.R. 1106.

What law governs validity of warrant or power of attorney to confess judgment, 19 A.L.R.2d 544.

Payment by obligor on note or other instrument containing warrant of attorney to confess judgment as the contending time within which power to confess may be exercised, 35 A.L.R.2d 1452.

Validity and enforceability of judgment entered in sister state under a warrant of attorney to confess judgment, 39 A.L.R.2d 1232.

Necessity, in order to enter judgment by confession on instrument containing warrant of attorney, that original note or other instrument and original warrant be produced or filed, 68 A.L.R.2d 1156.

Agent's authority to execute warrant of attorney to confess judgment against principal, 92 A.L.R.2d 952.

Requirements as to signing, sealing and attestation of warrants of attorney to confess judgments, 3 A.L.R.3d 1147.

Enforceability of warrant of attorney to confess judgment against assignee, guarantor or other party obligating himself for performance of primary contract, 5 A.L.R.3d 426.

49 C.J.S. Judgments §§ 160, 165.

39-1-10. [Subject of judgment by confession.]

Such confession can be only for money due, or to become due, or to secure a person against contingent liabilities on behalf of the defendant and must be for a specified sum.

History: Laws 1889, ch. 20, § 2; C.L. 1897, § 3078; Code 1915, § 3072; C.S. 1929, § 76-103; 1941 Comp., § 19-910; 1953 Comp., § 21-9-10.

ANNOTATIONS

Only pleading verified statement of defendant. — This section provides for taking judgment without any action pending, which is to be entered by the clerk without the knowledge or direction of the judge, and the only pleading contemplated is a verified written statement, signed by defendant, which is filed and entered by the clerk. First Nat'l Bank v. Baker, 25 N.M. 208, 180 P. 291 (1919).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 46 Am. Jur. 2d Judgments § 230.

49 C.J.S. Judgments §§ 138 to 141.

39-1-11. [Form of confession of judgment.]

A statement in writing must be made and signed by the defendant and verified by his oath to the following effect, and filed with the clerk:

A. if for money due, or to become due, it must state fully and concisely the facts out of which the indebtedness arose, and that the sum confessed therefor is justly due, or to become due, as the case may be;

B. if for the purpose of securing the plaintiff against a contingent liability, it must state fully but concisely the facts constituting such liability, and must show that the sum confessed therefor does not exceed the same.

History: Laws 1889, ch. 20, § 3; C.L. 1897, § 3079; Code 1915, § 3073; C.S. 1929, § 76-104; 1941 Comp., § 19-911; 1953 Comp., § 21-9-11.

ANNOTATIONS

Evidence to overcome recitals of judgment. — Where judgment had been entered on cognovit note signed by defendant, but ex parte affidavit of county clerk setting forth docket entries in the case did not show filing of note, such facts were insufficient to overcome the recitals of the judgment on motion to set aside the judgment. Hot Springs Nat'l Bank v. Kenney, 39 N.M. 428, 48 P.2d 1029 (1935).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 46 Am. Jur. 2d Judgments § 237 et seq.

49 C.J.S. Judgments §§ 159, 163, 171.

39-1-12. Record and transcript of judgment by confession; execution.

The clerk shall record the confession of judgment in his court record for such county and shall issue the transcript of judgment or execution as in other cases or as may be stipulated between the parties pursuant to Section 39-1-13 NMSA 1978.

History: Laws 1889, ch. 20, § 4; C.L. 1897, § 3080; Code 1915, § 3074; C.S. 1929, § 76-105; 1941 Comp., § 19-912; 1953 Comp., § 21-9-12; Laws 1983, ch. 89, § 4.

ANNOTATIONS

Confession judgment held not to abrogate warrant of attorney. — This section does not cover the same field as that occupied by the common-law practice of taking judgments on warrant of attorney, and does not abrogate such practice. First Nat'l Bank v. Baker, 25 N.M. 208, 180 P. 291 (1919).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 47 Am. Jur. 2d Judgments § 121 et seq.

49 C.J.S. Judgments §§ 122, 126, 127, 164, 165, 463.

39-1-13. [Conditions to stay execution of judgment by confession.]

Any defendant so confessing judgment, may attach such condition or conditions thereto as to stay of execution, not to exceed one year, as the beneficiary may agree to by signing the same.

History: Laws 1889, ch. 20, § 5; C.L. 1897, § 3081; Code 1915, § 3075; C.S. 1929, § 76-106; 1941 Comp., § 19-913; 1953 Comp., § 21-9-13.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 49 C.J.S. Judgments §§ 136, 146, 531.

39-1-14. [Effect of confessed judgment; transcripts filed in other counties; liens.]

Such judgment, when so filed, recorded and docketed, shall have all the binding force and effect that judgments obtained in the regular manner have by law in said courts, as to being liens upon real estate of such defendant, and otherwise. And the beneficiary, under such judgment, shall have the same right to file transcripts thereof in other counties to be a lien upon the real estate of such defendant, as any plaintiff has,

under the law, in like manner, filing a certified transcript thereof in the office of the county clerk of such other county or counties.

History: Laws 1889, ch. 20, § 6; C.L. 1897, § 3082; Code 1915, § 3076; C.S. 1929, § 76-107; 1941 Comp., § 19-914; 1953 Comp., § 21-9-14.

ANNOTATIONS

Practice of warrant of attorney not abrogated. — This section does not cover the same field as that occupied by the common-law practice of taking judgments on warrant of attorney, and does not abrogate such practice. First Nat'l Bank v. Baker, 25 N.M. 208, 180 P. 291 (1919).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 46 Am. Jur. 2d Judgments §§ 228 et seq., 360 et seq.

49 C.J.S. Judgments §§ 168, 463, 471.

39-1-15. [Affidavit of good faith.]

No such confession of judgment shall be filed with the clerks of said district courts, unless the defendant or debtor shall attach to and make as a part of the statement required in Section 39-1-11 NMSA 1978, an affidavit setting forth that the same is made in good faith to secure such beneficiary in debt or contingent liability justly due in the sum thus confessed or necessarily entered into, and not with the intention of defrauding any of such defendant's creditors.

History: Laws 1889, ch. 20, § 8; C.L. 1897, § 3084; Code 1915, § 3078; C.S. 1929, § 76-109; 1941 Comp., § 19-915; 1953 Comp., § 21-9-15.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 46 Am. Jur. 2d Judgments § 262.

49 C.J.S. Judgments § 146.

39-1-16. [Contracts providing for confession of judgment before cause of action accrues prohibited.]

That it shall be unlawful to execute or procure to be executed as part of or in connection with the execution of any negotiable instrument, or other written contract to pay money, and before a cause of action thereon shall have accrued, any contract, agreement, provision or stipulation giving to any person or persons a power of attorney or authority as attorney for the maker or endorser thereof, in his name to appear in any court of record, and waive the service of process in an action to enforce payment of money claimed to be due thereon, or authorizing or purporting to authorize an attorney

or agent, howsoever designated, to confess judgment on such instrument for a sum of money to be ascertained in a manner other than by action of the court upon a hearing after notice to the debtor, whether with or without an attorney fee, or authorizing or purporting to authorize any such attorney to release errors and the right of appealing from such judgment, or to consent to the issue of execution on such judgment. Any and all provisions hereinabove declared to be unlawful, contained in any contract, stipulation or power of attorney given or entered into before a cause of action on such promise to pay, shall have accrued, shall be void.

History: Laws 1933, ch. 46, § 1; 1941 Comp., § 19-916; 1953 Comp., § 21-9-16.

ANNOTATIONS

Cross references. — For prohibition against confessed judgment in retail installment sales, *see* 56-1-5 NMSA 1978.

Section operates prospectively only and does not apply to a note executed prior to its passage. Hot Springs Nat'l Bank v. Kenney, 39 N.M. 428, 48 P.2d 1029 (1935).

Construed in pari materia. — Provisions of this section and 39-1-18 NMSA 1978 must be construed together to arrive at the true intent of the legislature. Ritchey v. Gerard, 48 N.M. 452, 152 P.2d 394 (1944).

Legislature intended to limit section to voiding the provisions giving power of attorney with authority to confess judgment on cognovit notes for sums of money to be determined in some manner other than court action pursuant to a hearing upon proper service of process. Ritchey v. Gerard, 48 N.M. 452, 152 P.2d 394 (1944).

Legislature intended to prevent judgment without notice. — The purpose and intent of the legislature, as expressed in this section, is to prevent judgment from being obtained without notice or service of process by virtue of a power of attorney executed prior to the accrual of the cause of action. GECC v. Tidenberg, 78 N.M. 59, 428 P.2d 33 (1967).

Provisions not to be offensive to full faith and credit. — Sections 39-1-16 to 39-1-18 NMSA 1978 may not be construed or administered in a manner offensive to U.S. Const., art. IV, § 1, providing full faith and credit shall be given in each state to the judicial proceedings of every other state. Mountain States Fixture Co. v. Daskalos, 61 N.M. 491, 303 P.2d 698 (1956).

Cognovit provisions deemed illegal and void. — Cognovit provisions executed as part of a negotiable instrument or written contract to pay money, and before a cause of action has accrued thereon, are illegal and void. Mountain States Fixture Co. v. Daskalos, 61 N.M. 491, 303 P.2d 698 (1956).

Waiver of defenses in chattel paper was not in violation of the prohibition against cognovit contracts and notes as set forth in 39-1-16 and 39-1-18 NMSA 1978. GECC v. Tidenberg, 78 N.M. 59, 428 P.2d 33 (1967).

Only cognovit clause of note void. — A cognovit clause contained in a note does not void the entire instrument but only the cognovit provisions thereof. Ritchey v. Gerard, 48 N.M. 452, 152 P.2d 394 (1944).

Only cognovit clause of note void, note otherwise enforceable. — When cognovit provisions are disregarded in bringing suit on a cognovit note and no resort is made to them, the note is enforceable as provided by law. Ritchey v. Gerard, 48 N.M. 452, 152 P.2d 394 (1944).

Provision in note gave Colorado court jurisdiction. — The procedure authorized under cognovit provisions contained in a promissory note executed in this state and payable in Colorado, in connection with a contract made and to be performed in Colorado, is sufficient to give the Colorado court jurisdiction over the defendants in an action upon the promissory note. Mountain States Fixture Co. v. Daskalos, 61 N.M. 491, 303 P.2d 698 (1956).

Jurisdiction where portions of agreement illegal. — Contracting parties may agree to be bound by the laws of the state of the residence of one of them where the contract was to be performed, although some portion of their agreement is illegal where executed and under the law of the forum where suit is brought. Mountain States Fixture Co. v. Daskalos, 61 N.M. 491, 303 P.2d 698 (1956).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 46 Am. Jur. 2d Judgments § 236.

Constitutionality, construction, application and effect of statutes invalidating power of attorney to confess judgment or contracts giving such power, 40 A.L.R.3d 1158.

49 C.J.S. Judgments § 139.

39-1-17. [Execution of foreign judgment based upon confession of judgment prohibited.]

No execution, or other process, shall be issued out of any court in this state to aid or enforce the collection of any judgment which may be rendered upon any judgment taken in any other state, or foreign country, and which judgment was founded or based upon any negotiable instrument, or contract, containing any such agreement, stipulation, or provision, as herein prohibited and declared void, in all cases where the court rendering such foreign judgment, obtained or attempted to obtain, jurisdiction of such judgment debtor or debtors, in whole or in part, by virtue of any such contract, agreement, or stipulation, as in this act [39-1-16, 39-1-17 NMSA 1978] declared void and prohibited. No such judgment shall be or become a lien upon real estate.

History: Laws 1933, ch. 46, § 2; 1941 Comp., § 19-917; 1953 Comp., § 21-9-17.

ANNOTATIONS

Temporary provisions. — Laws 1933, ch. 46, § 3, provides that nothing contained in the act is to be so construed as to affect pending litigation.

Execution to aid foreign cognovit judgment prohibited. — Execution or other process to aid or enforce a foreign judgment obtained under cognovit provisions is prohibited and no such judgment shall be or become a lien upon real estate. Mountain States Fixture Co. v. Daskalos, 61 N.M. 491, 303 P.2d 698 (1956).

Provisions not to be offensive to full faith and credit. — Sections 39-1-16 to 39-1-18 NMSA 1978 may not be construed or administered in a manner offensive to U.S. Const., art. IV, § 1, providing full faith and credit shall be given in each state to the judicial proceedings of every other state. Mountain States Fixture Co. v. Daskalos, 61 N.M. 491, 303 P.2d 698 (1956).

Procedure authorized in note gave Colorado court jurisdiction. — The procedure authorized under cognovit provisions contained in a promissory note executed in this state and payable in Colorado, in connection with a contract made and to be performed in Colorado, is sufficient to give the Colorado court jurisdiction over the defendants in an action upon the promissory note. Mountain States Fixture Co. v. Daskalos, 61 N.M. 491, 303 P.2d 698 (1956).

Even though portion of contract illegal. — Contracting parties may agree to be bound by the laws of the state of the residence of one of them where the contract was to be performed, although some portion of their agreement is illegal where executed and under the law of the forum where suit is brought. Mountain States Fixture Co. v. Daskalos, 61 N.M. 491, 303 P.2d 698 (1956).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 47 Am. Jur. 2d Judgments § 954.

Judgment entered in sister state under warrant of attorney to confess judgment, 40 A.L.R. 441, 39 A.L.R.2d 1232.

Necessity in action on judgment of sister state confessed under warrant of attorney, of alleging and proving the law of the latter state permitting such judgment, 155 A.L.R. 921.

Necessity that the transcript of a judgment of another state upon a cognovit under warrant of attorney shall include the cognovit and the note containing the alleged warrant of attorney, 162 A.L.R. 685.

What law governs validity of warrant or power of attorney to confess judgment, 19 A.L.R.2d 544.

Validity and enforceability of judgment entered in sister state under a warrant of attorney to confess judgment, 39 A.L.R.2d 1232.

Judgment of court of foreign country as entitled to enforcement or extraterritorial effect in state court, 13 A.L.R.4th 1109.

Validity, construction, and application of Uniform Enforcement of Foreign Judgments Act, 31 A.L.R.4th 706.

Construction and application of Uniform Foreign Money-Judgments Recognition Act, 88 A.L.R.5th 545.

50 C.J.S. Judgments § 889.

39-1-18. ["Cognovit note" defined; execution and procurement prohibited; penalty for violation.]

That any negotiable instrument, or other written contract to pay money, which contains any provision or stipulation giving to any person any power of attorney, or authority as attorney, for the maker, or any endorser, or assignor, or other person liable thereon, and in the name of such maker, endorser, assignor, or other obligor to appear in any court, whether of record or inferior, or to waive the issuance of personal service of process in any action to enforce payment of the money, or any part claimed to be due thereon, or which contains any provision or stipulation authorizing or purporting to authorize an attorney, agent or other representative, be he designated howsoever, to confess judgment on such instrument for a sum of money when such sum is to be ascertained, or such judgment is to be rendered or entered otherwise than by action of court upon a hearing after personal service upon the debtor, whether with or without attorney's fee, or which contains any provision or stipulation authorizing or purporting to authorize any such attorney, agent, or representative to release errors, or the right of appeal from any judgment thereon, or consenting to the issuance of execution on such judgment, is hereby designated, defined and declared to be a cognovit note. Any person, natural or corporate, who directly or indirectly shall procure another, or others, to execute as maker, or to endorse, or assign such cognovit note, or whoever being the payee, endorsee or assignee thereof shall accept and retain in his possession any such instrument, or whoever shall conspire or confederate with another, or others, for the purpose of procuring the execution, endorsement or assignment of any such instrument, or whoever shall attempt to recover upon or enforce within this state any judgment obtained in any other state or foreign country based upon any such instrument, shall be deemed guilty of a misdemeanor and upon conviction shall be fined in any sum not less than fifty dollars ($50.00), and not exceeding five hundred dollars ($500.00), to which may be added imprisonment for not less than thirty (30) days.

History: Laws 1933, ch. 48, § 1; 1941 Comp., § 19-918; 1953 Comp., § 21-9-18.

ANNOTATIONS

Cross references. — For confessed judgment prohibited in retail installment sales, *see* 56-1-5 NMSA 1978.

Construed in pari materia. — Provisions of 39-1-16 NMSA 1978 and this section must be construed together to arrive at the true intent of the legislature. Ritchey v. Gerard, 48 N.M. 452, 152 P.2d 394 (1944).

Provisions not to be offensive to full faith and credit. — Sections 39-1-16 to 39-1-18 NMSA 1978 may not be construed or administered in a manner offensive to U.S. Const., art. IV, § 1, providing full faith and credit shall be given in each state to the judicial proceedings of every other state. Mountain States Fixture Co. v. Daskalos, 61 N.M. 491, 303 P.2d 698 (1956).

Procedure authorized in note gave Colorado court jurisdiction. — The procedure authorized under cognovit provisions contained in a promissory note executed in this state and payable in Colorado, in connection with a contract made and to be performed in Colorado, is sufficient to give the Colorado court jurisdiction over the defendants in an action upon the promissory note. Mountain States Fixture Co. v. Daskalos, 61 N.M. 491, 303 P.2d 698 (1956).

Even though portions of contract illegal. — Contracting parties may agree to be bound by the laws of the state of the residence of one of them where the contract was to be performed, although some portion of their agreement is illegal where executed and under the law of the forum where suit is brought. Mountain States Fixture Co. v. Daskalos, 61 N.M. 491, 303 P.2d 698 (1956).

Procurement, etc., of cognovit note deemed misdemeanor. — Any person who procures the execution, endorsement or assignment of a cognovit note, or who accepts and retains such instrument as payee, endorsee or assignee, or whoever attempts to enforce a foreign judgment based upon any such instrument shall be deemed guilty of a misdemeanor and penalized upon conviction. Mountain States Fixture Co. v. Daskalos, 61 N.M. 491, 303 P.2d 698 (1956).

Waiver of defenses in chattel paper was not in violation of the prohibition against cognovit contracts and notes as set forth in 39-1-16 NMSA 1978 and this section. GECC v. Tidenberg, 78 N.M. 59, 428 P.2d 33 (1967).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 46 Am. Jur. 2d Judgments § 234 et seq.

Successive judgments by confession on cognovit note or similar instrument, 80 A.L.R.2d 1380.

49 C.J.S. Judgments §§ 138, 139.

39-1-19. Repealed.

ANNOTATIONS

Repeals. — Laws 1983, ch. 259, § 2, repeals 39-1-19 NMSA 1978, relating to revival of judgment, effective March 19, 1983.

39-1-20. Execution after judgment.

An execution may issue at any time, on behalf of anyone interested in a judgment, within seven years after the rendition or revival of the judgment.

History: Laws 1887, ch. 61, § 2; C.L. 1897, § 3086; Code 1915, § 3086; C.S. 1929, § 76-118; 1941 Comp., § 19-920; 1953 Comp., § 21-9-20; Laws 1965, ch. 282, § 2; 1971, ch. 122, § 2.

ANNOTATIONS

Cross references. — For execution and foreclosure generally, *see* 39-4-1 NMSA 1978 et seq.

For attachment and garnishment generally, *see* 42-9-1 NMSA 1978 et seq.

For stay of proceedings to enforce a judgment, *see* Rule 1-062 NMRA.

For supplementary judgment proceedings, *see* Rule 1-069 NMRA.

Revival of judgment. — Section 39-1-20 NMSA 1978 prohibits execution on a judgment more than seven years after its issuance or revival. Plaintiff is free to pursue his execution remedy through a different procedure. Nothing in Section 39-1-20 NMSA 1978 prohibits a judgment creditor from seeking execution following revival under Section 37-1-2 NMSA 1978. Fischoff v. Tometich, 113 N.M. 271, 824 P.2d 1073 (Ct. App. 1991).

Scire facias to revive judgment is included in word "action" in this section. Browne v. Chavez, 181 U.S. 68, 21 S. Ct. 514, 45 L. Ed. 752 (1901) (decided under former law).

Claim of exemption not effective under second execution. — A claim of exemption made under an original execution did not remain effective to prevent a sale under a second or alias execution. Meyers Co. v. Mirabal, 27 N.M. 472, 202 P. 693 (1921).

Foreign judgments later domesticated. — Actions to domesticate a foreign judgment are governed by 37-1-2 NMSA 1978 and as such these actions must be brought within the applicable period of limitation for foreign judgments. Accordingly, a 1989 judgment on the domestication issue converted the foreign judgment into a New Mexico judgment from which date the applicable state statutes of limitations commenced running. Plaintiff's 1992 action for a charging order based on the 1989 judgment satisfied the three alternative state statutes of limitations (37-1-4, 39-1-20, 37-1-2 NMSA 1978) and

does not force a decision on the "correct" statute. Galef v. Buena Vista Dairy, 117 N.M. 701, 875 P.2d 1132 (Ct. App. 1994).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Part payment or promise to pay judgment as affecting time for execution, 45 A.L.R.2d 967.

49 C.J.S. Judgments §§ 585, 586.

ARTICLE 1A
Structured Settlement Protection Act

39-1A-1. Short title.

This act may be cited as the "Structured Settlement Protection Act".

History: Laws 2005, ch. 135, § 1.

ANNOTATIONS

Effective dates. — Laws 2005, ch. 135, § 8 makes the act effective July 1, 2005.

Cross references. — For motor vehicle accident settlement agreements, *see* 66-5-210 NMSA 1978.

39-1A-2. Definitions.

As used in the Structured Settlement Protection Act [39-1A-1 NMSA 1978]:

A. "annuity issuer" means an insurer that has issued a contract to fund periodic payments under a structured settlement;

B. "court" means:

(1) the court of original jurisdiction that authorized or approved a structured settlement; or

(2) if the court that authorized or approved the structured settlement no longer has jurisdiction to approve a transfer of payment rights under the structured settlement under the Structured Settlement Protection Act, a district court or a probate court located in the county in which the payee resides;

C. "dependents" includes a payee's spouse, minor children and all other persons for whom the payee is legally obligated to provide support, including alimony;

D. "discounted present value" means the present value of future payments determined by discounting the payments to the present using the most recently published applicable federal rate for determining the present value of an annuity, as issued by the United States internal revenue service;

E. "gross advance amount" means the sum payable to the payee or for the payee's account as consideration for a transfer of structured settlement payment rights before any reductions for transfer expenses or other deductions to be made from the consideration;

F. "independent professional advice" means advice of an attorney, certified public accountant, actuary or other licensed professional adviser;

G. "interested party" means, with respect to any structured settlement:

(1) the payee;

(2) any beneficiary irrevocably designated under the annuity contract to receive payments following the payee's death;

(3) the annuity issuer;

(4) the structured settlement obligor; and

(5) any other party that has continuing rights or obligations under the structured settlement;

H. "net advance amount" means the gross advance amount less the aggregate amount of the actual and estimated transfer expenses required to be disclosed under Subsection E of Section 3 [39-1A-3(E) NMSA 1978] of the Structured Settlement Protection Act;

I. "payee" means an individual who is receiving tax-free payments under a structured settlement and proposes to transfer payment rights under the structured settlement;

J. "periodic payments" includes both recurring payments and scheduled future lump-sum payments;

K. "qualified assignment agreement" means an agreement providing for a qualified assignment within the meaning of Section 130 of the Internal Revenue Code of 1986, as amended;

L. "settled claim" means the original tort claim or workers' compensation claim resolved by a structured settlement;

M. "structured settlement" means an arrangement for periodic payment of damages for personal injuries or sickness established by settlement or judgment in resolution of a tort claim or for periodic payments in settlement of a workers' compensation claim;

N. "structured settlement agreement" means the agreement, judgment, stipulation or release embodying the terms of a structured settlement;

O. "structured settlement obligor" means, with respect to any structured settlement, the party that has the continuing obligation to make periodic payments to the payee under a structured settlement agreement or a qualified assignment agreement;

P. "structured settlement payment rights" means rights to receive periodic payments under a structured settlement, whether from the structured settlement obligor or the annuity issuer, if:

(1) the payee is domiciled in or the domicile or principal place of business of the structured settlement obligor or the annuity issuer is located in this state;

(2) the structured settlement agreement was authorized or approved by a court located in this state; or

(3) the structured settlement agreement is expressly governed by the laws of this state;

Q. "terms of the structured settlement" include, with respect to any structured settlement, the terms of the structured settlement agreement, the annuity contract, any qualified assignment agreement and any order or other approval of the court;

R. "transfer" means any sale, assignment, pledge, hypothecation or other alienation or encumbrance of structured settlement payment rights made by a payee for consideration, except that "transfer" does not include the creation or perfection of a security interest in structured settlement payment rights under a blanket security agreement entered into with an insured depository institution, in the absence of any action to redirect the structured settlement payments to the insured depository institution, or its agent or successor in interest, or to enforce the blanket security interest against the structured settlement payment rights;

S. "transfer agreement" means the agreement providing for a transfer of structured settlement payment rights;

T. "transfer expenses" means all the expenses of a transfer that are required under the transfer agreement to be paid by the payee or deducted from the gross advance amount, including court filing fees, attorney fees, escrow fees, lien recording fees, judgment and lien search fees, finders' fees, commissions and other payments to a broker or other intermediary, except that "transfer expenses" does not include

preexisting obligations of the payee payable on the payee's account from the proceeds of a transfer; and

U. "transferee" means a party acquiring or proposing to acquire structured settlement payment rights through a transfer.

History: Laws 2005, ch. 135, § 2.

ANNOTATIONS

Effective dates. — Laws 2005, ch. 135, § 8 makes the act effective July 1, 2005.

39-1A-3. Required disclosures to payee.

At least three days before the date on which the payee signs a transfer agreement, the transferee shall provide to the payee a separate disclosure statement, in bold type at least fourteen points in size, that states:

A. the amounts and due dates of the structured settlement payments to be transferred;

B. the aggregate amount of the payments;

C. the discounted present value of the payments to be transferred, which shall be identified as the "calculation of current value of the transferred structured settlement payments under federal standards for valuing annuities", and the amount of the applicable federal rate used in calculating the discounted present value;

D. the gross advance amount;

E. an itemized listing of all applicable transfer expenses, other than attorney fees and related disbursements payable in connection with the transferee's application for approval of the transfer, and the transferee's best estimate of the amount of those expenses;

F. the net advance amount;

G. the amount of any penalties or liquidated damages payable by the payee in the event of any breach of the transfer agreement by the payee; and

H. a statement that the payee has the right to cancel the transfer agreement, without penalty or further obligation, not later than the close of the third business day after the date the agreement is signed by the payee.

History: Laws 2005, ch. 135, § 3.

ANNOTATIONS

Effective dates. — Laws 2005, ch. 135, § 8 makes the act effective July 1, 2005.

39-1A-4. Approval of transfers of structured settlement payment rights.

No direct or indirect transfer of structured settlement payment rights shall be effective and no structured settlement obligor or annuity issuer shall be required to make any payment directly or indirectly to any transferee of structured settlement payment rights unless the transfer has been approved in advance in a final court order based on express findings by the court that:

A. the transfer is in the best interest of the payee, taking into account the welfare and support of the payee's dependents;

B. the payee has been advised in writing by the transferee to seek independent professional advice regarding the transfer and has either received the advice or knowingly waived the advice in writing; and

C. the transfer does not contravene any applicable statute or an order of any court or other governmental authority.

History: Laws 2005, ch. 135, § 4.

ANNOTATIONS

Effective dates. — Laws 2005, ch. 135, § 8 makes the act effective July 1, 2005.

39-1A-5. Effects of transfer of structured settlement payment rights.

Following a transfer of structured settlement payment rights pursuant to the Structured Settlement Protection Act [39-1A-1 NMSA 1978]:

A. the structured settlement obligor and the annuity issuer shall, as to all parties except the transferee, be discharged and released from any and all liability for the transferred payments;

B. the transferee shall be liable to the structured settlement obligor and the annuity issuer:

(1) for any taxes incurred by the parties as a consequence of the transfer if the transfer contravenes the terms of the structured settlement; and

(2) for any other liabilities or costs, including reasonable costs and attorney fees, arising from compliance by the parties with the order of the court or arising as a

consequence of the transferee's failure to comply with the provisions of the Structured Settlement Protection Act;

C. the transferee shall be liable to the payee:

(1) if the transfer contravenes the terms of the structured settlement, for any taxes incurred by the payee as a consequence of the transfer; and

(2) for any other liabilities or costs, including reasonable costs and attorney fees, arising as a consequence of the transferee's failure to comply with the provisions of the Structured Settlement Protection Act;

D. neither the structured settlement obligor nor the annuity issuer may be required to divide any periodic payment between the payee and any transferee or assignee or between two or more transferees or assignees; and

E. any further transfer of structured settlement payment rights by the payee may be made only after compliance with all of the requirements of the Structured Settlement Protection Act.

History: Laws 2005, ch. 135, § 5.

ANNOTATIONS

Effective dates. — Laws 2005, ch. 135, § 8 makes the act effective July 1, 2005.

39-1A-6. Procedure for approval of transfers.

A. An application under the Structured Settlement Protection Act [39-1A-1 NMSA 1978] for approval of a transfer of structured settlement payment rights shall be made by the transferee and shall be brought in court.

B. At least twenty days before the date of the scheduled hearing on any application for approval of a transfer of structured settlement payment rights under Section 4 [39-1A-4 NMSA 1978] of the Structured Settlement Protection Act, the transferee shall file with the court and serve on all interested parties a notice of the proposed transfer and the application for authorization, including with the notice:

(1) a copy of the transferee's application;

(2) a copy of the transfer agreement;

(3) a copy of the disclosure statement required under Section 3 [39-1A-3 NMSA 1978] of the Structured Settlement Protection Act;

(4) a listing of each of the payee's dependents, together with each dependent's age;

(5) notice that any interested party is entitled to support, oppose or otherwise respond to the transferee's application, either in person or by counsel, by submitting written comments to the court or by participating in the hearing; and

(6) notice of the time and place of the hearing and notification of the manner in which and the time by which written responses to the application must be filed to be considered by the court.

C. Written responses to the application under Paragraph (6) of Subsection B of this section shall be filed on or before the fifteenth day after the date the transferee's notice is served.

History: Laws 2005, ch. 135, § 6.

ANNOTATIONS

Effective dates. — Laws 2005, ch. 135, § 8 makes the act effective July 1, 2005.

39-1A-7. General provisions; construction.

A. The provisions of the Structured Settlement Protection Act [39-1A-1 NMSA 1978] shall not be waived by any payee.

B. Any transfer agreement entered into by a payee who resides in this state shall provide that disputes under the transfer agreement, including any claim that the payee has breached the agreement, shall be determined in and under the laws of this state. The transfer agreement shall not authorize the transferee or any other party to confess judgment or consent to entry of judgment against the payee.

C. Transfer of structured settlement payment rights shall not extend to any payments that are life-contingent unless, prior to the date on which the payee signs the transfer agreement, the transferee has established and agreed to maintain procedures reasonably satisfactory to the structured settlement obligor and the annuity issuer for:

(1) periodically confirming the payee's survival; and

(2) giving the structured settlement obligor and the annuity issuer prompt written notice in the event of the payee's death.

D. A payee who proposes to make a transfer of structured settlement payment rights shall not incur any penalty, forfeit any application fee or other payment, or otherwise incur any liability to the proposed transferee or any assignee based on any

failure of the transfer to satisfy the conditions of the Structured Settlement Protection Act.

E. Nothing contained in the Structured Settlement Protection Act may be construed to authorize any transfer of structured settlement payment rights in contravention of any law or to imply that any transfer under a transfer agreement entered into before July 1, 2005 is valid or invalid.

F. Compliance with the requirements in Section 3 [39-1A-3 NMSA 1978] of the Structured Settlement Protection Act and fulfillment of the conditions in Section 4 [39-1A-4 NMSA 1978] of that act are solely the responsibility of the transferee in any transfer of structured settlement payment rights, and neither the structured settlement obligor nor the annuity issuer bears any responsibility for, or any liability arising from, noncompliance with the requirements or failure to fulfill the conditions.

History: Laws 2005, ch. 135, § 7.

ANNOTATIONS

Effective dates. — Laws 2005, ch. 135, § 8 makes the act effective July 1, 2005.

ARTICLE 2
Attorneys' Fees and Costs

39-2-1. Attorney's fees and costs; insured prevailing in action based on any type of first party coverage against insurer.

In any action where an insured prevails against an insurer who has not paid a claim on any type of first party coverage, the insured person may be awarded reasonable attorney's fees and costs of the action upon a finding by the court that the insurer acted unreasonably in failing to pay the claim.

History: 1953 Comp., § 58-8-36, enacted by Laws 1977, ch. 113, § 1.

ANNOTATIONS

Cross references. — For appellate costs, *see* 39-3-11 NMSA 1978.

For no costs being taxed against person seeking reinstatement in employment after leaving armed forces, see 28-15-3 NMSA 1978.

For costs of conviction, *see* 31-12-6 NMSA 1978.

For fees collected by supreme court clerk, *see* 34-2-5 NMSA 1978.

For fees and costs in magistrate courts, *see* 35-6-1 to 35-6-4 NMSA 1978.

For costs and attorney fees in garnishment proceedings, *see* 35-12-16 NMSA 1978.

For costs paid by county of origin in change of venue, *see* 38-3-11 NMSA 1978.

For costs in suit brought by representatives of infant, *see* 38-4-9 NMSA 1978.

For costs paid by guardians ad litem, *see* 38-4-17 NMSA 1978.

For witness fees, *see* 38-6-4 NMSA 1978.

For allocation of costs in partition action, *see* 42-5-8 NMSA 1978.

For costs in quieting title, *see* 42-6-7 NMSA 1978.

For bond for costs in habeas corpus proceeding, *see* 44-1-32 NMSA 1978.

For costs in quo warranto proceedings, *see* 44-3-11 NMSA 1978.

For costs of surety bonds, *see* 46-6-2 NMSA 1978.

For costs and attorney fees for prevailing party in suit under Uniform Owner-Resident Relations Act, *see* 47-8-48 NMSA 1978.

For costs and attorney fees in joinder of parties in action for mechanics' and materialmen's liens, *see* 48-2-14 NMSA 1978.

For each party paying own costs in review of public service commission orders, *see* 62-13-3 NMSA 1978.

For costs and attorney fees in joinder of action for liens on oil and gas wells and pipelines, *see* 70-4-9 NMSA 1978.

For costs in special proceedings determining validity of irrigation district bonds, *see* 73-9-59 NMSA 1978.

For jury fees, *see* Rule 1-038 NMRA.

For costs on previously dismissed action, *see* Paragraph D of Rule 1-041 NMRA.

For costs of judgments, *see* Paragraph D of Rule 1-054 NMRA.

For magistrate court civil trial costs, *see* Rule 2-701 NMRA.

For judgment costs in criminal cases, *see* Rule 5-701 NMRA.

For costs on appeal, *see* Rule 12-403 NMRA.

The purpose of this section is to encourage insurers to pay out injury or damage claims promptly without placing on their insureds the unreasonable burden of having to bring a lawsuit to collect what they are entitled to under the policy in order to make themselves whole; however, it is not aimed at holding out the threat of an award of attorney's fees any time an insurer challenges any issue, and is simply designed to encourage insurers to resolve any doubt in favor of the insured and to pay off the claim quickly in order to make the insured whole after a loss. Amica Mut. Ins. Co. v. Maloney, 120 N.M. 523, 903 P.2d 834 (1995).

The term "first party coverage" applies to the underlying claim for coverage under a policy and not to a subsequent dispute over the amount of subrogation interest which the insurer is entitled to receive. Amica Mut. Ins. Co. v. Maloney, 120 N.M. 523, 903 P.2d 834 (1995).

Fee award on appeal. — This section does not limit the award of attorney's fees to the insured who prevails at trial only, but also includes a fee award for successful defense on appeal. Stock v. Adco Gen. Corp., 96 N.M. 544, 632 P.2d 1182 (Ct. App.), cert. denied, 96 N.M. 543, 632 P.2d 1181 (1981).

This section does not limit an award of attorney fees and costs only to trial. In the appropriate case, a first party insured who prevails on appeal may be awarded reasonable attorney fees and costs for the appeal. Jessen v. Nat'l Excess Ins. Co., 108 N.M. 625, 776 P.2d 1244 (1989).

Award of attorney fees and costs on appeal of bad faith claim. — Where the insured was awarded judgment against the insurer because the insurer acted in bad faith in denying coverage and the court of appeals affirmed the judgment, the insured was entitled to attorney fees and costs because Rule 12-403 NMRA allows the court of appeals to award attorney fees for services rendered on appeal in cases where an award of attorney fees is permitted by law, and Section 39-2-1 NMSA 1978 permits a court to award attorney fees in cases in which the court finds that the insurer acted unreasonably in failing to pay a claim. Am. Nat’l. Prop. & Cas. Co. v. Cleveland, 2013-NMCA-013, 293 P.3d 954.

Not unreasonable failure to pay where amount of claimed damages is questionable. — Although an insurer may have unreasonably failed to acknowledge coverage under a policy, since the insurer had a reasonable basis for questioning the amount of claimed damages, it did not act "unreasonably in failing to pay the claim." United Nuclear Corp. v. Allendale Mut. Ins. Co., 103 N.M. 480, 709 P.2d 649 (1985).

Denial of insurance claim was not unreasonable. — Where insurance company’s denial of the insured’s claim was not in bad faith, but was based upon evidence accumulated after a reasonable investigation, the insurance company’s denial of the insured’s claim was not unreasonable and the award of attorney’s fees to the insured

was not proper. Suggs v. State Farm Fire and Casualty Company, 833 F.2d 883 (10th Cir. 1987), cert. denied, 486 U.S. 1007, 108 S.Ct. 1732, 100 L. Ed. 2d 196 (1988).

Statutory attorney's fees are authorized in favor of insured upon a finding that the insurance company has acted in bad faith. Yumukoglu v. Provident Life & Acc. Ins. Co., 131 F.Supp. 2d 1215 (D.N.M. 2001).

Request for attorney fees was timely even though the fees were never pled or requested under this section until after the case was disposed of on summary judgment. Sipp v. UNUM Provident Corp., 107 Fed. Appx. 867 (10th Cir 2004).

Award of attorney's fees was improper where the insurer's denial of a claim was not in bad faith, but was instead based upon evidence accumulated after a reasonable investigation. Suggs v. State Farm Fire & Cas. Co., 833 F.2d 883 (10th Cir. 1987), cert. denied, 486 U.S. 1007, 108 S. Ct. 1732, 100 L. Ed. 2d 196 (1988).

Insurer's duty to investigate. — Beyond comparing the pleadings of the underlying litigation with the coverage provisions of the policy, an insurer did not have the duty of investigating third-party claims before making the determination whether to defend its insured. Valley Improvement Ass'n v. U.S. Fid. & Guar. Corp., 129 F.3d 1108 (10th Cir. 1997).

Jury verdict supports award of fees. — Insured's entitlement to attorney's fees was established by the factual determinations implicit in the jury's award of punitive damages. O'Neel v. USAA Ins. Co., 2002-NMCA-028, 131 N.M. 630, 41 P.3d 356, cert. denied, 131 N.M. 737, 42 P.3d 842 (2002).

Denial of attorney's fees not improper. — The trial court's refusal to award attorney's fees to an insured in a suit against her insurance company for the payment of proceeds was not error because the insurance company's denial of the claim for failure to comply with conditions precedent was both nonfrivolous and reasonable, even though the denial turned out ultimately to have been in error. Jackson Nat'l Life Ins. Co. v. Receconi, 113 N.M. 403, 827 P.2d 118 (1992).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 20 Am. Jur. 2d Costs § 63 et seq.; 44 Am. Jur. 2d Insurance § 1772; 46 Am. Jur. 2d Judgments § 113.

Judgment, correction of clerical mistake in, respecting costs, 10 A.L.R. 612, 67 A.L.R. 828, 126 A.L.R. 956, 14 A.L.R.2d 224.

Keeping tender good, necessity of in equity to stop costs, 12 A.L.R. 953.

Grantee assuming mortgage debt as liable for costs of foreclosure proceedings, 21 A.L.R. 529, 76 A.L.R. 1191, 97 A.L.R. 1076.

Joint tortfeasor's liability for costs as affected by satisfaction of judgment by other tortfeasor, 27 A.L.R. 819, 65 A.L.R. 1087, 166 A.L.R. 1099.

Accommodation party's right to recover costs as against accommodated party after payment of paper, 36 A.L.R. 596, 77 A.L.R. 668.

Conditional pardon, requirement in, that convict pay cost of trial, 60 A.L.R. 1416.

Voluntary character of payment of tax or assessment made to avoid costs, 64 A.L.R. 42, 84 A.L.R. 294.

Apportionment of cost where judgment is against plaintiff on his complaint and against defendant on his counterclaim, 75 A.L.R. 1400.

Injunction to stay enforcement of judgment for costs pending final determination of case, right to, 78 A.L.R. 359.

Costs in habeas corpus, 81 A.L.R. 151.

Bail bond, right of surety on, to relief from forfeiture of, in event of subsequent surrender or production of principal as depending upon payment of costs, 84 A.L.R. 455.

Declaratory judgment, costs in proceeding to obtain, 87 A.L.R. 1249.

Warehouseman interpleading rival claimants to funds in his hands, right of, to allowance of costs out of funds, 100 A.L.R. 433.

Divorce suit, effect of death of party to, before final decree, on liability of estate for costs, 104 A.L.R. 667, 158 A.L.R. 1205.

Interpleader, question whether insurance company as a disinterested stakeholder for purposes of, as affected by claim of company, or one of the claimants to proceeds to policy, for costs and fees, 108 A.L.R. 270.

Set off as between judgments where one or both are for costs, 121 A.L.R. 509.

Trust, court costs or cost of litigation as payable from income or corpus of, 124 A.L.R. 1193.

What persons or corporations, contracts or policies, are within statutory provisions allowing recovery of attorneys' fees or penalty against companies dealing in specified kinds of insurance, 126 A.L.R. 1439.

Financial inability to pay costs of original action as affecting liability to stay of subsequent action, 156 A.L.R. 956.

Nonresident's duty to furnish security for costs as affected by joinder or addition of resident, 158 A.L.R. 737.

Constitutionality, construction and application of statutes requiring security for costs or expenses in case of stockholder's action and right of corporation, 159 A.L.R. 978.

Allowance of attorneys' fees in, or other costs of, litigation by beneficiary respecting trust, 9 A.L.R.2d 1132.

Right to sue in forma pauperis as dependent on showing of financial disability of attorney or other nonparty or nonapplicant, 11 A.L.R.2d 607.

Allowance of fees for guardian ad litem appointed for infant defendant as costs, 30 A.L.R.2d 1148.

Taxable costs and disbursements as including premiums paid on bonds incident to steps taken in action, 90 A.L.R.2d 448.

Construction, as to terms and conditions, of state statute or rule providing for voluntary dismissal without prejudice upon such terms and conditions as state court deems proper, 34 A.L.R.4th 778.

Attorneys' fees: obduracy as basis for state-court award, 49 A.L.R.4th 825.

Liability insurance: third party's right of action for insurer's bad-faith tactics designed to delay payment of claim, 62 A.L.R.4th 1113.

Attorney's personal liability for expenses incurred in relation to services for client, 66 A.L.R.4th 256.

Policy provision limiting time within which action may be brought on the policy as applicable to tort action by insured against insurer, 66 A.L.R.4th 859.

Recoverability of cost of computerized legal research under 28 USCS § 1920 or Rule 54(d), Federal Rules of Civil Procedure, 80 A.L.R. Fed. 168.

Pre-emption by Longshore and Harbor Workers' Compensation Act (33 USCS §§ 901 et seq.) of state law claims for bad-faith dealing by insurer or agent of insurer, 90 A.L.R. Fed. 723.

20 C.J.S. Costs §§ 46, 125 to 133; 46A C.J.S. Insurance § 1576 et seq.

39-2-2. Deficiencies; attorney fees.

In any civil action involving liability for a deficiency pursuant to Section 55-9-504 or 58-19-7 NMSA 1978, the debtor, if prevailing, may in the discretion of the court be allowed a reasonable attorney fee set by the court and taxed and collected as costs.

History: Laws 1981, ch. 10, § 3.

ANNOTATIONS

Replevin counterclaim was not a civil action "involving liability for a deficiency pursuant to Section 55-9-504" for which the court could allow a reasonable attorney fee to the debtor. Green Tree Acceptance, Inc. v. Layton, 108 N.M. 171, 769 P.2d 84 (1989).

39-2-2.1. Collection of open accounts; attorney fees.

In any civil action in the district court, small claims court or magistrate court to recover on an open account, the prevailing party may be allowed a reasonable attorney fee set by the court, and taxed and collected as costs.

History: 1953 Comp., § 18-1-37, enacted by Laws 1965, ch. 125, § 1; 1967, ch. 164, § 1; 1975, ch. 147, § 1; 1978 Comp., § 36-2-39, recompiled as 1978 Comp. § 39-2-2.1.

ANNOTATIONS

Recompilations. — Former 36-2-39 NMSA 1978 was recompiled as this section pursuant to an order of the New Mexico compilation commission.

Section was designed to prevent the threat of litigation as a tactic either to avoid paying just debts or to enforce false claims. Cutter Flying Serv., Inc. v. Straughan Chevrolet, Inc., 80 N.M. 646, 459 P.2d 350 (1969).

"Open account" defined. — As used in this section, "open account" does not mean an amount owed on a single transaction or an account stated. It is a written account concerning a related series of debit and credit entries of reciprocal charges and allowances kept upon until it shall suit the convenience of either party to settle and close the account. It gives rise to a single liability determined at the time of settlement. S. Union Exploration Co. v. Wynn Exploration Co., 95 N.M. 594, 624 P.2d 536 (Ct. App.), cert. denied, 95 N.M. 593, 624 P.2d 535 (1981), and cert. denied, 455 U.S. 920, 102 S. Ct. 1276, 71 L. Ed. 2d 461 (1982); Martinez v. Albuquerque Collection Servs., Inc., 867 F. Supp. 1495 (D.N.M. 1994).

Breaking continuity of open account. — The continuity of an open account is broken if the relationship of the parties changes or if the account has remained dormant. Martinez v. Albuquerque Collection Servs., Inc., 867 F. Supp. 1495 (D.N.M. 1994).

"Account stated" and "open account" distinguished. — Where the evidence shows a single transaction and that one party made a partial payment while acknowledging, in writing, the remaining amount owed, this is a finding of an "account stated" and not an "open account," which requires evidence of a connected series of debit and credit entries or a continuation of a related series of transactions; therefore, attorney's fees are not recoverable under this section. Tabet Lumber Co. v. Chalamidas, 83 N.M. 172, 489 P.2d 885 (Ct. App. 1971), distinguished in Hunt Process Co. v. Anderson, 455 F.2d 700 (10th Cir. 1972).

No attorney's fees for defending counterclaim on "account stated". — While this section clearly authorized attorney's fees to an attorney if he prevailed in his action on an open account, this section did not authorize attorney's fees for defending against counterclaims that were resolved on the basis of "account stated". Hinkle, Cox, Eaton, Coffield & Hensley v. Cadle Co. of Ohio, Inc., 115 N.M. 152, 848 P.2d 1079 (1993).

Retrospective application of section. — Because action was filed after the effective date of the statute, the statute applied to the parties only propspectively. Cutter Flying Serv., Inc., v. Straughan Chevrolet, Inc., 80 N.M. 646, 459 P.2d 350 (1969).

Professional surveyor not entitled to attorney's fees. — A professional surveyor, hired to survey an entire ranch perimeter, to establish a new boundary on one side of the ranch and to survey an 80-acre parcel in one corner of the tract, entered into a single transaction composed of three parts and not an "open account," which would involve a connected series of debit and credit entries or a series of related transactions, and, therefore, was not entitled to attorney's fees upon recovery of the amount owed him. Lujan v. Merhege, 86 N.M. 26, 519 P.2d 122 (1974).

Section is discretionary in nature, not mandatory, even assuming that the claim be one to recover on an open account. Audio-Visual Mktg. Corp. v. Omni Corp., 545 F.2d 715 (10th Cir. 1976).

Awarding of an attorney's fee is a matter for the court, and not one to be resolved by a jury. Audio-Visual Mktg. Corp. v. Omni Corp., 545 F.2d 715 (10th Cir. 1976); Leon, Ltd. v. Carver, 104 N.M. 29, 715 P.2d 1080 (1986).

Reasonableness of fee amount not questioned to trial court. — Where the question of reasonableness of the amount of attorney fees was not brought to the attention of the trial court, it cannot be raised on appeal. N.M. Feeding Co. v. Keck, 95 N.M. 615, 624 P.2d 1012 (1981).

Section allows fees on appeal. — This section allows reasonable attorney fees to the prevailing party on appeal as well as at trial. Superior Concrete Pumping, Inc. v. David Montoya Constr., Inc., 108 N.M. 401, 773 P.2d 346 (1989), overruling Otis Engg'r Corp. v. Grace, 86 N.M. 727, 527 P.2d 322 (1974), and Sw. Portland Cement v. Beavers, 82 N.M. 218, 478 P.2d 546 (1970).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Fee collection practices as ground for disciplinary action, 91 A.L.R.3d 583.

Limitation to quantum meruit recovery, where attorney employed under contingent fee contract is discharged without cause, 92 A.L.R.3d 690.

Priority between attorney's lien for fees against a judgment and lien of creditor against same judgment, 34 A.L.R.4th 665.

Attorney's retaining lien as affected by action to collect legal fees, 45 A.L.R.4th 198.

Right of prevailing defendant to recover attorney's fees under § 706 (k) of Civil Rights Act of 1964 (42 USCS § 2000e-5 (k)), 134 A.L.R. Fed. 1161.

39-2-3. [Unnecessary splitting of actions.]

When any plaintiff shall bring in the same court several suits against the same defendant that may be joined, and whenever any plaintiffs shall bring in the same court several suits against several defendants that may be joined, the plaintiff shall recover only the costs of one action, and the costs of the other actions shall be adjudged against him unless sufficient reason appear to the court for bringing several actions.

History: Laws 1897, ch. 73, § 129; C.L. 1897, § 2685(129); Code 1915, § 4223; C.S. 1929, § 105-839; 1941 Comp., § 29-102; 1953 Comp., § 25-1-2.

ANNOTATIONS

Cross references. — As to joinder of claims and remedies, *see* Rule 1-018 NMRA.

As to consolidation and separate trials, *see* Rule 1-042 NMRA.

Not error to render default judgment without motion for costs security. — After an answer to a verified complaint has been stricken as "sham and unverified," and the defendant has elected not to amend, but to stand on his answer, it is not error to render a default judgment without first acting on his motion for security for costs. Pilant v. S. Hirsch & Co., 14 N.M. 11, 88 P. 1129 (1907).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Separate suits against parties who might have been sued jointly, right to costs in both actions, 6 A.L.R. 623.

20 C.J.S. Costs § 27.

39-2-4. [Actions ex contractu; recovery of principal amount below jurisdiction of court.]

In all actions founded on debt or other contract, if the plaintiff recover an amount which, exclusive of interest, is below the jurisdiction of the court, he shall recover judgment therein, but the costs shall be adjudged against him unless the plaintiff 's claim, as established on the trial, shall be reduced by offsets below the jurisdiction of the court.

History: Kearny Code, Costs, § 2; C.L. 1865, ch. 45, § 2; C.L. 1884, § 2203; C.L. 1897, § 3149; Code 1915, § 4283; C.S. 1929, § 105-1302; 1941 Comp., § 29-103; 1953 Comp., § 25-1-3.

ANNOTATIONS

Allowance of costs where damages under certain amount. — The plaintiff in an action of debt in the district court recovering less than $100 damages is nevertheless entitled to costs. Romero v. Silva, 1 N.M. 157 (1857).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 20 Am. Jur. 2d Costs § 16.

20 C.J.S. Costs § 20.

39-2-5. [Costs on appeal from probate court or magistrate; when judgment appealed from was against appellant.]

When an appeal shall be taken from the judgment of a probate court or justice of the peace [magistrate] against the appellant, the costs shall be adjudged as follows:

A. if the judgment be affirmed, or the appellee on a trial anew shall recover as much or more than the amount of the judgment below, the appellant shall pay costs in both courts;

B. if, on such trial, the judgment of the appellate court shall be in favor of the appellant, the appellee shall pay costs in both courts;

C. if the appellant shall, at any time before the appeal is perfected, tender to the appellee any part of the judgment, and he shall not accept it in satisfaction, and the appellee shall not recover more than the amount as tendered, he shall pay costs in the appellate court, but not in the court below.

History: Kearny Code, Costs, § 3; C.L. 1865, ch. 45, § 3; C.L. 1884, § 2204; C.L. 1897, § 3150; Code 1915, § 4284; C.S. 1929, § 105-1303; 1941 Comp., § 29-104; 1953 Comp., § 25-1-4.

ANNOTATIONS

Bracketed material. — The bracketed reference to "magistrate", near the beginning, was inserted by the compiler, as the office of justice of the peace was abolished by

Laws 1968, ch. 62, § 40, which provides that reference to justice of the peace shall be construed to refer to magistrate court. *See* 35-1-38 NMSA 1978. The bracketed material was not enacted by the legislature and is not part of the law.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 5 Am. Jur. 2d Appellate Review § 909 et seq.

Right to have enforcement of judgment for costs stayed pending final determination of case, 78 A.L.R. 359.

20 C.J.S. Costs § 157 et seq.

39-2-6. [When judgment appealed from was for appellant.]

If such appeal be from a judgment in favor of the appellant, costs shall be adjudged as follows: if upon the trial anew, the appellant shall not recover more than the judgment below, he shall pay the costs of the appellate court; if he recover nothing, the costs shall be adjudged against him in both courts; if he recover more than the judgment below, he shall recover costs in both courts.

History: Kearny Code, Costs, § 4; C.L. 1865, ch. 45, § 4; C.L. 1884, § 2205; C.L. 1897, § 3151; Code 1915, § 4285; C.S. 1929, § 105-1304; 1941 Comp., § 29-105; 1953 Comp., § 25-1-5.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 5 Am. Jur. 2d Appellate Review § 909 et seq.

Right to have enforcement of judgment for costs stayed pending final determination of case, 78 A.L.R. 359.

Appellate court's award of costs as affected by subsequent proceedings or course of action in the lower court, 116 A.L.R. 1152.

20 C.J.S. Costs § 157 et seq.

39-2-7. [Depositions to perpetuate testimony; taxing costs.]

The costs and expenses of taking the depositions shall be audited and allowed by the officer taking the same, and such costs and expenses, together with the fees of recording and copying the same, shall be taxed in favor of the party or parties paying the same, and collected as other costs in the suit or suits in which such depositions, or any part thereof, may be used.

History: Laws 1882, ch. 12, § 18; C.L. 1884, § 2128; C.L. 1897, § 3066; Code 1915, § 2158; C.S. 1929, § 45-215; 1941 Comp., § 29-106; 1953 Comp., § 25-1-6.

ANNOTATIONS

Cross references. — For when costs of depositions are recoverable, *see* Rule 1-054 NMRA.

Section relates to cost of taking depositions as distinguished from officer's fees. Farmers Gin Co. v. Ward, 73 N.M. 405, 389 P.2d 9 (1964).

"Costs," "expenses" and "fees" are separate and distinct items and a deposition expense is a proper item of legal court costs. Danielson v. Miller, 75 N.M. 170, 402 P.2d 153 (1965).

Expense and fee become costs. — Expenses of deposition represent an economic item of outlay incurred. A fee is a charge fixed by law for the services of a public officer. Subsequent to trial and after performance or expenditure an "expense" and a "fee" become legal "costs" as assessed by the court. Danielson v. Miller, 75 N.M. 170, 402 P.2d 153 (1965).

Stenographic fees separate from appearance fees. — The $5.00 per day appearance fee may be waived and stenographic remuneration accepted as full and complete payment, and the charges for the stenographic taking and preparing of the depositions may be separated from the $5.00 per day fee provided for the notary or other officer necessarily present and participating. Danielson v. Miller, 75 N.M. 170, 402 P.2d 153 (1965).

Officer to approve deposition expense. — The direction to the officer of the court in this section to audit and allow the costs and expenses is broad enough to approve the actual deposition expense if taken by the officer himself. Danielson v. Miller, 75 N.M. 170, 402 P.2d 153 (1965).

When stenographer and officer taking deposition are one and same person, the actual expense of taking the deposition is a separate and distinct charge from the appearance fee allowed by law. Danielson v. Miller, 75 N.M. 170, 402 P.2d 153 (1965).

Stenographer other than officer of court may be reimbursed for the actual expense of taking a deposition and the officer supervising the taking of the deposition may be allowed a fee of $5.00 for each day of actual and necessary service. Danielson v. Miller, 75 N.M. 170, 402 P.2d 153 (1965).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 20 Am. Jur. 2d Costs § 45 et seq..

Construction and effect of Rules 30(b), (d), 31(d), of the Federal Rules of Civil Procedure, and similar state statutes and rules, relating to preventing, limiting, or terminating the taking of depositions, 70 A.L.R.2d 685.

Taxation of costs and expenses in proceedings for dispositions or inspection, 76 A.L.R.2d 953.

Taxation of costs associated with videotaped depositions under 28 U.S.C.A. § 1920 and Rule 54(d) of Federal Rules of Civil Procedure, 156 A.L.R. Fed. 311.

20 C.J.S. Costs § 97.

39-2-8. [Depositions; fees paid to the clerk and witnesses; compensation of officers.]

The fees of the county clerk for recording said depositions and certifying the same, shall be the same as are now allowed by law for recording and certifying deeds; and the fees of witnesses shall be the same as are now paid to witnesses in the district court in civil cases, and the fees of the officers taking the depositions shall be five dollars [($5.00)] per day for each day of actual and necessary service.

History: Laws 1882, ch. 12, § 19; C.L. 1884, § 2129; C.L. 1897, § 3067; Code 1915, § 2159; C.S. 1929, § 45-216; 1941 Comp., § 29-107; 1953 Comp., § 25-1-7.

ANNOTATIONS

Cross references. — For recording fees, *see* 14-8-12 NMSA 1978.

For per diem and mileage for witnesses, *see* 10-8-1 and 38-6-4 NMSA 1978; Rules 1-045, 2-502, 3-502, 5-111, 6-606, 7-606 and 8-602 NMRA; Civil Forms 4-503, 4-504, 4-505 and 4-505A NMRA; and Criminal Form 9-503 NMRA.

For costs of expert witness fees are recoverable, *see* Rule 1-054 NMRA.

Compiler's notes. — The compilers of the 1915 Code substituted the words "county clerk" for the words "probate clerk and ex-officio recorder."

"Costs," "expenses" and "fees" are separate and distinct items and a deposition expense is a proper item of legal court costs. Danielson v. Miller, 75 N.M. 170, 402 P.2d 153 (1965).

Expense and fee become costs. — Expenses of deposition represent an economic item of outlay incurred. A fee is a charge fixed by law for the services of a public officer. Subsequent to trial and after performance or expenditure an "expense" and a "fee" become legal "costs" as assessed by the court. Danielson v. Miller, 75 N.M. 170, 402 P.2d 153 (1965).

Stenographic fee separate from appearance fee. — The $5.00 per day appearance fee may be waived and stenographic remuneration accepted as full and complete payment, and the charges for the stenographic taking and preparing of the depositions may be separated from the $5.00 per day fee provided for the notary or other officer necessarily present and participating. Danielson v. Miller, 75 N.M. 170, 402 P.2d 153 (1965).

When stenographer and officer taking deposition are one and same person, the actual expense of taking the deposition is a separate and distinct charge from the appearance fee allowed by law. Danielson v. Miller, 75 N.M. 170, 402 P.2d 153 (1965).

Stenographer other than officer of court may be reimbursed for the actual expense of taking a deposition and the office supervising the taking of the deposition may be allowed a fee of $5.00 for each day of actual and necessary service. Danielson v. Miller, 75 N.M. 170, 402 P.2d 153 (1965).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 20 Am. Jur. 2d Costs § 49 et seq.

Construction and effect of Rules 30(b), (d), 31(d), of the Federal Rules of Civil Procedure, and similar state statutes and rules, relating to preventing, limiting, or terminating the taking of depositions, 70 A.L.R.2d 685.

20 C.J.S. Costs § 97.

39-2-9. [Witness fees taxed as costs; limitation.]

In no case in any of the courts of this state, shall any fees for witnesses be taxed to exceed four witnesses, on each side, unless under the direction of the court, and in the court's discretion the same may be necessary.

History: Laws 1887, ch. 40, § 3; C.L. 1897, § 1812; Code 1915, § 5900; C.S. 1929, § 155-106; 1941 Comp., § 29-108; 1953 Comp., § 25-1-8.

ANNOTATIONS

Cross references. — For when costs of depositions are recovered, *see* Rule 1-054 NMRA.

Compiler's notes. — The title of Laws 1887, ch. 40 purports to amend §§ 1268 to 1271 of C.L. 1884, but the body of the act appears to be an original instead of an amendatory act.

Duty of court to strike unnecessary fees. — When causes are consolidated for trial, there can be no necessity ordinarily to subpoena any witness more than once, or to pay him more than one fee. If a party unnecessarily accumulates such expense, or seeks recovery of fees he has not paid or is not obligated to pay, it is the duty of the court and

it has the power to strike such fees from the cost bill. Marcus v. St. Paul Fire & Marine Ins. Co., 35 N.M. 471, 1 P.2d 567 (1931).

Discretion abused where fees for consolidated cases taxed. — Discretion as to taxing witness fees as costs was held abused, where nine cases were consolidated for trial and full mileage and per diem for each witness were taxed as costs in each case. Marcus v. St. Paul Fire & Marine Ins. Co., 35 N.M. 471, 1 P.2d 567 (1931).

Section has reference only to civil cases. 1915-16 Op. Att'y Gen. No. 16-1792.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 20 Am. Jur. 2d Costs § 49.

20 C.J.S. Costs § 107 et seq.

39-2-10. [Taxing costs of additional witnesses; certificate of court required.]

It shall not be legal in any civil suit for the clerk of any district court to tax in favor of the prevailing party the costs of more than four witnesses, unless the court shall certify upon the record that the attendance of more than four witnesses was necessary in the case.

History: Laws 1858-1859, p. 30; C.L. 1865, ch. 46, § 16; C.L. 1884, § 2209; C.L. 1897, § 3155; Code 1915, § 4286; C.S. 1929, § 105-1305; 1941 Comp., § 29-109; 1953 Comp., § 25-1-9.

ANNOTATIONS

Stating grounds for denial of witness fees not required. — Trial court is not required to state grounds for denying motion for certificate allowing fees and expenses of more than four witnesses. Frank A. Hubbell Co. v. Curtis, 40 N.M. 234, 58 P.2d 1163 (1936).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 20 Am. Jur. 2d Costs § 49.

20 C.J.S. Costs § 107 et seq.

39-2-11. [Bill of costs to be collected after issuance of execution.]

When final judgment or decree shall be rendered in any cause, and execution shall be issued thereon, the clerk shall make a complete copy of all the costs taxed against the defendant in execution, under his hand and the seal of the court, together with a certificate that the said bill of costs is correct. The said bill of costs shall be delivered to the officer to whom the execution shall be directed for execution, and when the writ shall be served, the officer shall deliver the said bill of costs to the defendant in execution, and shall receipt the same when paid, and the said clerk shall be entitled to fifty cents [($.50)] for such copy, to be paid as other costs.

History: Laws 1858-1859, p. 32; C.L. 1865, ch. 46, § 18; C.L. 1884, § 2211; C.L. 1897, § 3157; Code 1915, § 4288; C.S. 1929, § 105-1307; 1941 Comp., § 29-110; 1953 Comp., § 25-1-10.

ANNOTATIONS

Costs should be taxed before transcript is prepared and filed in the supreme court. Daily v. Fitzgerald, 17 N.M. 159, 130 P. 247 (1913).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 20 Am. Jur. 2d Costs § 96.

39-2-12. [Transcript of cost book has effect of execution.]

In every cause in which either party shall become liable to pay costs, the clerk may make out a transcript from the cost book as above directed, and the same shall have in all respects the force and effect of an execution, and shall be served, collected and returned in the same manner.

History: Laws 1858-1859, p. 32; C.L. 1865, ch. 46, § 19; C.L. 1884, § 2212; C.L. 1897, § 3158; Code 1915, § 4289; C.S. 1929, § 105-1308; 1941 Comp., § 29-111; 1953 Comp., § 25-1-11.

ANNOTATIONS

Cross references. — For execution, *see* 39-4-1 NMSA 1978 et seq.

39-2-13. [Collection of excessive fees or fees for services not rendered; retaxing costs; civil penalty.]

Any officer who shall knowingly claim for his services in any cause in the district court higher fees than provided by law, or shall claim fees for services not rendered, shall be liable to the party against whom such fraudulent charge is made in three times the amount of such charge: provided, that the same has been paid by the party; and when such payment has been made, the party against whom the charge has been made may petition the court to retax the costs, and if the court shall find that fraudulent charges have been made and paid, it shall adjudge the officer in fault to pay to the party injured three times the amount of the charges and enforce the collection of the same by means of an execution as in other cases.

History: Laws 1858-1859, p. 32; C.L. 1865, ch. 46, § 20; C.L. 1884, § 2213; C.L. 1897, § 3159; Code 1915, § 4290; C.S. 1929, § 105-1309; 1941 Comp., § 29-112; 1953 Comp., § 25-1-12.

39-2-14. [Plaintiff may be required to give security for costs; abatement on failure; reinstatement.]

In all cases the plaintiff, on motion of any person interested in the suit or costs, may be ruled to give security for costs, and in case he shall fail so to do on or before the first day of the next term after such rule, the case shall abate.

Provided, however, that should said parties at any time during said term file with the clerk of the district court a good and sufficient bond, such cause may upon application of said party be reinstated on the docket of the court, subject to trial during the term as other cases.

History: Laws 1850-1851, p. 146; C.L. 1865, ch. 27, § 47; C.L. 1884, § 1843; C.L. 1897, § 2892; Laws 1909, ch. 77, § 1; Code 1915, § 4291; C.S. 1929, § 105-1310; 1941 Comp., § 29-113; 1953 Comp., § 25-1-13.

ANNOTATIONS

Cross references. — For labor commissioner not required to give security for costs, *see* 50-4-12 NMSA 1978.

For appeals bonds, *see* Rule 1-062 NMRA.

Discretion of court. — It is discretionary with the court as to whether plaintiff shall be ruled to give a cost bond. City of Roswell v. Bateman, 20 N.M. 77, 146 P. 950 (1915).

Granting or denying motion to give security bond for costs is an exercise of judicial discretion. State ex rel. Lebeck v. Chavez, 45 N.M. 161, 113 P.2d 179 (1941).

Meaning of "bond" for labor commissioner (now director of labor and industrial division). — Under Subsection A of wage claim statute, 50-4-12 NMSA 1978, the word "bond" relates only to the costs of a proceeding and relieves labor commissioner (now director of labor and industrial division) from giving a cost bond under the provisions of this section, and the word "bond" in Subsection B refers only to guaranteeing the fees of the sheriff or other officer. Cal-M, Inc. v. McManus, 73 N.M. 91, 385 P.2d 954 (1963).

Cost bond on appeal is not essential to jurisdiction of the supreme court, and its filing may be waived. Abeytia v. Spiegelberg, 20 N.M. 614, 151 P. 696 (1915).

Default judgment without acting on motion for cost bond. — After answer to a verified complaint on a promissory note has been stricken out as "sham and unverified," and the defendant has elected to stand on his answer, he may have default judgment against him without first acting specifically on his motion for costs bond filed with his answer. Pilant v. S. Hirsch & Co., 14 N.M. 11, 88 P. 1129 (1907).

Attachment proceeding bond not waived for labor commissioner (now director of labor and industrial division). — Sections 50-4-11 and 50-4-12 NMSA 1978 relating to wage-claim actions by the labor commissioner (now director of labor and industrial division) do not waive the requirement for the furnishing of a bond in an attachment

proceeding under 42-9-4 and 42-9-7 NMSA 1978. Cal-M, Inc. v. McManus, 73 N.M. 91, 385 P.2d 954 (1963).

Affidavit for forma pauperis sufficient answer to rule for security. — An affidavit for the right to sue in forma pauperis is sufficient answer to the rule for security for costs. Bearup v. Coffey, 9 N.M. 500, 55 P. 289 (1898).

Plaintiff who dismisses his suit must pay costs and reimburse the defendant. Delahoyde v. Lovelace, 39 N.M. 446, 49 P.2d 253 (1935).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 20 Am. Jur. 2d Costs § 78 et seq.

Leave of court as prerequisite to action on bond for costs, 2 A.L.R. 575.

Waiver of statute or court rule requiring nonresident plaintiff to give security for costs, 8 A.L.R. 1510.

Assignment of judgment as carrying rights of assignor as to cost bond, 63 A.L.R. 292.

Habeas corpus, security for costs in, 81 A.L.R. 154.

Statute regarding security for costs as mandatory or permitting exercise of discretion, 84 A.L.R. 252.

What is an action within statutes requiring security for costs, 131 A.L.R. 1476.

Recovery of damages resulting from wrongful issuance of injunction as limited to amount of bond, 30 A.L.R.4th 273.

What constitutes "fees" or "costs" within meaning of federal statutory provision (28 USCS § 1915 and similar predecessor statutes) permitting party to proceed in forma pauperis without prepayment of fees and costs or security therefor, 142 A.L.R. Fed. 627.

20 C.J.S. Costs § 59 et seq.

ARTICLE 3
Appeals

39-3-1. Appeals to district court; trial de novo.

All appeals from inferior tribunals to the district courts shall be tried anew in said courts on their merits, as if no trial had been had below, except as otherwise provided by law.

History: Laws 1917, ch. 43, § 59; C.S. 1929, § 105-2533; 1941 Comp., § 19-1001; 1953 Comp., § 21-10-1; Laws 1955, ch. 68, § 1.

ANNOTATIONS

Cross references. — For costs on appeal, *see* 39-2-5 and 39-2-6 NMSA 1978, and Rule 12-403 NMRA.

For free process on indigent appeals, *see* 39-3-12 NMSA 1978.

For constitutional provision as to appeals from probate courts and other inferior courts, *see* N.M. Const., art. VI, § 27.

For appeals from administrative agencies, *see* Rules 1-074 and 1-075 NMRA.

For appeal of assessments for local improvements, to district court, *see* 3-33-35 and 3-33-37 NMSA 1978.

For appeals from metropolitan court to district court, *see* 34-8A-6 NMSA 1978.

For appeals from magistrate court to district court, *see* 35-13-2 NMSA 1978.

For appeal of violation of municipal ordinances, *see* 35-15-10 NMSA 1978.

For appeal from order of director of financial institutions division, *see* 58-1-45 NMSA 1978.

For review of supervisor's order regarding savings and loan associations, *see* 58-10-84 NMSA 1978.

For review of bank examiner's decisions on small loans, *see* 58-15-25 NMSA 1978.

For review of public service commission orders, *see* 62-11-1 to 62-11-6 NMSA 1978.

For appeal from decision of viewers awarding damages to county roads, *see* 67-5-19 NMSA 1978.

For appeals from orders of mine inspector, *see* 69-6-2 NMSA 1978.

For appeals from state engineer regarding water rights, *see* 72-7-1 to 72-7-3 NMSA 1978.

For appeal from determination of irrigation district concerning exemption from tax, *see* 73-11-29 NMSA 1978.

For appeal from county commissioners regarding electrical irrigation districts, *see* 73-12-4 NMSA 1978.

For appeal from board of directors of irrigation district regarding transfer of water rights, *see* 73-13-4 NMSA 1978.

For civil appeals from magistrate courts, *see* Rules 2-705 and 1-072 NMRA.

For appeals from the metropolitan court in on the record cases, *see* Rule 1-073 NMRA.

For criminal appeals from magistrate courts, *see* Rule 6-703 NMRA.

Appeals from a court of record. — Whether a lower court is of record determines whether a trial will be de novo. If an appeal is on record, the district court acts as a typical appellate court reviewing the record of the lower court's trial for legal error. In a de novo appeal, in contrast to appeals on the record, the district court conducts a new trial as if the trial in the lower court had not occurred. State v. Foster, 2003-NMCA-099, 134 N.M. 224, 75 P.3d 824, cert. denied, 134 N.M. 179, 74 P.3d 1071 (2003).

Appeal of guilty plea. — A defendant is not entitled, as a matter of right, to a trial de novo in district court following judgment against him on his guilty plea and disposition agreement in the metropolitan court. State v. Bazan, 97 N.M. 531, 641 P.2d 1078 (Ct. App.), cert. denied, 98 N.M. 50, 644 P.2d 1039 (1982), overruled in part by State v. Ball, 104 N.M. 176, 718 P.2d 686 (1986)

County in which appeal should be heard. — An appeal of hearing officer's decision for bids for a campus electrical distribution upgrade project must be taken in the district court of the county in which the agency maintains its principal office or the district court of any county in which a hearing on the matter was conducted. Use of the word "may" in Section 39-3-1.1C NMSA 1978 does not permit an administrative appeal to be brought in any district court. The appeal itself is permissive and not mandatory. State ex rel ENMU Regents v. Baca, 2008-NMSC-047, 144 N.M. 530, 189 P.3d 663.

Appeal premature. — The petitioner's appeal of the human services department's administrative decision establishing a claim for overpayment of food stamp benefits was premature where the department failed to exercise its authority under federal law to settle, adjust, or compromise the department's overpayment claim. Waters-Haskins v. N.M. Human Services Dept., 2008-NMCA-127, 144 N.M. 853, 192 P.3d 1230, cert. granted, 2008-NMCERT-009, 145 N.M. 257, 196 P.3d 488, rev'd, 2009-NMSC-031, 146 N.M. 391, 210 P.3d 817.

District court must try case de novo. — District court, in prosecution for assault and battery, must try the case de novo, as other criminal cases. Territory v. Lowitski, 6 N.M. 235, 27 P. 496 (1891) (decided under former law).

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 but appellee's motion for affirmance of the judgment was overruled, the latter ruling was proper because the case is triable de novo in the district court, upon the merits, under our statute. Rogers v. Kemp Lumber Co., 18 N.M. 300, 137 P. 586 (1913) (decided under former law).

Trial de novo is trial "anew," as if no trial whatever had been had in the municipal court. City of Farmington v. Sandoval, 90 N.M. 246, 561 P.2d 945 (Ct. App. 1977).

District court does not review correctness of proceedings in municipal court; the district court trial is as if no trial had been held in the municipal court. City of Farmington v. Sandoval, 90 N.M. 246, 561 P.2d 945 (Ct. App. 1977).

Trial de novo on alternative means of committing offense did not violate double jeopardy. — When a defendant is convicted based on one of two alternative means of committing a single crime, there is not an implied acquittal of the other alternative unless the conviction logically excludes guilt of the other alternative; if there is no implied acquittal, there is no constitutional prohibition against retrial of both alternatives after a conviction is set aside. State v. Ben, 2015-NMCA-118, cert. denied, 2015-NMCERT-011.

Where defendant was charged in magistrate court with multiple means of committing DWI, per se DWI and impaired to the slightest degree, and was convicted on the per se theory of DWI, defendant’s double jeopardy rights were not violated when he was retried de novo on the impaired theory in the district court, because his conviction on the per se theory of DWI was not logically inconsistent with a finding of impaired DWI. State v. Ben, 2015-NMCA-118, cert. denied, 2015-NMCERT-011.

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, 117 N.M. 273, 871 P.2d 369 (1994).

Court error may excuse late appeal. — One unusual circumstance that 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, 117 N.M. 273, 871 P.2d 369 (1994).

District court not to review probate court determination on certiorari. — The district court is in error in reviewing the probate court's determination on writ of certiorari as certiorari is available only if the probate court lacked jurisdiction in the case or if no right of appeal existed. Jones v. Seaton, 80 N.M. 210, 453 P.2d 380 (1969).

Even if determination erroneous. — The determination of the intention of the testator, even though erroneous, does not oust the probate judge of jurisdiction. The remedy for a claimed error is by appeal, not by certiorari. Jones v. Seaton, 80 N.M. 210, 453 P.2d 380 (1969).

District court not to take jurisdiction unless inferior court had same. — District court cannot, on appeal, take jurisdiction, except for purpose of dismissal, unless the inferior court had acquired jurisdiction. Chaves v. Perea, 3 N.M. (Gild.) 89, 2 P. 73 (1884) (decided under former law).

Appeal held not to operate as stay of execution. — The taking of an appeal or suing out a writ of error does not operate as a stay of execution, and a judgment plaintiff has a right to issue execution upon such judgment, or take such other proceedings as the law contemplates, in the absence of a supersedeas bond approved and filed in accordance with law. Llewellyn v. First State Bank, 22 N.M. 358, 161 P. 1185 (1916) (decided under former law).

State has no right to appeal from judgment of the district court sustaining in part a demurrer (now motion to dismiss) to an information charging defendant with trespassing on a school section. State v. Dallas, 22 N.M. 392, 163 P. 252 (1917).

There is no statutory authority authorizing an appeal by the state from a judgment sustaining a plea in abatement to an indictment. Ex parte Carrillo, 22 N.M. 149, 158 P. 800 (1916) (decided under former law).

District court controlled by rules of practice. — Appeals from inferior tribunals to the district court must be tried upon their merits as if they were new actions in such court, which is not to be trammeled in its mode of proceeding by the irregular, untechnical acts of the justice of the peace (now magistrate), but the proceedings are to be controlled by its enlarged rules of practice which permit amendments to show jurisdiction of such justice of the peace. Sanchez y Contreas v. Candelaria, 5 N.M. 400, 23 P. 239 (1890) (decided under former law).

Amendment of complaint on appeal permitted. — On appeal from a justice of the peace (now magistrate), the district court may permit an amendment to the complaint to remedy deficiencies in the justice court, and it is error to refuse such amendment. Romero v. Luna, 6 N.M. 440, 30 P. 855 (1892); Sanchez y Contreas v. Candelaria, 5 N.M. 400, 23 P. 239 (1890) (decided under former law).

Right of appeal governed by statute when judgment rendered. — As a general rule, the right of appeal is governed by the statute in force when final judgment is rendered, and, unless the statute which changes the right of appeal clearly intends a retrospective effect, it has no application to causes in which final judgment was rendered prior to its passage. Jackman v. Atchison, T. & S.F. Ry., 22 N.M. 422, 163 P. 1084 (1917).

Computation of time for taking appeal. — The time for taking an appeal or writ of error is computed from the date of the denial of the motion for new trial and not from the date of the entry of judgment, the motion for a new trial having been filed within the specified time. Romero v. McIntosh, 19 N.M. 612, 145 P. 254 (1914) (decided under former law).

Delay in conducting appeal de novo. — A delay in conducting an appeal de novo in district court following a conviction in municipal court did not establish a deprivation of the defendant's constitutional rights since the defendant had a responsibility to try to keep the case from slipping through the cracks. Town of Bernalillo v. Garcia, 118 N.M. 610, 884 P.2d 501 (Ct. App.), cert. denied, 118 N.M. 585, 883 P.2d 1282 (1994).

Organic Act prohibited appeals other than from final judgments. — The Organic Act, establishing the territory of New Mexico, prohibited the entertaining of appeals from any class of decisions other than final judgments. Weaver v. Weaver, 15 N.M. 333, 107 P. 527 (1910) (decided under former law).

Judgment vacating previous voidable judgment as final. — A judgment of a district court purporting to vacate a previous judgment which was voidable, but not void, is a final judgment and appealable. Weaver v. Weaver, 16 N.M. 98, 113 P. 599 (1911) (decided under former law).

Violation of injunction as final judgment. — Appeals do not lie to the supreme court from judgments of district courts which commit persons to jail for the willful violation of an injunction, for this statute only confers jurisdiction to review by appeal final judgments rendered upon indictments in criminal cases. Marinan v. Baker, 12 N.M. 451, 78 P. 531 (1904) (decided under former law).

Fiduciaries are entitled to supersede judgment against them, as such, only when they have sued out an appeal or writ of error within 60 days from the date of final judgment. Sakariason v. Mechem, 20 N.M. 307, 149 P. 352 (1915) (decided under former law).

Appeal of contested election. — The district court had appellate jurisdiction from judgments and orders of the prefects and alcaldes in all cases not prohibited by law, including contested election cases for justice of the peace (now magistrate). Quintana v. Tompkins, 1 N.M. 29 (1853), overruled Arellano v. Chacon, 1 N.M. 269 (1859), holding that no appeal lie from probate court judgment in case of contested election for office of justice of the peace (decided under former law).

Appeals from probate court. — Appeals may be taken from judgments relating to revenue of probate courts, in which the causes originated, to the district and not to the supreme court, provided they are taken on the day of trial; so that the district and not the supreme court is by law the appropriate appellate tribunal from the judgment of the probate court. Territory v. Ortiz, 1 N.M. 5 (1852) (decided under former law).

Where judgment of probate court is not final, but merely an interlocutory order, it is error to compel an appeal to the district court by mandamus. Territory ex rel. Lee v. Hubbell, 9 N.M. 560, 58 P. 344 (1899) (decided under former law).

To allow interlocutory appeal of order of suppression from magistrate court would impermissibly expand the appellate jurisdiction of the district court to hear matters beyond those currently allowed. State v. Heinsen, 2004-NMCA-110, 136 N.M. 295, 97 P.3d 627, aff'd, 2005-NMSC-035, 138 N.M. 441, 121 P.3d 1040.

The state does not have the statutory authority or constitutional right to immediately appeal a magistrate court order suppressing evidence to the district court. State v. Heinsen, 2004-NMCA-110, 136 N.M. 295, 97 P.3d 627, aff'd, 2005-NMSC-035, 138 N.M. 441, 121 P.3d 1040.

Action outside scope of district court's appellate jurisdiction. — Where in a de novo motion hearing the district court took testimony of the same witnesses heard in the magistrate court, entered specific findings concerning those witnesses' credibility, reversed the magistrate's order and remanded the case to the magistrate for trial, this action is clearly outside the scope of the district court's appellate jurisdiction, which only provides an appeal by a full trial de novo as if the trial below had not happened in the magistrate court. State v. Heinsen, 2004-NMCA-110, 136 N.M. 295, 97 P.3d 627, aff'd, 2005-NMSC-035, 138 N.M. 441, 121 P.3d 1040.

Appeal from hearing officer's decision. — "Inferior tribunals," as used in this section, does not include a county personnel board or hearing officer; county was not entitled to de novo review of an adverse personnel decision by a hearing officer. Bd. of Cnty. Comm'rs v. Harrison, 1998-NMCA-106, 125 N.M. 495, 964 P.2d 56.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Constitutionality of statute penalizing unsuccessful appeal to courts from action of administrative board, 39 A.L.R. 1181.

Plea of guilty in police, magistrate, municipal, or similar inferior court as precluding appeal, 42 A.L.R.2d 995.

4 C.J.S. Appeal and Error § 41.

39-3-1.1. Appeal of final decisions by agencies to district court; application; scope of review; review of district court decisions.

A. The provisions of this section shall apply only to judicial review of agency final decisions that are placed under the authority of this section by specific statutory reference.

B. Upon issuing a final decision, an agency shall promptly:

(1) prepare a written decision that includes an order granting or denying relief and a statement of the factual and legal basis for the order;

(2) file the written decision with the official public records of the agency; and

(3) serve a document that includes a copy of the written decision and the requirements for filing an appeal of the final decision on:

(a) all persons who were parties in the proceeding before the agency; and

(b) every person who has filed a written request for notice of the final decision in that particular proceeding.

C. Unless standing is further limited by a specific statute, a person aggrieved by a final decision may appeal the decision to district court by filing in district court a notice of appeal within thirty days of the date of filing of the final decision. The appeal may be taken to the district court for the county in which the agency maintains its principal office or the district court of any county in which a hearing on the matter was conducted. When notices of appeal from a final decision are filed in more than one district court, all appeals not filed in the district court in which the first appeal was properly filed shall be dismissed without prejudice. An appellant whose appeal was dismissed without prejudice pursuant to the provisions of this subsection shall have fifteen days after receiving service of the notice of dismissal to file a notice of appeal in the district court in which the first appeal was properly filed.

D. In a proceeding for judicial review of a final decision by an agency, the district court may set aside, reverse or remand the final decision if it determines that:

(1) the agency acted fraudulently, arbitrarily or capriciously;

(2) the final decision was not supported by substantial evidence; or

(3) the agency did not act in accordance with law.

E. A party to the appeal to district court may seek review of the district court decision by filing a petition for writ of certiorari with the court of appeals, which may exercise its discretion whether to grant review. A party may seek further review by filing a petition for writ of certiorari with the supreme court.

F. The district court may certify to the court of appeals a final decision appealed to the district court, but undecided by that court, if the appeal involves an issue of substantial public interest that should be decided by the court of appeals. The appeal shall then be decided by the court of appeals.

G. The procedures governing appeals and petitions for writ of certiorari that may be filed pursuant to the provisions of this section shall be set forth in rules adopted by the supreme court.

H. As used in this section:

(1) "agency" means any state or local public body or officer placed under the authority of this section by specific statutory reference;

(2) "final decision" means an agency ruling that as a practical matter resolves all issues arising from a dispute within the jurisdiction of the agency, once all administrative remedies available within the agency have been exhausted. The determination of whether there is a final decision by an agency shall be governed by the law regarding the finality of decisions by district courts. "Final decision" does not mean a decision by an agency on a rule, as defined in the State Rules Act [14-4-1 NMSA 1978]; and

(3) "hearing on the matter" means a formal proceeding conducted by an agency or its hearing officer for the purpose of taking evidence or hearing argument concerning the dispute resolved by the final decision.

History: Laws 1998, ch. 55, § 1; 1999, ch. 265, § 1.

ANNOTATIONS

Cross references. — For appeals to district court, *see* Rule 1-074 NMRA.

For appeals from administrative agencies, *see* Rules 1-074 to 1-077 NMRA.

For appeal of refusal to register voter, *see* 1-4-21 NMSA 1978.

For appeal of determinations relating to incorporation of territories, *see* 3-2-9 NMSA 1978.

For appeal of order or decision of planning commission, *see* 3-19-8 NMSA 1978.

For appeal of decision of joint municipal-county zoning authority, *see* 3-21-4 NMSA 1978.

For appeal of zoning authority decision, *see* 3-21-9 NMSA 1978.

For appeals relating to improvement districts, *see* 3-33-13, 3-33-16, 3-33-22 and 3-33-35 NMSA 1978.

For appeal of provisional order relating to fire-fighting facilities, *see* 3-35-3 NMSA 1978.

For appeal of order relating to repair, closing and demolition of dwellings, *see* 3-46-43 NMSA 1978.

For appeal of provisional order relating to parking improvements, *see* 3-51-12 NMSA 1978.

For appeal of disallowance of claims against county, *see* 4-45-5 NMSA 1978.

For appeal of reassessment of improvement district assessment by county board, *see* 4-55A-31 NMSA 1978.

For appeal of decision by administrator under Uniform Unclaimed Property Act, *see* 7-8A-16 NMSA 1978.

For appeal from order of the secretary of taxation and revenue or county valuation protests board, *see* 7-38-28 NMSA 1978.

For appeal of board decision under Personnel Act, *see* 10-9-18 NMSA 1978.

For appeal of final decision of retirement board, *see* 10-11-120 NMSA 1978.

For appeal of final agency order or decision in an adjudicatory proceeding, *see* 12-8-16 NMSA 1978.

For judicial review authorized under Procurement Code, *see* 13-1-183 NMSA 1978.

For appeal of appeals board decisions under Public Works Minimum Wage Act, *see* 13-4-15 NMSA 1978.

For appeal of game commission decision revoking license, *see* 17-3-34 NMSA 1978.

For appeal of decision by commissioner fixing value of improvements or in collecting costs, *see* 19-7-17 NMSA 1978.

For appeal of commissioner's decision relating to sale or lease of state lands, *see* 19-7-67 NMSA 1978.

For appeal of order by commissioner affecting appellant's interest in oil or gas leases, *see* 19-10-23 NMSA 1978.

For appeal of final determination relating to registration of proprietary school, *see* 21-24-8 NMSA 1978.

For appeal of suspension or revocation of teaching certificate, *see* 22-10A-25 and 22-10A-28 NMSA 1978.

For appeal of final decision relating to health facility, *see* 24-1-5 NMSA 1978.

For appeal of denial, suspension or revocation of food service permit, *see* 25-1-11 NMSA 1978.

For appeal of board decision relating to imported meats, *see* 25-3-12 NMSA 1978.

For appeal of decision relating to renewal, suspension or revocation of state meat inspection service or establishment license, *see* 25-3-19 NMSA 1978.

For appeal of dairy establishment denial, suspension or revocation, *see* 25-7B-9 NMSA 1978.

For appeal of decision under Public Assistance Appeals Act, *see* 27-3-4 NMSA 1978.

For appeal of order affecting hospital or ambulance service, *see* 27-5-12.1 NMSA 1978.

For appeal of civil penalty for interference with the office of long-term care ombudsman or retaliatory actions, *see* 28-17-19 NMSA 1978.

For appeal of disciplinary action against state police officer, *see* 29-2-11 NMSA 1978.

For appeal of law enforcement agency refusal to correct arrest record information, *see* 29-10-8 NMSA 1978.

For appeal of administrative decisions relating to detention facility standards and inspections, *see* 32A-2-4 NMSA 1978.

For appeal of decision relating to dismissal, demotion or suspension of covered employee under District Attorney Personnel and Compensation Act, *see* 36-1A-9 NMSA 1978.

For appeal of decision relating to child placement agency or foster home, *see* 40-7A-6 NMSA 1978.

For appeal of decision relating to payments under the Relocation Assistance Act, *see* 42-3-14 NMSA 1978.

For appeal of decision of board of county commissioners approving or disapproving a preliminary or final plat, *see* 47-6-15 NMSA 1978.

For appeal of commission order pursuant to Occupational Health and Safety Act, *see* 50-9-17 NMSA 1978.

For appeal of revocation of certificate to conduct affairs in New Mexico of a foreign corporation, or of certificate of incorporation of a domestic corporation, *see* 53-8-91 NMSA 1978.

For appeal of failure by corporation commission (now public regulation commission) to approve articles of incorporation or other document, or of revocation of certificate of foreign corporation, *see* 53-18-2 NMSA 1978.

For appeal of notice of disapproval of documents required under Limited Liability Company Act, *see* 53-19-67 NMSA 1978.

For appeal of decisions relating to administrative penalty under Petroleum Products Standards Act, *see* 57-19-36 NMSA 1978.

For appeal of director's order under Banking Act, *see* 58-1-45 NMSA 1978.

For appeal of supervisor's refusal of savings and loan charter, *see* 58-10-13 NMSA 1978.

For appeal of supervisor's decision after hearing under Savings and Loan Act, *see* 58-10-84 NMSA 1978.

For appeal of order issued pursuant to Model State Commodity Code, *see* 58-13A-21 NMSA 1978.

For appeal of order under New Mexico Securities Act, *see* 58-13B-56 NMSA 1978.

For appeal of act or order of director pursuant to the New Mexico Small Loan Act of 1995, *see* 58-15-25 NMSA 1978.

For appeal of revocation or suspension of license under Motor Vehicle Sales Finance Act, *see* 58-19-4 NMSA 1978.

For appeal of final order issued under Mortgage Loan Company and Loan Broker Act, *see* 58-21-16 NMSA 1978.

For appeal of final order issued under Escrow Company Act, *see* 58-22-29 NMSA 1978.

For appeal from order of superintendent of insurance made after informal or administrative hearing, *see* 59A-4-20 NMSA 1978.

For appeal of revocation of, suspension of or refusal to grant insurance consultant license, *see* 59A-11A-4 NMSA 1978.

For appeal from insurance board order relating to action of superintendent, *see* 59A-17-35 NMSA 1978.

For appeal of decision by superintendent relating to action or decision of FAIR plan administrators, *see* 59A-29-6 NMSA 1978.

For judicial review of order promulgating rates under New Mexico Title Insurance Law, *see* 59A-30-9 NMSA 1978.

For appeal of superintendent's decision relating to action of board of directors of life insurance guaranty association, *see* 59A-42-12 NMSA 1978.

For appeal of superintendent's decision relating to claim denied by insurance guaranty association, *see* 59A-43-14 NMSA 1978.

For appeal of final decision by superintendent relating to contract dispute between health care plan and purveyor, *see* 59A-47-29 NMSA 1978.

For appeal of decision by state fire board, *see* 59A-52-22 NMSA 1978.

For appeal of licensing authority's suspension or revocation of a license under the Bingo and Raffle Act, *see* 60-2B-4 NMSA 1978.

For appeal of approval or disapproval of license under Liquor Control Act, *see* 60-6B-2 NMSA 1978.

For appeal of revocation, suspension or fine of licensee under Liquor Control Act, *see* 60-6C-6 NMSA 1978.

For appeal of adverse decision under Uniform Licensing Act, *see* 61-1-17 NMSA 1978.

For nonreviewability of decisions granting or denying stays of board decisions under Uniform Licensing Act, *see* 61-1-19 NMSA 1978.

For appeal of decision relating to enforcement of Collection Agency Regulatory Act, *see* 61-18A-32 NMSA 1978.

For appeal of decision by director relating to the division's refusal to issue motor vehicle dealer, wrecker, wholesaler or distributor license, *see* 66-4-3 NMSA 1978.

For appeal of decision by director relating to the division's refusal to issue motor vehicle license, *see* 66-5-36 NMSA 1978.

For appeal of order relating to utility relocation hearing, *see* 67-8-19 NMSA 1978.

For appeal of rates, tolls and other charges fixed by board for use of roads, bridges and ferries, *see* 67-10-2 NMSA 1978.

For appeal of zoning board decision, *see* 67-13-12 NMSA 1978.

For appeal of actions relating to mines, *see* 69-6-2 NMSA 1978.

For appeal of final action, other than rule, relating to mine or mining, *see* 69-36-16 NMSA 1978.

For appeal of commission order or decision under Oil and Gas Act, *see* 70-2-25 NMSA 1978.

For appeal of cancellation of compressed natural gas or liquefied petroleum gas license, *see* 70-5-16 and 70-5-17 NMSA 1978.

For appeal of decision of irrigation district board of directors, *see* 73-11-29 and 73-12-4 NMSA 1978.

For appeal of nuclear regulatory commission licensing action, *see* 74-3-9 NMSA 1978.

For appeal of charges assessed for cleanup of orphan hazardous materials, *see* 12-12-30 NMSA 1978.

For appeal of commission ruling on issuance, refusal or revocation of weather control or cloud modification license, *see* 75-3-11 NMSA 1978.

The 1999 amendment, effective July 1, 1999, substituted present subparagraph B(3)(a) for "all parties whose rights are adjudged by the final decision; and", added Subsection F, and redesignated the subsequent subsections accordingly.

Meaning of the word "may". — The use of the word "may" in Subsection C of Section 39-1-1.1 NMSA 1978 does not permit an administrative appeal to be brought in any district court. It means that the appeal itself is permissive and not mandatory. State ex rel. ENMU Regents v. Baca, 2008-NMSC-047, 144 M.M. 530, 189 P.3d 663.

Requirements of written decision. — Section 39-3-1.1 NMSA 1978, at least as it applies to legislative bodies, plainly requires a document that adequately informs the affected parties of the action of the policymaking body and alerts the parties that they may proceed with an appeal of the legislative order. Village resolutions were officially adopted at public meetings after a lengthy and public process mandated by the Improvement Districts Act. Each contained an order in the form of resolutions, and each contained both facts and law. The resolutions cited Sections 3-33-1 through -43 NMSA 1978 as legal authority for deciding the resolution, and included facts such as the approximate cost of the project and the names of the engineers who completed the study. They outlined the procedure that the village followed in arriving at the resolutions. They also contained a statement confirming that the village council examined the plans, costs, and plat, and accepted them. It incorporated those plans in the resolution, noting that the plans were available for public examination. They included information about the village's consideration of all protests, including a finding that some were without merit while others had merit, and its confirmation of the revised assessment roll, noting

that the roll was available for public examination. Both resolutions included written notification of a right to appeal the decisions therein to the district court. This is sufficient to meet the requirements of Section 39-3-1.1B(1) NMSA 1978. Angel Fire v. Wheeler, 2003-NMCA-041, 133 N.M. 421, 63 P.3d 524, cert. denied, 133 N.M. 413, 63 P.3d 516 (2003).

Factual and legal basis of decision required. — The district court exercising appellate jurisdiction under Section 39-1-1.1 NMSA 1978 is not a fact-determining body. Where a governing body is required by statute to provide a written factual and legal basis for its decision, and a decision turns on factual questions that the governing body failed to resolve, the district court must remand for further proceedings. VanderVossen v. City of Espanola, 2001-NMCA-016, 130 N.M. 287, 24 P.3d 319, cert. quashed, 131 N.M. 221, 34 P.3d 610 (2001).

Written basis for decision not required. — Even though statute does not explicitly state that the commission must provide a written factual and legal basis for its decision, administrative agencies must provide written factual and legal basis for their decisions in order to permit an effectual and meaningful review. Gila Res. Info. Project v. N.M. Water Quality Comm'n, 2005-NMCA-139, 138 N.M. 625, 124 P.3d 1164, cert. denied, 2005-NMCERT-009, 138 N.M. 439, 120 P.3d 1182.

Constitutionality. — Subsection E, vesting the court of appeals with discretionary review authority of appeals to district court does not violate Article 6, Section 2 of the New Mexico constitution, because that section only applies to appeals of a district court's original jurisdiction cases and not to review of the district court acting in an appellate capacity. VanderVossen v. City of Espanola, 2001-NMCA-016, 130 N.M. 287, 24 P.3d 319, cert. quashed, 131 N.M. 221, 34 P.3d 610 (2001).

Issue is one of "substantial public interest" when it raises a question of first impression that is likely to recur, and when the need for uniformity is great. Jicarilla Apache Nation v. Rio Arriba County Assessor, 2004-NMCA-055, 135 N.M. 630, 92 P.3d 642, rev'd on other grounds, 2004-NMSC-035, 136 N.M. 630, 103 P.3d 554.

Rule 12-505 A(1) NMRA is consistent with language in this section that directs review of district court decisions by an appellate court. Dixon v. State Taxation & Revenue Dep't, 2004-NMCA-044, 135 N.M. 431, 89 P.3d 680.

Rule 12-505 NMRA governs procedure by which aggrieved party may seek review in the court of appeals of a district court's determination based on a Rule 1-074 NMRA appeal authorized by this section. Dixon v. State Taxation & Revenue Dep't, 2004-NMCA-044, 135 N.M. 431, 89 P.3d 680.

Sections 66-8-112 and 66-5-35 NMSA 1978 are not read to preclude application of this section; on the contrary, they can be read together harmoniously with 66-5-36 NMSA 1978 to effect the legislature's intent to standardize the method for obtaining

judicial review of final decisions of certain administrative agencies. Dixon v. State Taxation & Revenue Dep't, 2004-NMCA-044, 135 N.M. 431, 89 P.3d 680.

Standard of review for court of appeals. — After the enactment of this section, the standard of review for the court of appeals upon the review of a district court decision of an appeal from an administrative agency is based upon the criteria for a writ of certiorari as outlined in Rule 12-505 NMRA, and no longer may the court of appeals review the district court decision under the administrative standard. C.F.T. Dev., LLC v. Board of County Comm'rs, 2001-NMCA-069, 130 N.M. 775, 32 P.3d 784, overruled on other grounds by Rio Grand Chapter of Sierra Club v. N.M. Mining Comm'n, 2003-NMSC-005, 113 N.M. 97, 61 P.3d 806.

Insurance company's decision to deny coverage was supported by substantial evidence. — Where respondent's daughter suffered a severely disabling anoxic brain injury which resulted from an incident of cardiac arrest and stroke, and where the insurance company denied coverage for hyperbaric oxygen therapy (HBOT), the district court erred in reversing the insurance company's decision because the HBOT treatments were not only specifically not covered treatments under the health plan into which the insurance company and respondent contracted, they were specifically excluded, and because substantial evidence supported the insurance company's determination that the HBOT treatments were not medically necessary to treat the medical condition under the Insurance Code, based on a lack of evidence that HBOT improved the injury and the lack of evidence establishing a causal linkage between any alleged improvements of the injury and HBOT treatment. Rodarte v. Presbyterian Ins. Co., 2016-NMCA-051, cert. denied, 2016-NMCERT-____.

Standard of review for district courts. — District court exceeded the limited review that characterized an administrative appeal by entertaining an issue that had not been raised below. N.M. State Bd. of Psychologist Exam'rs v. Land, 2003-NMCA-034, 133 N.M. 362, 62 P.3d 1244, cert. denied, 133 N.M. 413, 63 P.3d 516 (2003).

District court acted outside its capacity as an appellate court by engaging in fact-finding when it determined, contrary to the determination of the county board of commissioners, that the administrative record supported a conclusion that a landfill was in a critical area as defined in the county ground water policy. Cadena v. Bernalillo Cnty. Bd. of Cnty. Comm'rs, 2006-NMCA-036, 139 N.M. 300, 131 P.3d 687.

Proceedings prior to effective date of section. — Final district court orders following appeals of decisions of administrative agencies were entered after the effective dates of this section and Rule 12-505 NMRA. Therefore, cases before the court of appeals for review were not "pending" cases within the meaning of N.M. const., art. IV, § 34. Hyden v. N.M. Human Servs. Dep't, 2000-NMCA-002, 128 N.M. 423, 993 P.2d 740.

Time for filing notice of appeal. — Even though appellants failed to comply with the 20-day time limit imposed by Rule 12-505 NMRA for seeking review on certiorari, extensions were granted where they were sought because of confusion surrounding the

enactment and publication of the rule. Hyden v. N.M. Human Servs. Dep't, 2000-NMCA-002, 128 N.M. 423, 993 P.2d 740.

Tolling of time to appeal. — Where the developer sought review in federal court of the municipality's denial of the developer's preliminary plat within twenty-eight days after the municipality issued its final decision; while the developer's federal action was pending, the municipality filed an action in state district court to quiet title to the land; and after the federal court dismissed the federal action, the developer timely filed a counterclaim against the municipality in the state district court action to review the municipality's action denying the preliminary plat, the federal action tolled the limitations period to appeal and the developer's appeal for review in state district court was timely. City of Rio Rancho v. Amrep Sw., Inc., 2011-NMSC-037, 150 N.M. 428, 260 P.3d 414, aff'g in part and rev'g in part 2010-NMCA-075, 148 N.M. 542, 238 P.3d 911.

Subsection C details appeal process to the district court. Paule v. Santa Fe County, 2005-NMSC-021, 138 N.M.82, 117 P.3d 240.

A county's approval or disapproval of a preliminary plat is a final, appealable decision for purposes of Section 47-6-15 NMSA 1978. Zuni Indian Tribe v. McKinley Cnty. Bd. of Cnty. Comm'rs, 2013-NMCA-041, 300 P.3d 133.

A county's decision on a preliminary plat is appealable. — Where the county disapproved the applicant's preliminary plat in the form of a written resolution which incorporated the final findings and recommendations of the county planning commission; the resolution followed input by state agencies and other interested parties and public hearings before the planning commission; interested parties submitted proposed findings and recommendations after the hearings; and the findings and recommendations adopted by the county commission included important aspects of the subdivision development and review process, such as water availability, waste disposal and access, given the nature of the county commission's resolution and the procedural history that preceded its passage, the county commission's resolution constituted a "decision" under Section 47-6-15 NMSA 1978 and was appealable. Zuni Indian Tribe v. McKinley Cnty. Bd. of Cnty. Comm'rs, 2013-NMCA-041, 300 P.3d 133.

A timely filed appeal from a decision on a preliminary plat application is not rendered moot by the county's decision to approve the final subdivision plat application during the pendency of the appeal. Zuni Indian Tribe v. McKinley Cnty. Bd. of Cnty. Comm'rs, 2013-NMCA-041, 300 P.3d 133.

Time for filing notice of appeal. — The time for filing an administrative appeal to the district court under Subsection B of this section begins to run on the date the final decision or order is filed. Paule v. Santa Fe County, 2005-NMSC-021, 138 N.M. 82, 117 P.3d 240.

Final decision. — A "final decision" for purposes of this section is an agency ruling that as a practical matter resolves all issues arising from a dispute within the jurisdiction of the agency. Paule v. Santa Fe County, 2005-NMSC-021, 138 N.M. 82, 117 P.3d 240.

Decision revoking license or denying limited license. — A party should file a petition for certiorari when that party is seeking review in the Court of Appeals of a district court's determination on appeal from a motor vehicles division decision revoking a license or denying a limited license. Dixon v. State Taxation & Revenue Dep't, 2004-NMCA-044, 135 N.M. 431, 89 P.3d 680.

Rule 1-074 NMRA review in license revocation and denial of limited license cases is authorized by this section. Dixon v. State Taxation & Revenue Dep't, 2004-NMCA-044, 135 N.M. 431, 89 P.3d 680.

Appeals from motor vehicles division hearings. — The legislature has designated the district court as the exclusive forum for appeals from motor vehicles division hearings. Maso v. State Taxation & Revenue Dep't, 2004-NMCA-025, 135 N.M. 152, 85 P.3d 276, aff'd., 2004-NMSC-028, 136 N.M. 161, 96 P.3d 286.

Special use permit. — Where plaintiff properly sought a special use permit, it was reasonable for her to attempt an administrative resolution before proceeding to court, and a review pursuant to this section and Rule 1-074 NMRA would have been limited to the narrow matter of the special use permit. Takhar v. Town of Taos, 2004-NMCA-072, 135 N.M. 741, 93 P.3d 762, cert. denied, 2004-NMCERT-006, 135 N.M. 788, 93 P.3d 1292.

Law reviews. — For article, "Jurisdiction as May Be Provided by Law: Some Issues at Appellate Jurisdiction in New Mexico," see 36 N.M.L. Rev. 215 (2006).

39-3-2. Civil appeals from district court.

Within thirty days from the entry of any final judgment or decision, any interlocutory order or decision which practically disposes of the merits of the action, or any final order after entry of judgment which affects substantial rights, in any civil action in the district court, any party aggrieved may appeal therefrom to the supreme court or to the court of appeals, as appellate jurisdiction may be vested by law in these courts.

History: Laws 1917, ch. 43, § 1; C.S. 1929, § 105-2501; 1953 Comp., § 21-10-2; Laws 1966, ch. 28, § 35.

ANNOTATIONS

Cross references. — For supreme court jurisdiction, *see* N.M. Const., art. VI, § 2; 39-3-3, 39-3-4 NMSA 1978.

For court of appeals jurisdiction, *see* N.M. Const., art. VI, § 29; 39-5-8 NMSA 1978.

For Uniform Certification of Questions of Law Act, *see* Chapter 39, Article 7 NMSA 1978.

For when appeals taken, *see* Rules 12-201 and 12-203 NMRA.

For how appeals taken, *see* Rule 12-202 NMRA.

For procedure on certiorari to review decision of court of appeals, *see* Rule 12-502 NMRA.

For procedure on certification from court of appeals, *see* Rule 12-606 NMRA.

Provisions not applicable to election contests. — Laws 1917, ch. 43, § 1 (this section), § 2 (39-3-15 NMSA 1978), and § 4 (39-3-5 NMSA 1978) did not apply to review of election contest cases. Hannett v. Mowrer, 32 N.M. 231, 255 P. 636 (1927).

Creation of right of appeal is matter of substantive law and not within the rule-making power of the supreme court. State v. Arnold, 51 N.M. 311, 183 P.2d 845 (1947).

Timely filing of the notice of appeal is jurisdictional. Rivera v. King, 108 N.M. 5, 765 P.2d 1187 (Ct. App), cert. denied, 107 N.M. 785, 765 P2d 758 (1988).

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, 117 N.M. 273, 871 P.2d 369 (1994).

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, 117 N.M. 273, 871 P.2d 369 (1994).

Within rule-making power to reduce appeal time. — It was within the rule-making power of the supreme court to reduce the time for taking an appeal from six to three months once the legislature had authorized appeal, since the regulation of the manner and time for taking appeal were procedural matters. State v. Arnold, 51 N.M. 311, 183 P.2d 845 (1947).

Determination to be final before supreme court review. — The supreme court cannot exercise appellate jurisdiction by appeal or writ of error to review any determination in an inferior tribunal, unless such determination be the final judgment of a court as prescribed by law. Staab v. Atl. & Pac. R.R. Co., 3 N.M. (Gild.) 606, 9 P. 381 (1886) (decided under former law).

Test of whether judgment is final, so as to permit the taking of an immediate appeal, lies in the effect the judgment has upon the rights of some or all of the parties. Bralley v. City of Albuquerque, 102 N.M. 715, 699 P.2d 646 (Ct. App. 1985).

Judgment lacking decretal language not final. — Court "order" that made numerous findings of fact and rulings of law, including a finding that mother was entitled to child support payments and costs from father, but which failed to specifically order that judgment be entered for mother, and did not contain the signatures or initials of the parties' attorneys, was not a final, appealable order because of its lack of decretal language. Khalsa v. Levinson, 1998-NMCA-110, 125 N.M. 680, 964 P.2d 844.

"Order" is not final where all parties and the court consider it a non-final order. Hernandez v. Home Educ. Livelihood Program, Inc., 98 N.M. 125, 645 P.2d 1381 (Ct. App.), cert. denied, 98 N.M. 336, 648 P.2d 794 (1982).

Report of grand jury. — Since no parties are involved, and no facts are found nor issues of law decided, the report of a grand jury is not a judgment. Therefore, that report does not constitute a final, appealable order. McKenzie v. Fifth Judicial Dist. Court, 107 N.M. 778, 765 P.2d 194 (Ct. App.), cert. denied, 107 N.M. 785, 765 P2d 758 (1988).

Order deemed "final". — An order of dismissal "without prejudice" for failure to exhaust administrative remedies was a final order necessitating a timely appeal in order to preserve appellate review. Bralley v. City of Albuquerque, 102 N.M. 715, 699 P.2d 646 (Ct. App. 1985).

An order dismissing a party's entire complaint, without authorizing or specifying a definite time for leave to file an amended complaint, is a final order for purposes of appeal. Bralley v. City of Albuquerque, 102 N.M. 715, 699 P.2d 646 (Ct. App. 1985).

A ruling of a land use authority granting an application for a special use permit, subject to certain specified conditions, and the district court's affirmance of it were final orders for the purpose of allowing an aggrieved party to seek appellate review. West Gun Club Neighborhood Ass'n v. Extraterritorial Land Use Auth., 2001-NMCA-013, 130 N.M. 195, 22 P.3d 220, cert. denied, 130 N.M. 558, 28 P.3d 1099 (2001).

Orders under Uniform Arbitration Act. — Reading this section and 44-7-19(B) NMSA 1978 together because they are in pari materia, the plain meaning of the language indicates that the legislature intended that orders made under the Uniform Arbitration Act of 1971 be no more or less appealable than any other orders in civil actions. Collier v. Pennington, 2003-NMCA-064, 133 N.M. 728, 69 P.3d 238.

Order compelling arbitration was a final order from which defendants were obligated to appeal within 30 days. Lyman v. Kern, 2000-NMCA-013, 128 N.M. 582, 995 P.2d 504, cert. denied, 128 N.M. 688, 997 P.2d 820 (2000).

Appellants' claim that nonattorney police court judge was not constitutionally qualified to hear their criminal cases was properly taken directly from the district court to the supreme court; the court of appeals did not have jurisdiction thereof. Tsiosdia v. Rainaldi, 89 N.M. 70, 547 P.2d 553 (1976).

Order opening up judgment in workmen's compensation case is not final order, but merely interlocutory and not appealable. Davis v. Meadors-Cherry Co., 63 N.M. 285, 317 P.2d 901 (1957).

Order opening up judgment is not order vacating judgment. — The order reopening the judgment in workmen's compensation case was not, in effect, an order vacating the judgment. Davis v. Meadors-Cherry Co., 63 N.M. 285, 317 P.2d 901 (1957).

Order setting aside default judgment not final. — A district court order setting aside a default judgment in subsequent writ of garnishment stemming from a tort action merely vacated the judgment, leaving the case pending for further determination, and thus was not appealable. Hall v. Hall, 115 N.M. 384, 851 P.2d 506 (Ct. App. 1993).

Remand of zoning decision not final. — A district court's remand of a zoning matter to the city council is not a final, appealable order; before a party would have the right to challenge that order on appeal to the Court of Appeals, it would have to await the council decision on remand, obtain review of the council decision in district court, and then appeal the district court judgment. High Ridge Hinkle Joint Venture v. City of Albuquerque, 119 N.M. 29, 888 P.2d 475 (Ct. App.), cert. denied, 119 N.M. 20, 888 P.2d 466 (1994), aff'd, 123 N.M. 394, 940 P.2d 1189 (1997), rev'd on other grounds, 1998-NMSC-050, 126 N.M. 413, 970 P.2d 599.

Order remanding to administrative agency final. — An order by the district court finding a state statute unconstitutional and remanding the case to an administrative agency was final and appealable since, if the agency proceeded under the remanded order, the constitutional question would become moot and would be effectively unreviewable. Bustamante v. De Baca, 119 N.M. 739, 895 P.2d 261 (Ct. App. 1995).

Court letter classifying marital property not final, appealable order. — Trial court's letter informing the parties that the husband's certified public accountant business would be characterized as a community asset was not a final order from which the husband could appeal. Mitchell v. Mitchell, 104 N.M. 205, 719 P.2d 432 (Ct. App.), cert. denied, 104 N.M. 84, 717 P.2d 60 (1986).

Denial of motion for protective order held not appealable. — Doctors' appeal from order denying motion for protective order, which sought to have court order a stay in taking of deposition of patient seeking to perpetuate testimony until such time as court first determined competency of patient as witness, was not an appealable final judgment and was not appealable as interlocutory order where order did not comply with 39-3-4 NMSA 1978. In re Deposition of Bartow, 101 N.M. 532, 685 P.2d 387 (Ct. App. 1984).

Denial of immunity claim not immediately appealable. — Since 41-4-4A NMSA 1978 of the Tort Claims Act provides a defense to liability, and not absolute immunity from suit, a denial of a claim of immunity under that section does not meet the requirements for immediate appellate review under the collateral order exception to the traditional requirement of finality. Allen v. Bd. of Educ., 106 N.M. 673, 748 P.2d 516 (Ct. App. 1987).

Review of governmental immunity determination. — As a general matter, the limited exception to the rule of finality known as the collateral order doctrine applies to district court determinations regarding governmental immunity under 37-1-23A NMSA 1978, and such determinations are subject to review by writ of error. Handmaker v. Henney, 1999-NMSC-043, 128 N.M. 328, 992 P.2d 879.

When property judgment in divorce proceeding not final for appellate review. — A final property judgment in a petition for dissolution of marriage is not final so as to allow appellate review where the court has failed to determine the parties' rights to custody, support and visitation of minor children, as requested by the pleadings, and has failed to determine that there is no just reason for delay before its decision is final enough to allow appellate review. Thornton v. Gamble, 101 N.M. 764, 688 P.2d 1268 (Ct. App. 1984).

Open damages award not appealable. — District court's ruling of liability pursuant to the Declaratory Judgment Act, 44-6-1 to -15 NMSA 1978, was not a final, appealable judgment since it left open for future resolution the amount of a damages award including attorney's fees. Principal Mut. Life Ins. Co. v. Straus, 116 N.M. 412, 863 P.2d 447 (1993).

Issuance of subpoenas duces tecum to a non-party was a collateral order reviewable by writ of error. — Where plaintiff sued defendants for employment discrimination; plaintiff's spouse, who was not a party to the action, maintained a private law practice; plaintiff alleged that upon filing the complaint, defendants retaliated against plaintiff by asserting irregularities with regard to the gross receipts tax records and returns of the spouse's private law practice; the district court issued subpoenas duces tecum to the spouse and to defendant taxation and revenue department for the spouse's gross receipts tax records and returns; the spouse moved to quash the subpoenas on the grounds that the gross receipts tax information was confidential and privileged; the district court denied the motion; the order denying the motion to quash practically disposed of all issues raised by the spouse; the issue of the spouse's rights and privilege concerning the confidentiality of the gross receipt tax information had nothing to do with the merits of plaintiff's action; and the district court's order was not a final order disposing of the merits of the underlying case and was effectively unreviewable on appeal from a final judgment because the spouse was not a party to the action, the district court's order authorizing the subpoenas was reviewable by writ of error under the collateral order doctrine. Breen v. N.M. Taxation & Revenue Dep't, 2012-NMCA-101, 287 P.3d 379.

Law reviews. — For article, "Jurisdiction as May Be Provided by Law: Some Issues at Appellate Jurisdiction in New Mexico," see 36 N.M.L. Rev. 215 (2006).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 5 Am. Jur. 2d Appellate Review § 285 et seq.

Power of trial court indirectly to extend time for appeal, 89 A.L.R. 941, 149 A.L.R. 740.

Lower court's consideration, on the merits, of unseasonable application for new trial, rehearing, or other reexamination, as affecting time in which to apply for appellate review, 148 A.L.R. 795.

Failure, due to fraud, duress, or misrepresentation by adverse party, to file notice of appeal within prescribed time, 149 A.L.R. 1261.

Exclusion or inclusion of terminal Sunday or holiday in computing time for taking or perfecting appellate review, 61 A.L.R.2d 482.

Running of interest on judgment where both parties appeal, 11 A.L.R.4th 1099.

4 C.J.S. Appeal & Error § 264 et seq.

39-3-3. Appeals from district court in criminal cases.

A. By the defendant. In any criminal proceeding in district court an appeal may be taken by the defendant to the supreme court or court of appeals, as appellate jurisdiction may be vested by law in these courts:

(1) within thirty days from the entry of any final judgment;

(2) within ten days after entry of an order denying relief on a petition to review conditions of release pursuant to the Rules of Criminal Procedure [Rule 5-101 NMRA]; or

(3) by filing an application for an order allowing an appeal in the appropriate appellate court within ten days after entry of an interlocutory order or decision in which the district court, in its discretion, makes a finding in the order or decision that the order or decision involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from such order or decision may materially advance the ultimate termination of the litigation.

B. By the state. In any criminal proceeding in district court an appeal may be taken by the state to the supreme court or court of appeals, as appellate jurisdiction may be vested by law in these courts:

(1) within thirty days from a decision, judgment or order dismissing a complaint, indictment or information as to any one or more counts;

(2) within ten days from a decision or order of a district court suppressing or excluding evidence or requiring the return of seized property, if the district attorney certifies to the district court that the appeal is not taken for purpose of delay and that the evidence is a substantial proof of a fact material in the proceeding.

C. No appeal shall be taken by the state when the double jeopardy clause of the United States constitution or the constitution of the state of New Mexico prohibits further prosecution.

History: 1953 Comp., § 21-10-2.1, enacted by Laws 1972, ch. 71, § 2.

ANNOTATIONS

Cross references. — For supreme court jurisdiction, *see* N.M. Const., art. VI, § 2; 38-3-2, 39-3-4 NMSA 1978.

For court of appeals jurisdiction, *see* N.M. Const., art. VI, § 29; 34-5-8 NMSA 1978.

For Uniform Certification of Questions of Law Act, *see* Chapter 39, Article 7 NMSA 1978.

For how and when appeal as of right taken, *see* Rule 12-201 NMRA.

For interlocutory appeals by permission, *see* Rule 12-203 NMRA.

For appeals from orders regarding release entered prior to a judgment of conviction, *see* Rule 12-204 NMRA.

For procedure on certiorari to review decision of court of appeals, *see* Rule 12-502 NMRA.

For procedure on certification from court of appeals, *see* Rule 12-606 NMRA.

Repeals and reenactments. — Laws 1972, ch. 71, § 2 repealed 21-10-2.1, 1953 Comp., relating to allowing appeals to defendants, and enacted a new section.

Dismissal of charges was not an acquittal and was subject to appeal. — Where defendant's codefendant was acquitted in a separate trial of the identical charges that had been filed against defendant and the trial court adjudged defendant not guilty based on the codefendant's acquittal and dismissed the charges against defendant before defendant's trial had begun, the order of dismissal was not an acquittal of defendant and was appealable by the state. State v. Arevalo, 2002-NMCA-062, 132 N.M. 306, 47 P.3d 866.

Double jeopardy did not bar state appeal. — Where defendant moved to dismiss the charges for lack of venue at jury selection and the trial court reserved a ruling until the close of the state's case in chief where the trial court granted defendant's motion, and double jeopardy had attached, double jeopardy did not bar the state's appeal. State v. Roybal, 2006-NMCA-043, 139 N.M. 341, 132 P.3d 598, cert. denied, 2006-NMCER-003, 139 N.M. 353, 132 P.3d 1039.

"Sufficiently aggrieved" rationale of finality rule. — One exception to the general rule that an appeal lies only from a final judgment, or a practical construction of the term "finality", exists when the consequences of an order that is not the last contemplated order in the case are sufficiently severe that the aggrieved party should be granted a right to appeal to alleviate hardship that would otherwise accrue if the appeal were delayed. State v. Durant, 2000-NMCA-066, 129 N.M. 345, 7 P.3d 495.

"Sufficiently aggrieved" rationale allows appeal. — Where a jury convicted defendant of felony charges, the trial court entered a conditional discharge order pursuant to Section 31-20-13 NMSA 1978, which provided that without adjudication of guilt, further proceedings would be deferred and ordered defendant to be placed on probation, complete supervision required by the probation authorities, and complete alcohol treatment, defendant had a right to appeal the conditional discharge order because, unless defendant is permitted to appeal the order, the order could be used to enhance the sentence under Section 31-18-17 NMSA 1978. State v. Durant, 2000-NMCA-066, 129 N.M. 345, 7 P.3d 495.

Where a juvenile was sentenced to six months probation pursuant to a conditional consent decree, the juvenile was sufficiently aggrieved by the decree to allow an appeal even though the consent decree was not the last order contemplated in the case, because even though the charges against the juvenile may be dismissed, the fact of the charges and the consent decree may be considered if other charges arise while the juvenile is a child. State v. Crystal B., 2001-NMCA-010, 130 N.M. 336, 24 P.3d 771.

State’s appeal of granting of suppression order. — The state cannot appeal the exclusion of an inadmissible blood alcohol report under Section 39-3-3B(2) NMSA 1978, and double jeopardy precludes the state from trying defendant again because the state refused to present any evidence to satisfy the elements of the charged offense after the jury was impaneled. State v. Gomez, 2006-NMCA-132, 140 N.M. 586, 144 P.3d 145.

Supreme court jurisdiction. — The legislature intended the supreme court to have jurisdiction over interlocutory appeals in situations where a defendant may possibly be sentenced to life imprisonment or death. State v. Smallwood, 2007-NMSC-005, 141 N.M. 178, 152 P.3d 821.

The supreme court has exclusive jurisdiction over interlocutory appeals from pretrial release orders in cases where the defendant faces a possible sentence of life imprisonment or death. State v. Brown, 2014-NMSC-038.

Children's court cases. — Because juvenile delinquency proceedings are sufficiently similar to criminal proceedings, Section 39-3-3B(2) NMSA 1978 governs in the circumstances of interlocutory appeals of suppression orders from a children's court. State v. Jade G., 2007-NMSC-010, 141 N.M. 284, 154 P.3d 659.

Appellate jurisdiction over a district court's decision in an on-record appeal from metropolitan court. — This section does not distinguish the appeal of a judgment in a criminal case originating in the district court from one originating in the metropolitan court, nor does it distinguish the appeal of a district court's on-record review from the appeal of a district court's de novo trial, and therefore the New Mexico court of appeals has appellate jurisdiction to review decisions made in on-record appeals to the district court from the metropolitan court. State v. Armijo, 2016-NMSC-021, *aff'g* 2014-NMCA-013, 316 P.3d 902.

"Criminal proceeding" includes on-record appellate decisions of the district court. — This section provides defendants in "any criminal proceeding" with the right to appeal a final judgment of the district court to the court of appeals, a reasonable interpretation of which includes a defendant's right to appeal a district court's review of an on-record metropolitan court decision. State v. Carroll, 2015-NMCA-033, cert. granted, 2015-NMCERT-001.

Where defendant was convicted of DWI following a bench trial in metropolitan court, appealed the conviction to the district court for on-record review, which was affirmed by the district court, and then appealed the district court's decision to the court of appeals, the state's claim that there is no express right to appeal a district court's on-record appellate review of a metropolitan court conviction for DWI was in error; a reasonable interpretation of "criminal proceeding" includes a district court's on-record review of a metropolitan court decision; therefore a defendant has the right to appeal a district court's review of an on-record metropolitan court decision. State v. Carroll, 2015-NMCA-033, cert. granted, 2015-NMCERT-001.

District court jurisdiction over issues not included in appeal. — Where defendant was indicted by two separate grand juries; the two indictments were joined for trial; defendant was convicted of violating an order of protection; the district court declared a mistrial on the remaining charges, because the jury was unable to reach a verdict; defendant appealed the conviction of violating an order of protection; and during the pendency of defendant's appeal, defendant was retried and convicted on the mistrial charges, defendant's appeal was limited to only the conviction of violating an order of protection and the district court retained jurisdiction to retry the unresolved charges. State v. Gutierrez, 2011-NMCA-088, 150 N.M. 505, 263 P.3d 282, cert. denied, 2011-NMCERT-008, 268 P.3d 513.

Appeal of exclusion of statements made during a SANE examination. — Where the trial court excluded the victim's statements to a sexual assault nurse examiner on the morning of trial; the jury had been impaneled, but not sworn; the victim's statements identified the defendant as the perpetrator and described the criminal acts; and the

victim was available to testify, the state's appeal was timely and the evidence was sufficiently material to support an appeal. State v. Mendez, 2009-NMCA-060, 146 N.M. 409, 211 P.3d 206, rev'd on other grounds, 2010-NMSC-044, 148 N.M. 761, 242 P.3d 328.

Appeal of exclusion of prior convictions in the penalty phase of a capital felony case. — In a capital felony case, the state has a statutory right to an interlocutory appeal of the district court's pre-trial order excluding the per se introduction of the defendant's prior convictions during the penalty phase of the defendant's trial when the evidence is substantial proof of a fact material in the proceeding. State v. Sanchez, 2008-NMSC-066, 145 N.M. 311, 198 P. 3d 337.

An order denying and dismissing a petition to revoke probation is not an order from which an appeal can be taken under this section. State v. Grossetete, 2008-NMCA-088, 144 N.M. 346, 187 P.3d 692, cert. denied, 2008-NMCERT-005, 144 N.M. 331, 187 P.3d 677.

History of section. State v. Santillanes, 96 N.M. 482, 632 P.2d 359 (Ct. App.), cert. denied, 95 N.M. 426, 622 P.2d 1046 (1980), aff'd in part, rev'd in part, 96 N.M. 477, 632 P.2d 354 (1981).

Computation of time period. — Rule 12-308A NMRA governs the computation of the ten-day period under Paragraph B(2). State v. Fernandez, 1999-NMCA-128, 128 N.M. 111, 990 P.2d 224.

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, 117 N.M. 273, 871 P.2d 369 (1994).

Court error may excuse late appeal. — One unusual circumstance that 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, 117 N.M. 273, 871 P.2d 369 (1994).

Supreme court has authority to issue writs of certiorari directed to the court of appeals in a criminal case where the conditions of 34-5-14 NMSA 1978 are met, and the court's original jurisdiction to issue writs of certiorari, as provided for in N.M. Const., art. VI, § 3, leaves no doubt as to the power of the court to issue such writs. State v. Gunzelman, 85 N.M. 295, 512 P.2d 55 (1973), overruled on other grounds, State v. Orosco, 113 N.M. 780, 833 P.2d 1146 (1992).

Entry of judgment. — An appeal can be taken only after entry of judgment. State v. Edmondson, 112 N.M. 654, 818 P.2d 855 (Ct. App.), cert. quashed, 112 N.M. 641, 818 P.2d 419 (1991).

Final order. — An order is final if all issues of law and fact necessary to be determined have been determined and the case has been completely disposed of to the extent that the court has power to dispose of it. State v. Webb, 111 N.M. 78, 801 P.2d 660 (Ct. App.), cert. denied, 111 N.M. 164, 803 P.2d 253 (1990).

Initial orders not final. — Where the trial court had made only the initial orders in a multi-part proceeding to determine defendant's competency to stand trial for murder, the orders finding defendant dangerous and incompetent to stand trial from which he appealed were not final orders subject to appellate review. State v. Webb, 111 N.M. 78, 801 P.2d 660 (Ct. App.), cert. denied, 111 N.M. 164, 803 P.2d 253 (1990).

Order allowing withdrawal of a plea agreement is not a final order for purpose of filing an appeal under Subsection B(1) of this section. State v. Griego, 2004-NMCA-107, 136 N.M. 272, 96 P.3d 1192.

Where the district court specifically found that the state presented no witnesses or evidence to substantiate its claim that its case would be prejudiced by a loss of witnesses or evidence if the plea was withdrawn, without a factual basis in the record, the state=s bare assertions of prejudice gives no reason to find such a substantial interest so as to create an exception to the rule requiring appeals be taken only from final orders. State v. Griego, 2004-NMCA-107, 136 N.M. 272, 96 P.3d 1192.

Magistrate court orders suppressing evidence were not final orders in either an actual or practical sense. State v. Heinsen, 2004-NMCA-110, 136 N.M. 295, 97 P.3d 627, aff'd 2005-NMSC-035, 138 N.M. 441, 121 P.3d 1040.

Order disqualifying counsel. — A trial court order disqualifying defendant's counsel is not a final, appealable order. State v. Pacheco, 115 N.M. 325, 850 P.2d 1028 (Ct. App. 1993).

Review of disqualification of prosecutor. — On appeal from an order dismissing an indictment the appellate courts may also review a second portion of the order that disqualifies the prosecutor on grounds related to those supporting the dismissal of the indictment. State v. Armijo, 118 N.M. 802, 887 P.2d 1269 (Ct. App. 1994).

Allowance of interlocutory appeal is discretionary with the appellate court. State v. Hernandez, 95 N.M. 125, 619 P.2d 570 (Ct. App.), cert. denied, 95 N.M. 299, 621 P.2d 516 (1980).

Trial court does not have authority to grant interlocutory appeal. State v. Garcia, 91 N.M. 131, 571 P.2d 123 (Ct. App. 1977).

When permission to appeal from interlocutory order is denied, the appellate court never assumes jurisdiction of the matter, consequently, jurisdiction remains in the trial court and there is nothing to prevent the trial court from proceeding to try the pending case. State v. Hernandez, 95 N.M. 125, 619 P.2d 570 (Ct. App.), cert. denied, 95 N.M. 299, 621 P.2d 516 (1980).

Court of appeals granted interlocutory appeal on denied motion to dismiss. — Where on the basis of the municipal court convictions defendant moved that the indictment be dismissed, claiming the district court prosecution was barred by the constitutional prohibition against double jeopardy which the district court denied, the court of appeals granted an interlocutory appeal pursuant to this section. State v. Tanton, 88 N.M. 5, 536 P.2d 269 (Ct. App.), rev'd on other grounds, 88 N.M. 333, 540 P.2d 813 (1975).

Exceptions to dismissal of indictment or information. — Although Subsection B(1) of this section requires that the order dismiss the indictment or information, there are exceptions to this general rule. State v. Griego, 2004-NMCA-107, 136 N.M. 272, 96 P.3d 1192.

No appeal from denial of motion to suppress. — Where defendant filed a motion to suppress which was denied by the trial court, and defendant attempted to appeal from that order, relying on language of the trial court attempting to grant an interlocutory appeal, there was no final judgment in this case or any matter involving conditions of release, and the appeal did not come within this section. State v. Garcia, 91 N.M. 131, 571 P.2d 123 (Ct. App. 1977).

Appeal from suppression order. — Since the state has no constitutional appeal as of right from a suppression order, the time for filing such an appeal is governed by the ten-day limit in Paragraph B(2) of this section and not the thirty-day limit provided for in Rule 12-201A NMRA. State v. Alvarez, 113 N.M. 82, 823 P.2d 324 (Ct. App.), cert. denied, 113 N.M. 23, 821 P.2d 1060 (1991).

Because the state did not intend to use at trial any of the physical evidence seized or statements made as the result of a stop, the state would have been unable to, and indeed was not required, to appeal the suppression order within ten days after the trial court's ruling. State v. Harris, 116 N.M. 234, 861 P.2d 275 (Ct. App. 1993).

The right of the state to appeal orders of suppression from the district court is created by statute as set forth in Subsection B of this section, which has been held not to be a statutory codification of the state's constitutional right to appeal. State v. Heinsen, 2004-NMCA-110, 136 N.M. 295, 97 P.3d 627, aff'd, 2005-NMSC-035, 138 N.M. 441, 121 P.3d 1040.

The state may obtain judicial review of a suppression order of a magistrate court by filing a nolle prosequi to dismiss some or all of the charges in the magistrate court after

the suppression order is entered, and refiling in the district court for a trial de novo. State v. Heinsen, 2005-NMSC-035, 138 N.M. 441, 121 P.3d 1040.

Timeliness of appeal. — Where the suppression orders were filed on January 15, 2003, and the notice of appeal was filed on January 24, 2003, it was timely under Subsection B(2) of this section. State v. Jade G., 2005-NMCA-019, 137 N.M. 128, 108 P.3d 534, aff'd 2007-NMSC-010, 141 N.M. 284, 154 P.3d 659.

Tolling of appeal period. — Motions to reconsider filed within the permissible appeal period suspend the finality of an appealable order or judgment and toll the time to appeal until the district court has ruled on the motion. State v. Suskiewich, 2014-NMSC-040.

Untimely notice of appeal. — Where state's motion to reconsider district court's order suppressing evidence was filed outside the permissible ten-day appeal period set forth in Subsection B(2) of this section, the motion did not toll the appeal period, and the state's notice of appeal, filed nine days after the denial of the motion to reconsider, was untimely. State v. Suskiewich, 2014-NMSC-040.

Docketing statement treated as application for interlocutory appeal. — Where the docketing statement proceeded on the basis that the appeal was as of right, and it was not, the court of appeals treated the docketing statement as an application for an interlocutory appeal, and denied it. State v. Garcia, 91 N.M. 131, 571 P.2d 123 (Ct. App. 1977).

State's right to appeal independent of statutory authority. — Where the district court dismissed the state's motion to revoke defendant's probation on the ground that the adjudicatory hearing on the motion did not occur within 100 days after defendant was arrested contrary to the requirement of Rule 5-805 NMRA, the district court acted as a matter of law and the state's right to appeal stemmed from N.M. const., art. IV, § 2 and was independent of Section 39-3-3 NMSA 1978. State v. Montoya, 2011-NMCA-009, 149 N.M. 242, 247 P.3d 1127, cert. denied, 2011-NMCERT-001, 150 N.M. 558, 263 P.3d 900.

State's constitutional right to appeal. — This section recognizes the state's constitutional right to appeal, identifies circumstances permitting ordinary and interlocutory appeals and affirms the constitutional prohibition against appeals that would violate double jeopardy principles. State v. Santillanes, 96 N.M. 482, 632 P.2d 359 (Ct. App. 1980), aff'd in part, rev'd in part, 96 N.M. 477, 632 P.2d 354 (1981).

The state has a constitutional right to appeal an order of the trial court which struck the enhancement portion of an indictment and dismissed the enhancement proceeding, with prejudice. State v. Santillanes, 96 N.M. 482, 632 P.2d 359 (Ct. App. 1980), aff'd in part, rev'd in part, 96 N.M. 477, 632 P.2d 354 (1981).

Certification is neither a jurisdictional limitation nor a mandatory precondition. — New Mexico law does not bar appellate review when the state timely files its notice of appeal but fails to make the necessary certification to the district court or attach a copy of the certification to the notice of appeal. Section 39-3-3(B)(2) NMSA 1978 does not limit the court of appeal's general subject matter jurisdiction either expressly or implicitly. Rule 12-202(D) NMRA does not establish a mandatory precondition to an appeal. State v. Vasquez, 2014-NMSC-010, rev'g 2012-NMCA-107.

Remedy for failure to file a certification. — When the prosecutor files an interlocutory appeal and fails to make a timely certification to the district court or fails to attach a copy of the certification to the notice of appeal, the interlocutory appeal should not be dismissed for lack of jurisdiction. Instead of summarily dismissing an appeal that may affect a defendant's substantive rights, the better policy is to assess the circumstances of each case and hear the appeal when (1) the intent to appeal a specific judgment can be fairly inferred, and (2) the defendant is not prejudiced by any technical error or mistake. Sanctions are an appropriate means to ensure compliance with Rule 12-202 NMRA. State v. Vasquez, 2014-NMSC-010, rev'g 2012-NMCA-107.

Failure to file a certification. — Where defendant was charged with criminal sexual contact of a minor child; the district court excluded the testimony of the child and the parent of the child because the defense had not been able to interview them; the state filed an interlocutory appeal that did not contain the district attorney's certification to the district court as provided for in 39-3-3(B)(2) NMSA 1978; and a year after filing the interlocutory appeal and before the court of appeals heard the appeal, the state filed an amended notice of appeal that included the certification language and stated that the notice of appeal related back to the original notice of appeal; and the state's intent to appeal the exclusion of the two critical witnesses could be fairly inferred from the record and defendant was not prejudiced by the state's failure to attach a copy of the certification to the notice of appeal, the court of appeals erred in dismissing the interlocutory appeal for lack of jurisdiction. State v. Vasquez, 2014-NMSC-010, rev'g 2012-NMCA-107.

Certification language is mandatory. — Filing a timely appeal and the inclusion of the certification that the appeal is not taken for purposes of delay and that the evidence that has been suppressed is a substantial proof of a fact material in the proceeding in the state's notice of appeal are mandatory preconditions to the exercise of the court of appeals' jurisdiction to hear the state's appeal and the court of appeals will not exercise its discretion to hear the state's appeal when the certification is lacking, absent a showing of exceptional circumstances. State v. Vasquez, 2012-NMCA-107, 288 P.3d 520, rev'd, 2014-NMSC-010.

Where the district court excluded the testimony of the alleged victim and the victim's parent in a case of sexual contact of a minor, kidnapping and bribery of a witness; the state filed a timely notice of appeal, but failed to certify that the appeal was not taken for purposes of delay and that the excluded evidence was substantial proof of a material fact in the case; the state filed an amended notice of appeal almost one year later which

included the required certification; the state never requested leave to amend the notice of appeal or an extension of the filing deadline; and the state explained the failure to include the certification in the notice of appeal as an inadvertent omission, the court of appeals did not have jurisdiction to hear the appeal because the state failed to show exceptional circumstances to justify its failure to file a notice of appeal that complied with the mandatory statutory requirements and the amended notice of appeal did not relate back to the filing of the original notice of appeal. State v. Vasquez, 2012-NMCA-107, 288 P.3d 520, rev'd, 2014-NMSC-010.

Appeals by state. — Although the state may appeal an order granting a new trial in a criminal case, an immediate appeal is limited to an order in which it is claimed: (1) the grant of a new trial was based on an erroneous conclusion; (2) prejudicial legal error occurred during the trial; or, (3) newly-discovered evidence warrants a new trial. Thus, an immediate appeal by the state of an order granting a new criminal trial is limited to issues of law. State v. Griffin, 117 N.M. 745, 877 P.2d 551 (1994).

The state may appeal any order dismissing one or more counts of a complaint, indictment, or information, regardless of whether the dismissal is with prejudice. State v. Armijo, 118 N.M. 802, 887 P.2d 1269 (Ct. App. 1994).

The state has the right to appeal a ruling excluding the state's witness where the ruling was based on an interpretation of the contributing to the delinquency of a minor statute that controls the course of the presentation of material evidence in the case. State v. Romero, 2000-NMCA-029, 128 N.M. 806, 999 P.2d 1038.

Appeal after remand to magistrate. — District court's order remanding defendant's misdemeanor DWI trial to magistrate court was, in effect, a dismissal of the charges against defendant; thus, under the doctrine of practical finality, the appellate court had jurisdiction to review the state's appeal. State v. Ahasteen, 1998-NMCA-158, 126 N.M. 238, 968 P.2d 328, cert. denied, 126 N.M. 532, 972 P.2d 351 (1988).

Rule restricting state's bases for appeal retracted. — Restrictive nature of Rule 71(b), N.M.R.P. Metro. Cts. (now Rule 7-703B), in providing only two bases for appeal by the state, unconstitutionality of statute and insufficiency of complaint, limits the state's substantive right to appeal provided by the New Mexico constitution and is therefore invalid and retracted. Smith v. Love, 101 N.M. 355, 683 P.2d 37 (1984)(decided under prior law).

Post-conviction proceedings must be invoked before habeas corpus may be sought. In re Martinez, 99 N.M. 198, 656 P.2d 861 (1982).

Federal habeas review denied. — Because of the petitioner's default in not appealing his convictions and sentences directly in state court, federal habeas review of his claims is barred unless the petitioner can demonstrate cause for the default and actual prejudice as a result of the alleged violation; the petitioner would have to show that some objective factor external to the defense impeded his efforts to comply with the

state's procedural rule. Lepiscopo v. Tansy, 38 F.3d 1128 (10th Cir. 1994), cert. denied, 514 U.S. 1025, 115 S. Ct. 1376, 131 L. Ed. 2d 230 (1995).

Presumption of ineffective assistance of counsel. — The conclusive presumption of ineffective assistance of counsel established in State v. Duran, 1986-NMCA-125, 105 N.M. 231, 731 P.2d 374 applies to appeals from a de novo trial in district court following a conviction in magistrate or municipal court. State v. Cannon, 2014-NMCA-058, cert. denied, 2014-NMCERT-006.

Where defendant was convicted of aggravated DWI by a jury in magistrate court; defendant timely appealed the conviction to district court and filed a demand for a jury trial; the district court denied defendant's request for a jury trial; at a bench trial, the district court found defendant guilty of DWI; and defendant filed an untimely notice of appeal with the district court, defense counsel was conclusively presumed to be ineffective. State v. Cannon, 2014-NMCA-058, cert. denied, 2014-NMCERT-006.

Presumption of ineffective assistance of counsel applies to failure to file timely notice of appeal. — A criminal defendant, whose counsel files an untimely notice of appeal from the district court's on-record review of a metropolitan court decision, is entitled to a conclusive presumption of ineffective assistance of counsel. State v. Vigil, 2014-NMCA-096, cert. granted, 2014-NMCERT-009.

Presumption of ineffective assistance of counsel for failure to timely file a notice of appeal still applies after four years of inaction. — The first and foremost reason that the passage of time alone does not prevent application of the presumption of ineffective assistance of counsel for failure to timely file a notice of appeal is based on the fundamental premise that the rights implicated by the presumption, the right to appeal and the right to effective assistance of counsel, protect a defendant's fundamental liberty interest in a fair trial. This interest is no less significant after the deadline for appeal than it was before the deadline, nor does it diminish over time, and therefore where defendant appealed from a stipulated corrected sentence that was entered four years after the original judgment and sentence, after which defendant filed neither an appeal nor an affidavit of waiver, the presumption of ineffective assistance of counsel for failure to file a timely notice of appeal still applied. State v. Dorais, 2016-NMCA-049, cert. denied, 2016-NMCERT-____.

Untimely notice waived where counsel ineffective. — Where defendant's counsel filed a notice of appeal sixty-two days after the entry of an order revoking defendant's probation and failed to timely file a motion for an extension of time; the court of appeals determined that defendant had a right to counsel at the probation revocation hearing because defendant raised issues that required assistance of counsel, the filing of the notice of appeal was defendant's counsel's responsibility because it is only after the filing of the docketing statement that trial counsel's responsibility to the client ceases, defendant had a fundamental liberty interest at stake in the revocation of defendant' probation that entitled defendant to minimal due process, and defendant had a right to appeal the revocation which defendant had not waived, the court of appeals presumed

that defendant’s counsel’s failure to timely file a notice of appeal was per se ineffective assistance of counsel and considered defendant’s appeal as if timely filed. State v. Leon, 2013-NMCA-011, 292 P.3d 493, cert. granted, 2012-NMCERT-012.

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

For annual survey of New Mexico law relating to criminal procedure, see 12 N.M.L. Rev. 271 (1982).

For article, "Jurisdiction as May Be Provided by Law: Some Issues of Appellate Jurisdiction in New Mexico," see 36 N.M.L. Rev. 215 (2006).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 4 Am. Jur. 2d Appellate Review § 223 et seq.

Power of trial court indirectly to extend time for appeal, 89 A.L.R. 941, 149 A.L.R. 740.

Lower court's consideration, on the merits, of unseasonable application for new trial, rehearing, or other reexamination, as affecting time in which to apply for appellate review, 148 A.L.R. 795.

Failure, due to fraud, duress, or misrepresentation by adverse party, to file notice of appeal within prescribed time, 149 A.L.R. 1261.

Construction of federal statute (28 USC § 2255), dealing with vacation, by direct attack, of sentence in criminal case on ground that it violated Constitution or laws, or exceeded jurisdiction, or is otherwise subject to collateral attack, 20 A.L.R.2d 976.

Exclusion or inclusion of terminal Sunday or holiday in computing time for taking or perfecting appellate review, 61 A.L.R.2d 482.

Appealability of order arresting judgment in criminal case, 98 A.L.R.2d 737.

When criminal case becomes moot so as to preclude review of or attack on conviction or sentence, 9 A.L.R.3d 462.

Adequacy of defense counsel's representation of criminal client regarding appellate and postconviction remedies, 15 A.L.R.4th 582.

Appealability of state criminal court order requiring witness other than accused to undergo psychiatric examination, 17 A.L.R.4th 867.

4 C.J.S. Appeal & Error § 264 et seq.

39-3-4. Interlocutory order appeals from district court.

A. In any civil action or special statutory proceeding in the district court, when the district judge makes an interlocutory order or decision which does not practically dispose of the merits of the action and he believes the order or decision involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order or decision may materially advance the ultimate termination of the litigation, he shall so state in writing in the order or decision.

B. The supreme court or court of appeals has jurisdiction over an appeal from such an interlocutory order or decision, as appellate jurisdiction may be vested in those courts. Within fifteen days after entry of the order or decision, any party aggrieved may file with the clerk of the supreme court or court of appeals an application for an order allowing an appeal, accompanied by a copy of the interlocutory order or decision.

C. Application under this section for an order allowing appeal does not stay proceedings in the district court unless so ordered by the district judge or a judge or justice of the court to which application is made.

History: 1953 Comp., § 21-10-3, enacted by Laws 1971, ch. 40, § 1; 1999, ch. 80, § 1.

ANNOTATIONS

Cross references. — For appellate jurisdiction of supreme court, *see* N.M. Const., art. VI, § 2; 39-3-2, 39-3-3 NMSA 1978.

For jurisdiction of court of appeals, *see* N.M. Const., art. VI, § 29.

For Uniform Certification of Questions of Law Act, *see* Chapter 39, Article 7 NMSA 1978.

For appellate jurisdiction of court of appeals, *see* 34-5-8 NMSA 1978.

For when appeals taken, *see* Rules 12-201 and 12-203 NMRA.

For procedure on certiorari to review decision of court of appeals, *see* Rule 12-502 NMRA.

For procedure on certification from court of appeals, *see* Rule 12-606 NMRA.

The 1999 amendment, effective July 1, 1999, in Subsection B, substituted "fifteen days" for "ten days" in the second sentence, and deleted the former last sentence, which read "If an application has not been acted upon within twenty days, it shall be deemed denied", and made a minor stylistic change.

Final order as to one plaintiff. — Where both plaintiffs were parties to counts I through III of the complaint; plaintiff Bigbyte was not a party to count IV; the parties dismissed

count III; the district court granted summary judgment against plaintiffs on counts I and II; count IV remained pending before the district court; and the district court's summary judgment provided that the summary judgment did not practically dispose of the merits of the case, but did finally dispose of the claims raised in counts I and II; that the summary judgment involved a controlling question of law as to which there was a substantial ground for differences of opinion, and "an immediate appeal from the summary judgment may materially advance the ultimate termination of litigation and there is no just cause for delay"; the summary judgment was a final judgment as to Bigbyte because all of Bigbyte's claims had been disposed of and the summary judgment did not contain express language stating that the summary judgment was not a final order as to Bigbyte. Santa Fe Pacific Trust, Inc. v. City of Albuquerque, 2012-NMSC-028, 285 P.3d 595.

Appeal of barred issues. — An application for interlocutory appeal will not be granted where the controlling questions of law advanced by the appellant relate to issues that the district court, in its partial judgment, barred as untimely raised. Ellis v. Cigna Prop. & Cas. Cos., 2007-NMCA-123, 142 N.M. 497, 167 P.3d 945, cert. denied, 2007-NMCERT-009, 142 N.M. 715, 169 P.3d 408.

Jurisdiction over interlocutory appeal. — Court of appeals had jurisdiction to entertain petitioner's application for interlocutory appeal, even though the application was granted more than 20 days after it was filed. Lovelace Med. Ctr. v. Mendez, 111 N.M. 336, 805 P.2d 603 (1991).

The legislature did not intend the 20-day requirement in this section to be a limitation on the appellate courts' jurisdiction, conferred by that section, over interlocutory appeals. The requirement, in other words, was intended to assist the courts with the management of their cases in the absence of some other provision, not to limit the courts' jurisdiction. Lovelace Med. Ctr. v. Mendez, 111 N.M. 336, 805 P.2d 603 (1991).

Allowance of interlocutory appeal is discretionary with the appellate court. State v. Hernandez, 95 N.M. 125, 619 P.2d 570 (Ct. App.), cert. denied, 95 N.M. 299, 621 P.2d 516 (1980).

Requirements of interlocutory appeals. — Interlocutory appeals require the existence of a substantial difference of opinion on a controlling issue of law. Starko, Inc., et al. v. Cimarron Health Plan, Inc., 2005-NMCA-040, 137 N.M. 310, 110 P.3d 526, cert denied, 2005-NMCERT-004, 137 N.M. 454, 112 P.3d 1111.

Allowance of appeal not subject to challenge. — The acceptance of an appeal by the court of appeals when there has been compliance with Subsection A of this section, is not subject to challenge. Salazar v. St. Vincent Hosp., 96 N.M. 409, 631 P.2d 315 (Ct. App.), aff'd in part, rev'd in part, 95 N.M. 147, 619 P.2d 823 (1980).

When permission to appeal from interlocutory order is denied, the appellate court never assumes jurisdiction of the matter; consequently, jurisdiction remains in the trial

court and there is nothing to prevent the trial court from proceeding to try the pending case. State v. Hernandez, 95 N.M. 125, 619 P.2d 570 (Ct. App.), cert. denied, 95 N.M. 299, 621 P.2d 516 (1980).

Extension of time for interlocutory appeal. — Absent statutory authority or supreme court rule, appellate courts may not extend the time for an interlocutory appeal, even to relieve against mistake, inadvertence or accident. However, in appropriate circumstances, the district court may reconsider the issue and enter a second interlocutory order from which application for a timely interlocutory appeal may be made. Candelaria v. Middle Rio Grande Conservancy Dist., 107 N.M. 579, 761 P.2d 457 (Ct. App. 1988).

Section gives jurisdiction to appellate court to deny motion for summary judgment. — This section, along with 34-5-8 NMSA 1978, gives court of appeals jurisdiction over interlocutory appeal from an order or decision which does not practically dispose of the merits of the case. Therefore court could hear appeal of defendant whose motion for summary judgment in medical malpractice suit was denied. Vaca v. Whitaker, 86 N.M. 79, 519 P.2d 315 (Ct. App. 1974).

Section does not give jurisdiction to appellate court to grant motion to dismiss. — Where an order denying defendant's motion to dismiss was a part of the main action, no final judgment or interlocutory order which practically disposed of the merits having been entered, and the order did not contain the requisite finding on which to base an application for an interlocutory appeal under this section, the argument that a decision whether to make the requisite finding should only have been made by the judge who held the motion hearing and could not have properly been made by a different judge was not an issue in the appeal because the order denying the motion to dismiss was not an appealable order. Miller v. City of Albuquerque, 88 N.M. 324, 540 P.2d 254 (Ct. App.), cert. denied, 88 N.M. 319, 540 P.2d 249 (1975).

Order disqualifying counsel. — Although an order disqualifying counsel may not be properly appealed under the collateral order doctrine, an appellate court may hear the issue if it is certified by the trial court for interlocutory appeal. Sanders v. Rosenberg, 119 N.M. 811, 896 P.2d 491 (Ct. App.), rev'd on other grounds, 1997-NMSC–002, 122 N.M. 692, 930 P.2d 1144 (1995).

Denial of motion for protective order held not appealable. — Doctors' appeal from order denying motion for protective order, which sought to have court order a stay in taking of deposition of patient seeking to perpetuate testimony until such time as court first determined competency of patient as witness, was not an appealable final judgment and was not appealable as interlocutory order where order did not comply with this section. In re Deposition of Bartow, 101 N.M. 532, 685 P.2d 387 (Ct. App. 1984).

Appeals from children's court. — The court of appeals has jurisdiction over appeals from interlocutory orders from the children's court pursuant to this section, as the

children's court is a division of the district court. In re Doe, 85 N.M. 691, 516 P.2d 201 (Ct. App. 1973).

This section is not applicable to appeals from judgments of the children's court where the child was alleged to be delinquent or in need of supervision. Health & Social Servs. Dep't v. Doe, 91 N.M. 675, 579 P.2d 801 (Ct. App. 1978).

Remand of zoning decision not final. — The district court's remand of a zoning matter to the city council was not a final, appealable order; before a party would have the right to challenge that order on appeal to the court of appeals, it would have to await the council decision on remand, obtain review of the council decision in district court, and then appeal the district court judgment. High Ridge Hinkle Joint Venture v. City of Albuquerque, 119 N.M. 29, 888 P.2d 475 (Ct. App.), cert. denied, 119 N.M. 20, 888 P.2d 46 (1994), aff'd, 123 N.M. 394, 940 P.2d 1189 (1997), rev'd on other grounds, 1998-NMSC-050, 126 N.M. 413, 970 P.2d 599.

Order not final appealable order. — Where court order contained language required to certify an order for interlocutory appeal, and order also contained language certifying an order for immediate appeal as of right, the order is not a final appealable order. Sys. Tech., Inc. v. Hall, 2004-NMCA-130, 136 N.M.548 , 102 P.3d 107.

Law reviews. — For comment, "New Mexico's Analogue to 28 U.S.C. § 1292(b): Interlocutory Appeals Come to the State Courts," see 2 N.M. L. Rev. 113 (1972).

For article, "Judicial Adoption of Comparative Fault in New Mexico: The Time Is at Hand," see 10 N.M.L. Rev. 3 (1979-80).

For annual survey of New Mexico law relating to civil procedure, see 13 N.M.L. Rev. 251 (1983).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 4 Am. Jur. 2d Appellate Review § 84 et seq.; 5 Am. Jur. 2d Appellate Review § 967 et seq.

Appealability of interlocutory orders in proceedings in bankruptcy, 33 A.L.R.2d 1366.

Reviewability, on appeal from final judgment, of interlocutory order, as affected by fact that order was separately appealable, 79 A.L.R.2d 1352.

Reviewability of order denying motion for summary judgment, 15 A.L.R.3d 899.

Appealability of order staying, or refusing to stay, action because of pendency of another action, 18 A.L.R.3d 400.

Appealability of state criminal court order requiring witness other than accused to undergo psychiatric examination, 17 A.L.R.4th 867.

Appealability of interlocutory or pendente lite order for temporary child custody, 82 A.L.R.5th 389.

4 C.J.S. Appeal and Error §§ 81, 298, 397; 5 C.J.S. Appeal and Error § 716.

39-3-5. Writs of error.

Writs of error to bring into the supreme court any cause adjudged or determined in any of the district courts, as provided by law, may be issued by the supreme court, or any justice thereof, if application is made within the time provided by law for the taking of appeals. A writ of error shall issue from the supreme court to the district court only in those actions wherein appellate jurisdiction has not been vested by law in the court of appeals.

History: Laws 1917, ch. 43, § 4; 1927, ch. 93, § 2; C.S. 1929, § 105-2504; 1953 Comp., § 21-10-3.1; Laws 1966, ch. 28, § 37.

ANNOTATIONS

Cross references. — For writs of error, *see* Rule 12-503 NMRA.

Compiler's notes. — Laws 1966, ch. 28, § 37, recompiled this section. It had been omitted by the compilers of the 1941 Compilation as superseded by the Supreme Court Rules.

Writ of error is an appropriate means for invoking collateral order doctrine. Carrillo v. Rostro, 114 N.M. 607, 845 P.2d 130 (1992).

Law reviews. — For note, "The Adoption of the Collateral Order Doctrine in New Mexico: *Carrillo v. Rostro*," see 24 N.M.L. Rev. 389 (1994).

For article, "Jurisdiction as May Be Provided by Law: Some Issues at Appellate Jurisdiction in New Mexico," see 36 N.M.L. Rev. 215 (2006).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 4 C.J.S. Appeal and Error § 356 et seq.

39-3-6. Continuation in supreme court and court of appeals.

Cases which are argued or submitted in the supreme court or court of appeals during any term which are not decided during that term shall be deemed continued from term to term until disposed of.

History: Laws 1917, ch. 43, § 42; C.S. 1929, § 105-2524; 1941 Comp., § 19-1004; 1953 Comp., § 21-10-4; Laws 1966, ch. 28, § 38.

ANNOTATIONS

Cross references. — For supreme court terms, sessions and recesses, *see* N.M. Const., art. VI, § 7.

For disposition of cause, *see* Rule 12-402 NMRA.

39-3-7. Appeals from district court; special statutory proceedings.

Within thirty days from the entry of any final judgment or decision, any interlocutory order or decision which practically disposes of the merits of the action or any final order after entry of judgment which affects substantial rights, in any special statutory proceeding in the district court, any party aggrieved may appeal therefrom to the supreme court or to the court of appeals, as appellate jurisdiction may be vested by law in these courts.

History: Laws 1937, ch. 197, § 1; 1941 Comp., § 19-1005; 1953 Comp., § 21-10-5; Laws 1966, ch. 28, § 39.

ANNOTATIONS

Cross references. — For appellate jurisdiction of supreme court, *see* N.M. Const., art. VI, § 2.

For court of appeals jurisdiction, *see* N.M. Const., art. VI, § 29.

For special statutory proceedings, *see* Rule 12-601 NMRA.

This section allows interlocutory appeals to aggrieved parties in special proceedings. State v. Jade G., 2005-NMCA-019, 137 N.M. 128, 108 P.3d 534, aff'd, 2007-NMSC-010, 141 N.M. 284, 154 P.3d 659.

Applicability to tax sales. — This section does not apply to proceeding for sale of property and tax sale certificates. In re Sevilleta De La Joya Grant, 41 N.M. 305, 68 P.2d 160 (1937); In re Blatt, 41 N.M. 269, 67 P.2d 293, 110 A.L.R. 656 (1937).

Applicability to remedies created by statute, not known at common law. — The proceedings contemplated by this section are statutory proceedings to enforce rights and remedies created by statute and unknown to the common law and equity practice of England prior to 1776. In re Forest, 45 N.M. 204, 113 P.2d 582 (1941).

Appeal from order in condemnation case. — A district court order in a condemnation case granting immediate possession of land where the court had not yet awarded damages was not a final appealable order. City of Sunland Park v. Paseo Del Norte Ltd. P'ship, 1999-NMCA-124, 128 N.M. 163, 990 P.2d 1286.

Appeal from board of embalmers and funeral directors. — Where counsel for the board failed to point out any provision of the Funeral Directors and Embalmers Act

permitting an appeal to the supreme court of the judgment of the district in the statutory review of the board's decision, the supreme court entertained the appeal under the authority of Supreme Court Rule 5(6), (now Rule 12-601 NMRA); although this section omitted a material portion of Supreme Court Rule 5(6) as adopted. Gonzales v. N.M. State Bd. of Embalmers & Funeral Dirs., 63 N.M. 13, 312 P.2d 541 (1957).

City labor management relations board decisions. — The court of appeals had jurisdiction of an appeal from the decision of the district court affirming a city labor management relations board holding that a proposed collective bargaining unit of fire suppression personnel included lieutenants. Las Cruces Prof. Fire Fighters v. City of Las Cruces, 1997-NMCA-044, 123 N.M. 329, 940 P.2d 177.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 4 Am. Jur. 2d Appellate Review § 120.

4 C.J.S. Appeal & Error §§ 91, 92; 5 C.J.S. Appeal and Error § 724.

39-3-8. Cross appeals.

Cross appeal may be taken by giving notice thereof, as provided for appeals, within thirty days after the entry of any appealable judgment, decision or order, or within fifteen days after receipt of notice of appeal or application for writ of error, whichever is later.

History: 1953 Comp., § 21-10-5.1, enacted by Laws 1966, ch. 28, § 40.

ANNOTATIONS

Cross references. — For when appeals taken, *see* Rule 12-201 NMRA.

For how appeals taken, *see* Rule 12-202 NMRA.

Rule controls over statute. — Rule 12-201 NMRA, which requires a party to file cross-appeals not later than ten days following notice of appeal, controls over this section, allowing 15 days to file a cross-appeal. Rodriguez v. McAnally Enters., 117 N.M. 250, 871 P.2d 14 (Ct. App. 1994).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 4 Am. Jur. 2d Appellate Review § 288.

Right to perfect appeal, against party who has not appealed, by cross appeal filed after time for direct appeal has passed, 32 A.L.R.3d 1290.

4 C.J.S. Appeal and Error §§ 27, 262, 270, 348, 353.

39-3-9. [Title or possession of property involved; supersedeas bond.]

Where an appeal is taken or a writ of error sued out, from a judgment or decree of any district court involving the title to or possession of real or personal property, the trial court shall fix the amount of the supersedeas bond, if supersedeas is granted, for such sum as will indemnify the appellee for all damages that may result from such supersedeas, or from such appeal or writ of error. Said bond shall be conditioned to prosecute the appeal with effect and pay all damages and costs that may result to the appellee, if said appeal or writ of error be dismissed or the judgment or decree appealed from shall be affirmed. In case the title to or possession of real estate is involved in such action, the rental value, and all damages to improvements and waste, shall be considered elements of damages.

History: Laws 1933, ch. 6, § 1; 1941 Comp., § 19-1006; 1953 Comp., § 21-10-6.

ANNOTATIONS

Cross references. — For supersedeas and stay in civil action, *see* 39-3-22 NMSA 1978.

For supersedeas and stay, *see* Rule 12-207 NMRA.

Not applicable as bond for value of property sought. — This section was not considered to be applicable as a bond for the value of the property of which possession was sought. Burroughs v. United States Fid. & Guar. Co., 74 N.M. 618, 397 P.2d 10 (1964), overruled on other grounds, Quintana v. Knowles, 113 N.M. 382, 827 P.2d 97 (1992).

Supersedeas bond not required in adjudication of title. — Where party out of possession of real estate appeals from an adverse judgment, decreeing title in party in possession, supersedeas bond is not required. Higgins v. Fuller, 48 N.M. 215, 148 P.2d 573 (1943).

Self-executing judgment not encompassed by section. — Supersedeas bond is not required where, under judgment from which appeal is made, there would be no judgment to stay nor any change as to status of the parties regarding either title or possession, as a self-executing judgment, order or decree which does not command or permit performance of an act or which cannot be actively enforced by execution, etc., is not encompassed by the section. Higgins v. Fuller, 48 N.M. 215, 148 P.2d 573 (1943).

The posting of a supersedeas bond is necessary to maintain the status quo when appealing from a judgment decreeing ownership of realty in a party not in possession thereof; however, such a bond is not required where, under the judgment appealed from, there exists no judgment to stay, no change in the ownership or possession of the property, and such a bond would serve no purpose. Thus, a self-executing judgment or order which does not command or permit that any act be done, or is not of a nature to be actively enforced by execution or otherwise, is not within this section. Salas v. Bolagh, 106 N.M. 613, 747 P.2d 259 (Ct. App. 1987).

If status quo to be maintained, bond to be provided. — This section is nothing more than a provision that if the status quo is to be maintained a supersedeas bond must be provided in such an amount as will "indemnify the appellee, from all damages that may result from such supersedeas," the amount to be fixed by the court. Absent an order of the court and a bond, the judgment remains in effect and may be enforced. Gregg v. Gardner, 73 N.M. 347, 388 P.2d 68 (1963).

Where posting of supersedeas bond not prerequisite to appeal. — As a precondition to operation of this section, the appellant must have moved for supersedeas, and the trial court must have granted the motion. Nothing in this section requires the appellant to post a supersedeas bond when supersedeas has not been sought and granted. Where no stay has been sought, a trial court, under this section, cannot order the appellant to post a bond. Quintana v. Knowles, 113 N.M. 382, 827 P.2d 97 (1992).

Amount of supersedeas bond was not excessive. — Where the appraised value of defendant's home was $206,000; the property sold for $100,000 or 48.7% of appraised value at the foreclosure sale; the purchaser purchased the property for a potential profit of $106,000 if the property were resold; the district court considered the lost rental value, interest on the money paid to purchase the property, and the potential for damages and waste to the property while the appeal was pending, the district court did not abuse its discretion in setting the supersedeas bond at $150,000, regardless of the fact that defendant could afford to post only a $50,000 supersedeas bond. Charter Bank v. Francoeur, 2012-NMCA-078, 287 P.3d 333, cert. granted, 2012-NMCERT-008.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 5 Am. Jur. 2d Appellate Review § 436 et seq.

When appeal is or is not deemed to have been prosecuted "with effect" or "to effect" within condition of supersedeas bond, 163 A.L.R. 410.

4 C.J.S. Appeal & Error § 421 et seq.

39-3-10. [Sections 39-3-9 and 39-3-10 NMSA 1978 supplemental.]

This act [39-3-9, 39-3-10 NMSA 1978] shall not be construed to repeal any existing statutes or rule of the supreme court regulating appellate procedure, except insofar as they may conflict with this act, but shall be construed as supplemental thereto.

History: Laws 1933, ch. 6, § 2; 1941 Comp., § 19-1007; 1953 Comp., § 21-10-7.

39-3-11. Appellate costs.

Amounts to be taxed as costs on appeals and writs of error shall be fixed by rule of procedure.

History: Laws 1917, ch. 43, § 16; 1927, ch. 93, § 4; C.S. 1929, § 105-2512; 1941 Comp., § 19-1008; 1953 Comp., § 21-10-8; Laws 1966, ch. 28, § 41.

ANNOTATIONS

Cross references. — For court of appeals fees and costs, *see* 34-5-6 NMSA 1978.

For costs, *see* Rule 12-403 NMRA.

Compiler's notes. — The title of the 1927 act did not indicate that the 1917 law was to be amended.

Requirement for bond not waived. — The requirement that a cost or supersedeas bond be filed in appeal cases within a certain time is not waived by an appellee where he seeks to take advantage of the irregularity at the first opportunity, but only where he first performs some act consistent with recognizing the regularity of the appeal. Johnson v. N.M. Fire Brick Co., 22 N.M. 124, 158 P. 796 (1916) (decided under former law).

Appeal abated where no bond filed. — Where an appellant failed to file a cost bond within 30 days as required by Laws 1917, ch. 43, § 15 (now repealed), the appeal failed or abated. Hubert v. Am.Sur. Co., 25 N.M. 131, 177 P. 889 (1918).

Motion to dismiss where no cost bond. — Where plaintiff in error has not filed a cost bond within 30 days after suing out writ of error, and the default has not been waived by defendant, the court will grant motion to dismiss. Palmer v. Allen, 19 N.M. 175, 141 P. 998 (1914) (decided under former law).

Where neither cost nor supersedeas bond is given, appeal will be dismissed. Rogers v. Herbst, 25 N.M. 408, 183 P. 749 (1919).

Failure to file bond cannot be cured. — The giving of a bond for costs, where no supersedeas bond was given, was essential to perfect an appeal or writ of error. It would appear in principle that the omission could not be cured by a later compliance with the statute after a motion to dismiss for such failure had been filed. Farmers' Dev. Co. v. Rayado Land & Irrigation Co., 18 N.M. 138, 134 P. 216 (1913), criticized in Canavan v. Canavan, 18 N.M. 468, 138 P. 200 (1914) (decided under former law).

Printing transcript not taxable charge. — There is no law compelling the printing of a transcript involving less than $1,000, so that such printing is not a taxable charge. Givens v. Veeder, 9 N.M. 405, 54 P. 879 (1898) (decided under former law).

Affirmance of judgment on remittitur did not discharge sureties from liability on appeal bond. Orr v. Hopkins, 3 N.M. (Gild.) 183, 3 P. 61 (1884), aff'd, 124 U.S. 510, 8 S. Ct. 590, 31 L. Ed. 523 (1888) (decided under former law).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 5 Am. Jur. 2d Appellate Review §§ 909, 928.

39-3-12. Indigent appeals; free process.

In any appeal, the court may grant free process, including the cost of any necessary transcripts of record, to any appellant upon a proper showing of indigency, unless the trial court certifies in writing that the appeal is not taken in good faith. Necessary costs, including costs of transcripts, shall be paid by the administrative office of the courts. Any costs awarded to an indigent appellant shall be taxed in favor of the state.

History: 1953 Comp., § 21-10-9, enacted by Laws 1977, ch. 163, § 1.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 5 Am. Jur. 2d Appellate Review § 407 et seq.

39-3-13. Transcript of record.

The official court reporter shall make an original and as many copies of transcripts of his notes as demanded, and he shall certify and file them with the clerk of the district court. These transcripts, or any portion thereof, may be used for the purpose of making up the record to be taken to the supreme court or court of appeals. The clerk of the district court shall collect the certification fee, but shall receive no compensation for transcribing. Where not otherwise fixed by statute, the court may, by rule, fix the compensation of official court reporters for extra copies filed with the clerk, which shall be paid for in advance, if demanded, by the party ordering them. The amount paid for the original and two copies of the transcript by the party ordering them shall be taxed as costs in the cause.

History: Laws 1897, ch. 73, § 174; C.L. 1897, § 2685 (174); Code 1915, § 4255; C.S. 1929, § 105-1002; 1941 Comp., § 19-1011; 1953 Comp., § 21-10-10; Laws 1966, ch. 28, § 42.

ANNOTATIONS

Cross references. — For transmission of transcript and record, *see* Rule 12-211 NMRA.

Compiler's notes. — This section may be affected by Rule 12-209, NMRA, dealing with the record on appeal, and Rule 12-403, NMRA, concerning costs, specifically the costs of the transcript.

Court's power as to printing of copies of record. — Where the transcript shows the amount in controversy to be less than $1,000, the court has no power to compel a

printing of the record and will not dismiss the appeal because of appellant's failure to file more than one copy of the record. Mora v. Schick, 4 N.M. (Gild.) 301, 13 P. 341 (1887) (decided under former law).

39-3-14. [Appellant may dismiss appeal.]

In all causes appealed, or in any other manner brought from any inferior court to any superior court, the party appealing, or so bringing said suit into the superior court, may, in like manner, dismiss his appeal in the same manner as in the preceding section provided; and when said cause is dismissed, as aforesaid, the judgment in the inferior court shall remain and be in all things as valid, as if said cause had never been removed from said inferior court.

History: Laws 1851-1852, p. 246; C.L. 1865, ch. 30, § 2; C.L. 1884, § 1858; C.L. 1897, § 2907; Code 1915, § 4294; C.S. 1929, § 105-1402; 1941 Comp., § 19-1002; 1953 Comp., § 21-10-11.

ANNOTATIONS

Compiler's notes. — The words "in like manner" and "in the same manner as in the preceding section" referred to Comp. Laws 1865, ch. 30, § 1, providing that any suit pending in district court could be dismissed in vacation by filing a written dismissal with the clerk. That section is omitted as superseded by Rule 41(a), N.M.R. Civ. P. (now see Paragraph A of Rule 1-041 NMRA), and if there is a method for dismissal of appeals from inferior courts, it would appear to be the latter provision.

This section, insofar as it applies to appeals in the supreme court, may be affected by Rule 12-401 NMRA.

Appellant has no right to dismiss his appeal in the face of a motion for affirmance well taken. Hubbell v. Armijo, 18 N.M. 68, 133 P. 978 (1913); Acequia Madre v. Meyer, 17 N.M. 371, 128 P. 68 (1912).

The plaintiff in an action of replevin in justice (now magistrate) court may not, on appeal to the district court, dismiss his appeal and thus deprive the defendant of his right to a trial as to the value of the property replevied and an assessment of damages for its detention. Strauss v. Smith, 8 N.M. 391, 45 P. 930 (1896).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 5 Am. Jur. 2d Appellate Review §§ 872, 877.

5 C.J.S. Appeal & Error § 631 et seq.

39-3-15. Appeals; contempt and habeas corpus.

A. Any person aggrieved by the judgment of the district court in any proceeding for civil contempt, and any person convicted of criminal contempt except criminal contempt committed in the presence of the court, may appeal within thirty days from the judgment of conviction to the supreme court or the court of appeals, as appellate jurisdiction may be vested by law in these courts. Any person convicted of criminal contempt of the court of appeals, except criminal contempt committed in the presence of the court of appeals, may appeal to the supreme court within thirty days from the judgment of conviction. In any case of criminal contempt, the taking of an appeal operates to stay execution of the judgment without bond.

B. In habeas corpus proceedings, where the petitioner is held upon an order, warrant or commitment of any court, and is ordered discharged and released from custody by any district court, the officer having custody of the petitioner, or the district attorney of the district wherein the proceedings are instituted, on behalf of the state, may appeal within thirty days from the order of discharge to the supreme court or the court of appeals, as appellate jurisdiction may be vested by law in these courts. The appeal shall not operate as a stay of execution. If the order of the district court is reversed, the officer from whose custody the petitioner was ordered released, his successor or any other peace officer of the state shall rearrest the petitioner and hold him for trial or commit him to jail or imprisonment as directed by the original order, warrant or commitment.

History: Laws 1917, ch. 43, § 2; C.S. 1929, § 105-2502; 1953 Comp., § 21-10-12; Laws 1966, ch. 28, § 43.

ANNOTATIONS

Cross references. — For appellate jurisdiction of supreme court, *see* N.M. Const., art. VI, § 2.

For jurisdiction of court of appeals, *see* N.M. Const., art. VI, § 29.

For habeas corpus generally, *see* 44-1-1 NMSA 1978 et seq.

Compiler's notes. — Laws 1966, ch. 28, § 43, recompiled this section. It had been omitted by the compilers of the 1941 Compilation as superseded by the Supreme Court Rules.

Right of appeal in civil contempt proceedings. — The right of appeal in civil contempt proceedings is extended to persons who have unsuccessfully sought enforcement of an order through a contempt proceeding. Kucel v. N.M. Med. Review Comm'n, 2000-NMCA-026, 128 N.M. 691, 997 P.2d 823, cert. denied, 128 N.M. 688, 997 P.2d 820 (2000).

No appeal for criminal contempt. — No appeal lies from a judgment for what is classed as a criminal contempt. Costilla Land & Inv. Co. v. Allen, 15 N.M. 528, 110 P. 847 (1910) (decided under former law).

The right of appeal is limited to final judgments rendered upon an indictment, and there is no right of appeal from commitment to jail for criminal contempt. State v. Chacon, 19 N.M. 456, 145 P. 125 (1914).

Law reviews. — 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. — 4 Am. Jur. 2d Appellate Review § 216 et seq.

39-3-16. Parties; joinder.

If there are several parties entitled to sue out a writ of error or take an appeal and any of them have separate interests in the judgment; or if the judgment, though joint in form, is substantially against one; or if some of the parties in the district court have no interests in reversing or maintaining the judgment; or if upon notice and request to join in the writ of error or appeal, they fail or refuse to do so; it is not necessary to join these parties in the writ of error or appeal. The supreme court or court of appeals may, on affidavits or from the record, determine whether or not the parties omitted should have been joined.

History: Laws 1917, ch. 43, § 5; C.S. 1929, § 105-2505; 1953 Comp., § 21-10-13; Laws 1966, ch. 28, § 44.

ANNOTATIONS

Compiler's notes. — Laws 1966, ch. 28, § 44, recompiled this section. It had been omitted by the compilers of the 1941 Compilation as superseded by the Supreme Court Rules.

Rule 12-301 NMRA provides that the appellate court may add, drop or substitute parties upon motion or on its own initiative at any stage of an appeal.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 5 Am. Jur. 2d Appellate Review §§ 268, 278.

4 C.J.S. Appeal & Error § 234 et seq.

39-3-17. Failure to join.

If any person named in the notice provided for in Section 39-3-16 NMSA 1978 does not join in the writ of error or appeal under terms contained in the notice, upon filing

proof of service of the notice, he shall thereby be forever precluded from bringing any writ of error or appeal on the same judgment, order, decision or conviction, and the cause shall proceed in the same manner as if he had been named in the writ of error or appeal.

History: Laws 1917, ch. 43, § 6; C.S. 1929, § 105-2506; 1953 Comp., § 21-10-14; Laws 1966, ch. 28, § 45.

ANNOTATIONS

Compiler's notes. — Laws 1966, ch. 28, § 45, recompiled this section. It had been omitted by the compilers of the 1941 Compilation as superseded by the Supreme Court Rules.

39-3-18. Inability to join.

When the name of any person out of this state or incapable of giving consent to the bringing of a writ of error or taking of an appeal is omitted in the writ of error or appeal, and the cause proceeds without his name, his rights shall not be impaired by the judgment on the writ of error or appeal, and he may bring his separate writ of error or appeal in the same manner as if no former writ or appeal had been brought.

History: Laws 1917, ch. 43, § 7; C.S. 1929, § 105-2507; 1953 Comp., § 21-10-15; Laws 1966, ch. 28, § 46.

ANNOTATIONS

Compiler's notes. — Laws 1966, ch. 28, § 46, recompiled this section. It had been omitted by the compilers of the 1941 Compilation as superseded by the Supreme Court Rules.

39-3-19. Death of party before review.

If a judgment is rendered against several persons and one or more of them dies, a writ of error or appeal may be brought by any survivors or by the successors in interest of the decedent.

History: Laws 1917, ch. 43, § 9; C.S. 1929, § 105-2509; 1953 Comp., § 21-10-16; Laws 1966, ch. 28, § 47.

ANNOTATIONS

Compiler's notes. — Laws 1966, ch. 28, § 47, recompiled this section. It had been omitted by the compilers of the 1941 Compilation as superseded by the Supreme Court Rules.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 4 C.J.S. Appeal & Error § 245.

39-3-20. Death of party pending review.

If any party to an appeal or writ of error dies after appeal is taken or writ of error sued out, but before final judgment thereon, the appeal or writ of error shall not abate thereby. The death shall be suggested to the supreme court or court of appeals by any surviving party, and the court shall proceed as may be provided by rule of procedure.

History: Laws 1917, ch. 43, § 10; 1927, ch. 93, § 3; C.S. 1929, § 105-2510; 1953 Comp., § 21-10-17; Laws 1966, ch. 28, § 48.

ANNOTATIONS

Compiler's notes. — Laws 1966, ch. 28, § 48, recompiled this section. It had been omitted by the compilers of the 1941 Compilation as superseded by the Supreme Court Rules.

Rule 12-301 NMRA provides that if a party dies after notice of appeal has been filed, the personal representative of the deceased party may be substituted as a party on motion filed in the appellate court by the representative or by any party.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 5 Am. Jur. 2d Appellate Review § 279.

Effect of death of party to divorce proceeding pending appeal or time allowed for appeal, 33 A.L.R.4th 47.

4 C.J.S. Appeal & Error §§ 246, 247.

39-3-21. Substitution of parties upon review.

Persons may be substituted as parties or compelled to become parties in cases pending in the supreme court or court of appeals in like time and manner, and with like effect, as provided for in original suits in district courts.

History: Laws 1917, ch. 43, § 14; C.S. 1929, § 105-2511; 1953 Comp., § 21-10-18; Laws 1966, ch. 28, § 49.

ANNOTATIONS

Compiler's notes. — Laws 1966, ch. 28, § 49, recompiled this section. It had been omitted by the compilers of the 1941 Compilation as superseded by the Supreme Court Rules.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 5 Am. Jur. 2d Appellate Review § 279 et seq.

4 C.J.S. Appeal & Error § 244.

39-3-22. Supersedeas and stay in civil actions.

A. There shall be no supersedeas or stay of execution upon any final judgment or decision of the district court in any civil action in which an appeal has been taken or a writ of error sued out unless the appellant or plaintiff in error, or some responsible person for the appellant or plaintiff in error, within sixty days from the entry of the judgment or decision, executes a bond to the adverse party in double the amount of the judgment complained of, with sufficient sureties, and approved by the clerk of the district court in case of appeals or by the clerk of the supreme court in case of writ of error. The bond shall be conditioned for the payment of the judgment and all costs that may be finally adjudged against the appellant or plaintiff in error if the appeal or writ of error is dismissed or the judgment or decision of the district court is affirmed. The district court, for good cause shown, may grant the appellant not to exceed thirty days' additional time within which to file the bond, and a like extension of time may be granted by the supreme court in cases of writs of error upon a like showing.

B. If the decision appealed from, or from which a writ of error is sued out, is for a recovery other than a fixed amount of money, the amount of the bond, if any, shall be fixed by the district court if an appeal is taken or, in case of a writ of error, by the chief justice or any justice of the supreme court, conditioned that the appellant or plaintiff in error shall prosecute the appeal or writ of error with diligence and that if the decision of the district court is affirmed or the appeal or writ of error is dismissed, the appellant or plaintiff in error will comply with the judgment of the district court and pay all damages and costs finally adjudged against the appellant or plaintiff in error in the district court and in the supreme court or court of appeals on the appeal or writ of error, including any legal damages caused by taking the appeal, whether the damages are assessed upon motion in the cause or in a civil action on the bond.

C. In any civil action involving a signatory, a successor of a signatory or any affiliate of a signatory to the master settlement agreement, as defined in Subsection E of Section 6-4-12 NMSA 1978, the supersedeas bond required of all appellants collectively in order to stay the execution of a judgment during the entire course of appellate review shall not exceed one hundred million dollars ($100,000,000), regardless of the amount of the judgment.

D. Upon approval of a bond provided for in this section and upon filing the bond, in case of appeal with the clerk of the district court and in case of writ of error with the clerk of the supreme court, there shall be a stay of proceedings in the action until the appeal or writ of error is finally determined.

E. In all cases where an appeal has been taken or a writ of error sued out against any interlocutory judgment, order or decision of the district court, from any final order affecting a substantial right made after entry of a final judgment or from any proceeding or conviction of civil contempt, supersedeas may be granted under the provisions of this

section, but the bond shall be filed within thirty days from the entry of such judgment, order, decision or conviction and no extension of time for the filing of the bond shall be granted in excess of ten days.

F. Any supersedeas granted under this section in any matter appealed to the supreme court or court of appeals shall automatically continue in effect pending any action or further review that may be taken in the supreme court or court of appeals.

History: Laws 1917, ch. 43, § 17; C.S. 1929, § 105-2513; 1953 Comp., § 21-10-19; Laws 1966, ch. 28, § 50; 2007, ch. 272 , § 1.

ANNOTATIONS

Cross references. — For title or possession of property, supersedeas bond, *see* 39-3-9 NMSA 1978.

Compiler's notes. — Laws 1966, ch. 28, § 50, recompiled this section. It had been omitted by the compilers of the 1941 Compilation as superseded by the Supreme Court Rules.

The 2007 amendment, effective June 15, 2007, added Subsection C limiting the supersedeas bond of a signatory in a master settlement agreement.

Amount of supersedeas bond. — Rule 1-062(D) NMRA and Section 39-3-22 NMSA 1978 are not in conflict. Rule 1-062(D) NMRA provides for factors that must be considered by the court in determining the amount of a bond that will protect a judgment holder who must delay execution of the judgment pending appeal. Section 39-3-22 NMSA 1978 expands upon the purpose of Rule 1-062(D) NMRA by providing an alternative mechanism for enduring that the holder of a judgment is adequately protected from any damage that may result from a stay of the judgment pending appeal. Grassie v. Roswell Hosp. Corp., 2008-NMCA-076, 144 N.M. 241, 185 P.3d 1091, cert. quashed, 2009-NMCERT-005, 146 N.M. 728, 214 P.3d 793.

Time period to seek supersedeas bond. — The time period specified in Paragraph D of Rule 1-062 NMRA in which an appellant may seek a supersedeas bond prevails over the time period specified in Subsection A of Section 39-3-22 NMSA 1978. Jones v. Harris News, Inc., 2010-NMCA-088, 148 N.M. 612, 241 P.3d 613.

Time limitations must be complied with. — Although a district court has the inherent power to stay execution of a judgment rendered, the party must show the existence of exceptional, equitable grounds justifying the granting of a stay when the statute or rule does not otherwise provide for such relief. A party may not, however, disregard the time limitations of Subsection A and Rule 1-062D NMRA, and then post a supersedeas bond or obtain a stay of execution. Long v. Continental Divide Elec. Coop., 117 N.M. 543, 873 P.2d 289 (Ct. App. 1994), superseded by statute, Jones v. Harris News, Inc., 2010-NMCA-088, 148 N.M. 612, 241 P.3d 613.

District court action on motion. — When the district court is allowed by rule and statute to act upon the motion of a party who has become an appellant for a stay of execution, the general rule divesting that court of jurisdiction upon notice of appeal is inapplicable. Devlin v. State ex rel. N.M. State Police Dep't, 108 N.M. 72, 766 P.2d 916 (1988).

Circumventing prohibitions against summary execution. — The prevailing party at trial may not circumvent prohibitions against summarily executing upon his judgment until the time for permitting the trial court to act upon motions for obtaining supersedeas has expired. Devlin v. State ex rel. N.M. State Police Dep't, 108 N.M. 72, 766 P.2d 916 (1988).

Appellant not allowed to correct imperfect bond. — Where an imperfect supersedeas bond has been filed, which was nevertheless sufficient as a cost bond, appellant may not correct the record by filing another supersedeas bond, after the time allowed, since to do so would prejudice the rights of appellee. Mundy v. Irwin, 19 N.M. 170, 141 P. 877 (1914) (decided under former law).

Bond can act as cost bond. — A bond filed 37 days after appeal, purporting to be a supersedeas bond which was ineffective for that purpose, because conditioned only for the payment of costs, is nevertheless sufficient as a cost bond, having been filed before any advantage was taken of the failure to file within 30 days. Mundy v. Irwin, 19 N.M. 170, 141 P. 877 (1914) (decided under former law).

Failure to post a supersedeas bond to stay a foreclosure sale pending review does not bar restitution if the district court's judgment is reversed. Bank of Santa Fe v. Honey Boy Haven, Inc., 106 N.M. 584, 746 P.2d 1116 (1987).

Release of bond. — Trial court erred in ordering the release of a supersedeas bond, which husband had posted pending appeal, to the surety, when the appeal had been dismissed, yet husband refused to pay fees and costs, as required under the trial court's order in the divorce proceeding. Khalsa v. Levinson, 2003-NMCA-018, 133 N.M. 206, 62 P.3d 297.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 5 Am. Jur. 2d Appellate Review § 436 et seq.

Constitutionality, construction and application of statute as to effect of taking appeal, or staying execution, on right to redeem for execution or judicial sale, 44 A.L.R.4th 1229.

4 C.J.S. Appeal & Error § 421 et seq.

39-3-23. Automatic stay.

When the appellant or plaintiff in error is the state, a county or a municipal corporation, the taking of an appeal or suing out of a writ of error operates to stay the execution of the judgment, order or decision of the district court without bond.

History: Laws 1917, ch. 43, § 18; C.S. 1929, § 105-2514; 1953 Comp., § 21-10-20; Laws 1966, ch. 28, § 51.

ANNOTATIONS

Compiler's notes. — Laws 1966, ch. 28, § 51, recompiled this section. It had been omitted by the compilers of the 1941 Compilation as superseded by the Supreme Court Rules.

Affidavit that appellant is "county-municipal hospital" insufficient. — Where a hospital seeks a stay of execution on a judgment, without bond, because an appeal has been taken, and the motion relies upon an affidavit by the hospital administrator which states that the movant is a "county-municipal hospital," the affidavit is deficient where it fails to state either that a city-county organization operated the hospital or that it was not leased to some other entity. Robinson v. Mem. Gen. Hosp., 99 N.M. 60, 653 P.2d 891 (Ct. App. 1982).

Filing appeal by state or its political subdivision triggers the automatic stay provisions of this section and Rule 1-062. City of Sunland Park v. N.M. Pub. Regulation Comm'n., 2004-NMCA-024, 135 N.M. 143, 85 P.3d 267, cert. denied, 2004-NMCERT-002, 135 N.M. 169, 86 P.3d 47.

Stay generally considered prospective. — Under the plain language of this section, Rule 1-062 and the prevailing common law, a stay is generally prospective rather than retroactive, unless otherwise specified. City of Sunland Park v. N.M. Pub. Regulation Comm'n., 2004-NMCA-024, 135 N.M. 143, 85 P.3d 267, cert. denied, 2004-NMCERT-002, 135 N.M. 169, 86 P.3d 47.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Constitutionality, construction and application of statute as to effect of taking appeal, or staying execution, on right to redeem for execution or judicial sale, 44 A.L.R.4th 1229.

4 C.J.S. Appeal & Error § 413.

39-3-24. Discretionary stay.

In all actions of contested elections, mandamus, removal of public officers, quo warranto or prohibition, it is discretionary with the court rendering judgment, or with the supreme court, to allow a supersedeas of the judgment. If the appeal or writ of error is allowed to operate as a supersedeas, it shall be upon terms and conditions the court may deem proper.

History: Laws 1917, ch. 43, § 19; C.S. 1929, § 105-2515; 1953 Comp., § 21-10-21; Laws 1966, ch. 28, § 52.

ANNOTATIONS

Compiler's notes. — Laws 1966, ch. 28, § 52, recompiled this section. It had been omitted by the compilers of the 1941 Compilation as superseded by the Supreme Court Rules.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 5 Am. Jur. 2d Appellate Review § 436 et seq.

4 C.J.S. Appeal & Error § 408 et seq.

39-3-25. District court clerk; fees for record.

The clerk of the district court shall collect the following fees from the party suing out a writ of error or taking an appeal:

for making out and certifying the original copy of the record on appeal or writ of error, per typewritten folio	$ .10
for each additional copy, per typewritten folio	.05
for certifying a bill of exceptions furnished by the official court reporter	2.00
for copies of any records reproduced by photographic process, per page	.10

History: Laws 1917, ch. 43, § 24; 1927, ch. 93, § 5; C.S. 1929, § 105-2518; 1953 Comp., § 21-10-22; Laws 1966, ch. 28, § 53.

ANNOTATIONS

Cross references. — For miscellaneous district court civil filing fees, *see* Rule 1-099 NMRA.

Compiler's notes. — Laws 1966, ch. 28, § 53, recompiled this section. It had been omitted by the compilers of the 1941 Compilation as superseded by the Supreme Court Rules.

39-3-26. Disposition after review.

The supreme court or court of appeals in appeals, and the supreme court in writs of error, shall examine the record, and on the facts therein contained alone, shall award a new trial, reverse or affirm the judgment of the district court or give any other judgment it deems agreeable to law. The supreme court or court of appeals shall not decline to pass upon any question of law or fact which may appear in any record, either upon the

face of the record or in the bill of exceptions, because the cause was tried by the court without a jury, but shall review the cause in the same manner and to the same extent as if it had been tried by a jury.

History: Laws 1917, ch. 43, § 38; C.S. 1929, § 105-2520; 1953 Comp., § 21-10-23; Laws 1966, ch. 28, § 54.

ANNOTATIONS

Compiler's notes. — Laws 1966, ch. 28, § 54, recompiled this section. It had been omitted by the compilers of the 1941 Compilation as superseded by the Supreme Court Rules.

Case remanded for new trial on damages. — In a personal injury case where past medical expenses bore no relation to contemplated future treatment, the jury had no yardstick for determining future expenses, and the case was remanded for a new trial on damages. Selgado v. Commercial Warehouse Co., 86 N.M. 633, 526 P.2d 430 (Ct. App. 1974).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 5 Am. Jur. 2d Appellate Review § 591 et seq.

Propriety of limiting to issue of damages alone new trial granted on ground of inadequacy of damages - modern cases, 5 A.L.R.5th 875.

5 C.J.S. Appeal and Error § 860 et seq.

39-3-27. Award of damages on review.

Upon the affirmation of any judgment or decision, the supreme court or court of appeals may award to the appellee or defendant in error damages not exceeding ten percent of the judgment complained of, as may be deemed just by the court.

History: Laws 1917, ch. 43, § 39; C.S. 1929, § 105-2521; 1953 Comp., § 21-10-24; Laws 1966, ch. 28, § 55.

ANNOTATIONS

Compiler's notes. — Laws 1966, ch. 28, § 55, recompiled this section. It had been omitted by the compilers of the 1941 Compilation as superseded by the Supreme Court Rules.

Damages not awarded. — The appellate court will not award damages where the application of general propositions of law to the facts of the case present an issue of first impression concerning a shareholder’s standing to bring an individual action against another equal shareholder in a closely held corporation for a breach of fiduciary duty in

the sale of corporate assets. Clark v. Sims, 2009-NMCA-118, 147 N.M. 252, 219 P.3d 20, cert. denied, 2009-NMCERT-009, 147 N.M. 421, 224 P.3d 648.

The appellate court will not award damages where the appellant continues to pursue an appeal by opposing the appellate court's proposed disposition of the appeal. Clark v. Sims, 2009-NMCA-118, 147 N.M. 252, 219 P.3d 20, cert. denied, 2009-NMCERT-009, 147 N.M. 421, 224 P.3d 648.

Damages assessed where appeal frivolous or for delay. — Under this section damages may be assessed where an appeal is found to be frivolous or merely for delay, but a court should be reluctant to penalize litigants who take advantage of their right to appeal. Genuine Parts Co. v. Garcia, 92 N.M. 57, 582 P.2d 1270 (1978).

Attorney fees not awarded. — The appellate court will not award attorney fees where an appeal raises substantial questions concerning a decision of the personnel board. State ex rel. N.M. State Hwy. Dep't v. Silva, 98 N.M. 549, 650 P.2d 833 (Ct. App. 1982).

39-3-28. Directions following review; execution.

The supreme court or court of appeals, on the determination of a cause on appeal or error, may award execution to carry it into effect, or may remit the record with its decision to the district court from which the cause came, and the determination shall be carried into effect by the district court. When any writ of execution sued out of the supreme court or court of appeals is placed in the hands of any officer for levy or collection and the officer fails to find any property from which it may be satisfied, the officer shall notify all persons who may be indebted to the defendant named in the writ not to pay the defendant, but to appear before the district court from which the cause was originally taken by appeal or writ of error and answer on oath concerning his indebtedness. Thereupon, like proceedings shall be had in the district court as in case of garnishees summoned in suits originating by attachment in the district courts.

History: Laws 1917, ch. 43, § 40; C.S. 1929, § 105-2522; 1953 Comp., § 21-10-25; Laws 1966, ch. 28, § 56.

ANNOTATIONS

Cross references. — For execution after judgment, *see* 39-1-20 NMSA 1978.

For execution and foreclosure, *see* 39-4-1 NMSA 1978 et seq.

For issuance and stay of mandate, *see* Rule 12-402 NMRA.

For executions and garnishments in the district court, *see* Rule 1-065.1 NMRA.

Compiler's notes. — Laws 1966, ch. 28, § 56, recompiled this section. It had been omitted by the compilers of the 1941 Compilation as superseded by the Supreme Court Rules.

Constitutionality. — For procedure required for writs for execution, *see* Aacen v. San Juan County Sheriff's Dep't., 944 F.2d 691 (10th Cir. 1991)(decided under prior version of Rule 1-065.1 NMRA).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 5B C.J.S. Appeal and Error § 1977.

39-3-29. Directions following review; judgment on bond.

If the judgment on review is against the appellant or plaintiff in error, the supreme court or court of appeals shall either render judgment against him and his sureties on the appeal or supersedeas bond, or remand the cause with directions to the district court to enter judgment against him and his sureties on the bond. Execution may issue on any such judgment against the principal and his sureties, either jointly or severally.

History: Laws 1917, ch. 43, § 41; C.S. 1929, § 105-2523; 1953 Comp., § 21-10-26; Laws 1966, ch. 28, § 57.

ANNOTATIONS

Compiler's notes. — Laws 1966, ch. 28, § 57, recompiled this section. It had been omitted by the compilers of the 1941 Compilation as superseded by the Supreme Court Rules.

Appeal bond principal step. — On appeal from justice of the peace (now magistrate), an appeal bond is the process or principal step and requires a United States revenue stamp to validate it, and its absence cannot be cured by order of district court permitting amendment by filing of properly stamped bond. Tipton v. Cordova, 1 N.M. 383 (1866) (decided under former law).

Appeal bond cannot be perfected by appellate court order. — An appeal from a justice's court, which is invalid because a revenue stamp was not placed on appeal bond, cannot be perfected by order of appellate court which permitted affixing such stamp nunc pro tunc. Secou v. Leroux, 1 N.M. 388 (1866) (decided under former law).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 5 Am. Jur. 2d Appellate Review § 476.

39-3-30. Costs in civil actions.

In all civil actions or proceedings of any kind, the party prevailing shall recover his costs against the other party unless the court orders otherwise for good cause shown. In all cases triable in the supreme court in the first instance, or removed to the supreme court or court of appeals upon appeal or writ of error, the taxation of costs shall be in the

discretion of the reviewing court except in those cases in which a different provision is made by law.

History: Kearny Code, Costs, § 1; C.L. 1865, ch. 45, § 1; C.L. 1884, § 2202; C.L. 1897, § 3148; Code 1915, § 4282; Laws 1917, ch. 45, § 1; C.S. 1929, § 105-1301; Laws 1933, ch. 16, § 1; 1953 Comp., § 21-10-27; Laws 1966, ch. 28, § 58.

ANNOTATIONS

Cross references. — For costs on appeal from probate or magistrate court, *see* 39-2-5 and 39-2-6 NMSA 1978.

For witness fees taxed as costs, *see* 39-2-9 NMSA 1978.

For taxing costs of additional witnesses, *see* 39-2-10 NMSA 1978.

For judgment costs, *see* Rule 1-054 NMRA.

Compiler's notes. — Laws 1966, ch. 28, § 58, recompiled this section. It had been omitted by the compilers of the 1941 Compilation as superseded by the Supreme Court Rules.

Rule 12-403 NMRA provides that the party prevailing shall recover his costs unless otherwise provided by rule or unless the court directs otherwise, and that costs may be apportioned. The allowable costs are specified. Absent objection or a court order to the contrary, the clerk is to tax the costs in question.

Discretion of court. — The assessment of costs is entrusted to the sound discretion of the court, and absent a showing of an abuse of discretion, a reviewing court will not interfere with such discretion. In re Adoption of Stailey, 117 N.M. 199, 870 P.2d 161 (Ct. App. 1994).

Reducing award of costs based on financial disparity between parties. — The district court abused its discretion when, without evidence, it reduced a cost award to defendant because of the financial disparity between the parties, plaintiff's perceived inability to pay all of defendant's costs, and the chilling effect that a large cost award would have on future litigation under the Motor Vehicle Dealers Franchising Act. Key v. Chrysler Motors Corp., 2000-NMSC-010, 128 N.M. 739, 998 P.2d 575.

Expenses not costs. — Expenses for photocopies, telephone, facsimile, courier, mileage, travel, and per diem, and a large expense paid for obtaining plaintiff's own medical records, were not properly recoverable as costs. Gillingham v. Reliable Chevrolet, 1998-NMCA-143, 126 N.M. 30, 966 P.2d 197, overruled on other grounds by Fernandez v. Espanola Pub. Sch. Dist., 2005-NMSC-026, 138 N.M. 283, 119 P.3d 163.

Computer-assisted legal research. — Computer-assisted legal research expenses are not allowable as costs. Key v. Chrysler Motors Corp., 2000-NMSC-010, 128 N.M. 739, 998 P.2d 575.

Costs allowed in case of fraudulent claim. — In an action to quiet title to property, where a claim was based upon a document expressly found to have been forged by defendant, the trial court's order denying an award of costs for plaintiff's expert witness and imposition of sanctions against defendant was reversed and remanded for reconsideration. Martinez v. Martinez, 1997-NMCA-096, 123 N.M. 816, 945 P.2d 1034.

Costs need not be awarded. — Where the district court imposed the sanction of dismissal against plaintiff for discovery violations, it did not abuse its discretion in viewing the assessment of costs as an additional sanction and, thus, grounds for refusing to award defendant its costs. Reed v. Furr's Supermarkets, Inc., 2000-NMCA-091, 129 N.M. 639, 11 P.3d 603, cert. denied, 129 N.M. 599, 11 P.3d 563 (2000).

Costs may be recovered against state. — The legislature, in this section, gives express authority, without exception, to the recovery of costs against any losing party, including the state. Kirby v. N.M. State Hwy. Dep't, 97 N.M. 692, 643 P.2d 256 (Ct. App.), cert. denied, 98 N.M. 51, 644 P.2d 1040 (1982).

Decision to award costs on appeal is within discretion of supreme court and is final. Spingola v. Spingola, 93 N.M. 598, 603 P.2d 708 (1979).

Physicians appearing as expert witnesses. — Fees paid to physicians who testified as expert witnesses at trial or served as consulting experts to plaintiff were properly awarded as costs against defendant. Gillingham v. Reliable Chevrolet, 1998-NMCA-143, 126 N.M. 30, 966 P.2d 197, overruled by Fernandez v. Espanola Pub. Sch. Dist., 2005-NMSC-026, 138 N.M. 283, 119 P.3d 163.

Expert witnesses not testifying because hearing rescheduled. — The prevailing party may not recover fees for expert witnesses who did not testify because the hearing was rescheduled through no fault of either party. Jimenez v. Found. Reserve Ins. Co., 107 N.M. 322, 757 P.2d 792 (1988).

Action under Children's Code. — A specific Children's Code provision for assessing costs, former 32-1-41 NMSA 1978, controlled, in a child abuse and neglect proceeding, over this general statute. State ex rel. Human Servs. Dep't v. Judy H., 105 N.M. 678, 735 P.2d 1184 (Ct. App), cert. denied, 105 N.M. 644, 735 P.2d 1150 (1987).

Effect on finality of proceeding for costs — The pendency of a proceeding solely to determine the amount of costs does not render an otherwise final judgment nonfinal. Schleft v. Bd. of Educ., 107 N.M. 56, 752 P.2d 248 (Ct. App.), cert. denied, 109 N.M 232, 784 P.2d 419 (1988).

Award against prevailing party. — The court cannot order a prevailing party to share, or shoulder, all or part of the costs of an unsuccessful litigant, unless the costs are intended to serve as a sanction and the court clearly expresses its reasons for imposing such sanction. Absent a finding of bad faith or misconduct by a prevailing party during litigation, neither Rule 1-054E NMRA nor this section authorizes a court to award costs against a prevailing party. In re Adoption of Stailey, 117 N.M. 199, 870 P.2d 161 (Ct. App. 1994).

Costs awarded to party supporting valuation determined by court. — Where central issue is valuation of plaintiff's interest in an LLC, and where trial court entered judgment for plaintiff on the amount defendant agreed was the value of plaintiff's interest rather than on higher amount claimed by plaintiff, defendant was the prevailing party for purpose of awarding costs to defendant. Mayeux v. Winder, 2006-NMCA-028, 139 N.M. 235, 131 P.3d 85.

Mediation costs not recoverable. — Where mediation is conducted pursuant to agreement of the parties, not by order of the court, the expense of the mediator's fee should not be a recoverable cost, absent an enforceable agreement permitting such award. Smith v. Vill. of Ruidoso, 1999-NMCA-151, 128 N.M. 470, 994 P.2d 50.

Law reviews. — For article, "Settlement Without Sacrifice: The Recovery of Expert Witness Fees as Costs Under New Mexico's Rule 1-068," see 38 N.M.L. Rev. 655 (2008).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 5 Am. Jur. 2d Appellate Review § 909 et seq.

Attorney's fees in products liability suits, 53 A.L.R.4th 414.

Attorney's personal liability for expenses incurred in relation to services for client, 66 A.L.R.4th 256.

Recoverability of cost of computerized legal research under 28 USCS § 1920 or Rule 54(d), Federal Rules of Civil Procedure, 80 A.L.R. Fed. 168.

20 C.J.S. Costs § 157 et seq.

ARTICLE 4
Recovery on Judgments

39-4-1. [Right to execution; issuance; levy and sale; jurisdiction.]

The party in whose favor any judgment, order or decree in any court may be returned, shall have execution therefor in conformity to the order, judgment or decree. Said execution may be issued to the sheriff of any county of the state, and levy and sale

made in any county wherein the judgment debtor may have property subject to execution.

The court where the judgment or decree was rendered shall have jurisdiction over all matters growing out of the levy or sale under any execution.

History: Kearny Code, Executions, § 1; C.L. 1865, ch. 34, § 1; C.L. 1884, § 2157; C.L. 1897, § 3105; Code 1915, § 2190; Laws 1919, ch. 60, § 1; C.S. 1929, § 46-101; 1941 Comp., § 21-101; 1953 Comp., § 24-1-1.

ANNOTATIONS

Cross references. — For provisions that execution not issue against county commissioner or municipality, *see* N.M. Const., art. VIII, § 7.

For sheriff's fees for levy and sale, *see* 4-41-16 and 4-41-17 NMSA 1978, respectively.

For levy to collect contributions due under Unemployment Compensation Law, *see* 51-1-36 NMSA 1978.

For rule relating to stay of proceedings to enforce a judgment, *see* Rule 1-062 NMRA.

For rule relating to examination of judgment debtor or others, *see* Rule 1-069 NMRA.

Exclusive jurisdiction. — The jurisdiction clause at the end of the section vests exclusive jurisdiction over "matters growing out of the levy or sale under any execution" in the court rendering the judgment. Heimann v. Adee, 1996-NMSC-053, 122 N.M. 340, 924 P.2d 1352.

Effect on equity powers of court. — This section, though giving execution for money decrees in equity, does not abrogate equity power to enforce by attachment as for contempt its decree for monthly payments for support of children. Ex parte Sedillo, 34 N.M. 98, 278 P. 202 (1929).

Judgment and execution for contract breach. — Where, after labor, material and money, sufficient to build a house, was voluntarily furnished, and the house was built on furnishee's lot, the furnishee and his wife, in consideration for such furnishing, verbally agreed with furnisher to board him for life, and, upon his death, to provide him a suitable burial, and, after the death of furnishee's wife, the furnishee breached the agreement, the furnisher was not entitled to equitable relief, but was entitled to remedy by judgment at law and execution thereon, or by attachment, or by judgment, execution and supplementary proceedings subsequent to execution. Van Sickle v. Keck, 42 N.M. 450, 81 P.2d 707 (1938).

Sales by IRS distinguished. — Sales on execution or foreclosure are sales conducted under the auspices of the courts following entry of a judgment, order or decree, unlike

sales under the Internal Revenue Code following administrative levy or seizure, which latter sales could not serve purchaser as basis of statutory action for forcible entry and detainer. Henderson v. Gibbany, 76 N.M. 674, 417 P.2d 807 (1966).

Sheriff as agent of law. — The sheriff in execution of writs of execution is acting as an officer of, or as an agent of, the law, not necessarily as agent of the party who procures service of the writ, and in such capacity he is merely a nominal party. Riggs v. Gardikas, 78 N.M. 5, 427 P.2d 890 (1967).

Order for sale modifiable. — Although, order for judicial sale may not initially be in accord with the statute, as an interlocutory order it may be modified, and is valid provided that the sale is conducted lawfully. Speckner v. Riebold, 86 N.M. 275, 523 P.2d 10 (1974).

Duties of sheriff. — Proceeding in aid of execution statutes, a sheriff must first reduce the property to possession, next he must advertise it for sale, then he must determine its value before sale and, in case exemption is claimed in lieu of homestead, he must not levy on such property to the amount of the exemption. 1943-44 Op. Att'y Gen. No. 44-4538.

Execution out of supreme court. — When writ of execution issues out of supreme court the same procedure should be followed as when writ issues from the district court. 1943-44 Op. Att'y Gen. No. 44-4538.

Section was not applicable to justice of peace courts (now magistrate courts) as former 36-6-9, 1953 Comp., the more specific statute, was controlling. 1966 Op. Att'y Gen. No. 66-68.

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

Am. Jur. 2d, A.L.R. and C.J.S. references. — 30 Am. Jur. 2d Executions § 1 et seq.

Time of issuing writ as ground of collateral attack on execution sales, 1 A.L.R. 1437.

Ratification by corporation of unauthorized stay of execution by officer by acceptance and retention of benefits, 7 A.L.R. 1482.

Receiver's appointment for corporation as affecting enforcement of execution, 8 A.L.R. 459.

Effect of levy of execution on correction of clerical errors in judgment, 10 A.L.R. 579, 67 A.L.R. 828, 126 A.L.R. 956, 14 A.L.R.2d 224.

Stay of execution of judgment as suspending running of limitations, 21 A.L.R. 1067.

Marketability of title as affected by execution lien, 57 A.L.R. 1406, 81 A.L.R.2d 1020.

Mechanic's lien as waived by resort to execution, 65 A.L.R. 317.

Right to have enforcement of costs stayed pending final determination of case, 78 A.L.R. 359.

Stay of execution on judgment obtained by withdrawing member of building and loan association, 98 A.L.R. 105.

Injunction against waste to protect execution lien, 103 A.L.R. 387.

Death of joint tenant as affecting right of his judgment creditor to execution in respect of his interest in the joint property, 111 A.L.R. 171.

Appearance to attack execution as submission to jurisdiction, 111 A.L.R. 938.

Right to execution to enforce judgment lien after death of judgment debtor, 114 A.L.R. 1169.

Motion for new trial as suspension or stay of execution or judgment, 121 A.L.R. 686.

Property right of creditor who institutes supplementary proceedings over other creditors in respect of property disclosed thereby, 153 A.L.R. 211.

Interest of spouse in estate by the entirety as subject to execution for individual debt, 166 A.L.R. 969, 75 A.L.R.2d 1172.

Statutory provisions respecting registration of mortgages or other liens on personal property in case of residents of other states as affecting priority of execution lien over lien of chattel mortgage or conditional sale contract, 10 A.L.R.2d 764.

Mere rendition or formal entry or docketing, of judgment as prerequisite to issuance of valid execution thereon, 65 A.L.R.2d 1162.

Issuance or levy of execution as extending period of judgment lien, 77 A.L.R.2d 1064.

Tort immunity of nongovernmental charities, 25 A.L.R.4th 517.

Validity, construction, and effect of body execution statutes allowing imprisonment based on judgment, debt, or the like - modern cases, 79 A.L.R.4th 232.

33 C.J.S. Executions § 14.

39-4-2. [Property subject to execution.]

The execution shall be against the goods, chattels and lands of the defendant against whom the judgment, order or decree shall be rendered: provided, that executions from justices of the peace [magistrate courts] shall not go against lands.

History: Kearny Code, Executions, § 2; C.L. 1865, ch. 34, § 2; C.L. 1884, § 2158; C.L. 1897, § 3106; Code 1915, § 2191; C.S. 1929, § 46-102; 1941 Comp., § 21-102; 1953 Comp., § 24-1-2.

ANNOTATIONS

Cross references. — For rules governing garnishment and writs of execution in the district, magistrate, and metropolitan courts, *see* Rules 1-065.1, 2-801, and 3-801 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.

Bracketed material. — The bracketed reference to "magistrate courts" was inserted by the compiler, as the office of justice of the peace has been abolished by 35-1-38 NMSA 1978, which provides that reference to "justices of the peace" shall be construed to refer to the magistrate courts. The bracketed material was not enacted by the legislature and is not part of the law.

Property affected by execution. — The execution provided for in this section and 39-4-1 NMSA 1978 is one which may run against the property of the defendant generally, and is not one for the enforcement of liens upon specific property, such as mortgages and the like. Crowell v. Kopp, 26 N.M. 146, 189 P. 652 (1919).

Lien not necessary. — The existence of a lien is not a prerequisite to a sheriff's levy and sale of real property. Heimann v. Adee, 1996-NMSC-053, 122 N.M. 340, 924 P.2d 1352.

Liquor license. — As between the state and the licensee, a liquor license is a mere revocable privilege vesting no property rights in the licensee, but, as between the licensee and any other individual, such license is property and as such is subject to levy and sale under execution. Nelson v. Naranjo, 74 N.M. 502, 395 P.2d 228 (1964).

Process by attachment as for contempt is not execution in contemplation of this section. In re Jaramillo, 8 N.M. 598, 45 P. 1110 (1896).

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

Am. Jur. 2d, A.L.R. and C.J.S. references. — 30 Am. Jur. 2d Executions § 113 et seq.

Shares of corporate stock as subject to execution or attachment, 1 A.L.R. 653.

Execution sale of realty as affecting debtor's share in crops grown by tenant or cropper, 13 A.L.R. 1425, 113 A.L.R. 1355.

Seat in chamber of commerce, board of trade, or stock exchange, 14 A.L.R. 285.

Levy upon or garnishment of contents of safety deposit box, 19 A.L.R. 863, 39 A.L.R 1215.

Mortgagor's statutory right to redeem or his right to possession after foreclosure as subject of levy and seizure by creditors, 42 A.L.R. 884, 57 A.L.R. 1128.

Sale of lease under execution as violation of covenant against assignment, 46 A.L.R. 850.

Contingent remainder as subject to sale, 60 A.L.R. 803.

Money or other property taken from prisoner as subject of attachment, garnishment, or seizure under execution, 154 A.L.R. 758.

Interest of spouse in estate by the entirety as subject to execution for individual debt, 166 A.L.R. 969, 75 A.L.R.2d 1172.

Interest of vendee under executory contract as subject to execution, judgment, lien, or attachment, 1 A.L.R.2d 727.

Solid mineral royalty as real or personal property, 68 A.L.R.2d 728.

Joint bank account as subject to attachment, garnishment, or execution by creditor of one of the joint depositors, 11 A.L.R.3d 1465.

Family allowance from decedent's estate as exempt from attachment, garnishment, execution, and foreclosure, 27 A.L.R.3d 863.

Furniture: what is "necessary" furniture entitled to exemption from seizure for debt, 41 A.L.R.3d 607.

Joint bank account as subject to attachment, garnishment, or execution by creditor of one joint depositor, 86 A.L.R.5th 527.

33 C.J.S. Executions §§ 18 to 55.

39-4-3. [Levy; insufficient property; garnishment proceedings.]

When any execution shall be placed in the hands of any officer for collection, he shall call upon the defendant for payment thereof, or to show him sufficient goods, chattels, effects and lands, whereof the same may be satisfied; and if the officer fail to find property sufficient to make the same he shall notify all persons who may be indebted to said defendant not to pay said defendant, but to appear before the court, out of which said execution issued, and make true answers, on oath, concerning his indebtedness, and the like proceedings shall be had as in cases of garnishees, summoned in suits originating by attachments.

History: Kearny Code, Executions, § 3; C.L. 1865, ch. 34, § 3; C.L. 1884, § 2159; C.L. 1897, § 3107; Laws 1901, ch. 49, § 1; Code 1915, § 2192; C.S. 1929, § 46-103; 1941 Comp., § 21-103; 1953 Comp., § 24-1-3.

ANNOTATIONS

Cross references. — For taxing of bill of costs against defendant in execution, *see* 39-2-11 NMSA 1978.

For garnishment, *see* 35-12-1 NMSA 1978 et seq.

For attachment, *see* 42-9-1 NMSA 1978 et seq.

For rule regarding proceedings supplementary to judgment, *see* Rule 1-069 NMRA.

Constitutionality. — The part of the section allowing, in effect, a writ of garnishment to be signed by the sheriff is not unconstitutional, as process not signed and attested by the court clerk, as this notice is merely in aid of the execution in the hands of the sheriff, and has the effect of tying up any money the garnishee may owe the defendant. Hinds v. Velasquez, 63 N.M. 282, 317 P.2d 899 (1957).

No implicit repeal. — Laws 1909, ch. 63 (former 26-2-1, 1953 Comp., et seq.), regarding garnishment, did not repeal the garnishment feature of this section. Hinds v. Velasquez, 63 N.M. 282, 317 P.2d 899 (1957).

Provisions not inconsistent. — There was no inconsistency between former general garnishment statute (26-2-1, 1953 Comp. et seq.) and that part of this section which is to be used in aid of execution. Hinds v. Velasquez, 63 N.M. 282, 317 P.2d 899 (1957).

Strict construction. — This section is in derogation of the common law and must be strictly construed. Hinds v. Velasquez, 63 N.M. 282, 317 P.2d 899 (1957).

Section directory. — This section means that it is the duty of the sheriff to make demand for the payment of the debt upon the debtor, but it is directory. Inman v. Brown, 59 N.M. 196, 281 P.2d 474 (1955).

No demand is contemplated where debtor is without sheriff's jurisdiction or otherwise so situated that a demand cannot readily be made upon him. Inman v. Brown, 59 N.M. 196, 281 P.2d 474 (1955).

No demand is necessary where the debtor lives outside the jurisdiction of the sheriff, and no authorized agent of the debtor is known to the sheriff or can be ascertained with reasonable diligence. Pecos Valley Lumber Co. v. Friedenbloom, 23 N.M. 383, 168 P. 497 (1917).

Notice ineffectual. — A notice to trustee of notice of levy without notice to appear and answer execution is ineffectual. Citizens' Nat'l Bank v. First Nat'l Bank, 29 N.M. 273, 222 P. 935 (1924).

Sale not invalid. — Where owner of a barber shop, fixtures of which were to be sold under execution, had left a man in charge whom he regarded as his agent, but who failed to act as agent and did not transmit to the owner notice of proposed sale, such facts did not invalidate the sale. Pecos Valley Lumber Co. v. Friedenbloom, 23 N.M. 383, 168 P. 497 (1917).

Effect of variance. — A variance between the amount of the execution and the amount of the judgment does not render the execution void, but voidable. It may be amended at any time, even on the return day, or after its return, to conform; and such variance is no defense to the action. Bachelder Bros. v. Chaves, 5 N.M. 562, 25 P. 783 (1891).

Prerequisites for jurisdiction in garnishment. — In garnishment proceedings, the plaintiff cannot subject the third party to the jurisdiction of the court unless he has complied with the statutory prerequisites. Garland v. Sperling Bros., 6 N.M. 623, 30 P. 925 (1892), aff'd, 7 N.M. 121, 32 P. 499 (1893).

A district court does not have jurisdiction of an escrow fund allegedly held by a title company for the benefit of a defendant unless the record supports the conclusion that the title company was indebted to the defendants within the meaning of this section, and unless the sheriff first made demand on the judgment debtor. Title Guar. & Ins. Co. v. Campbell, 106 N.M. 272, 742 P.2d 8 (Ct. App. 1987).

Existing and absolute debt essential. — In garnishment, in aid of execution, it is essential that the garnishee's debt to the judgment debtor be in existence at the time of the serving of the garnishment summons, absolutely and unconditionally owing and

payable at the present or some future time. Garland v. Sperling Bros., 6 N.M. 623, 30 P. 925 (1892), aff'd, 7 N.M. 121, 32 P. 499 (1893).

Issues in garnishment proceedings. — In garnishment proceedings by judgment creditor, under execution issued upon the judgment against a debtor of defendant, where garnishee's answer denied the indebtedness and denied fraud, the issue was not only as to the facts of indebtedness and fraud, but also as to the amount of indebtedness, and verdict that the answer was not true was a finding on only part of the issue, insufficient to support a judgment. Perea v. Colorado Nat'l Bank, 6 N.M. 1, 27 P. 322 (1891).

Status of garnishee. — A garnishee stands, as nearly as possible, in the same position he would occupy if sued at law by his creditor. Field v. Sammis, 12 N.M. 36, 73 P. 617 (1903).

Measure of garnishee's liability. — Garnishee's liability, legal and equitable, to the principal debtor is the measure of his liability. Field v. Sammis, 12 N.M. 36, 73 P. 617 (1903).

Answer of garnishee was prima facie evidence of facts therein set forth, so that burden of proof was on plaintiff, and evidence offered to controvert the answer presented an issue of fact for the jury; the court therefore erred in directing a verdict for the plaintiff. Perea v. Colorado Nat'l Bank, 6 N.M. 1, 27 P. 322 (1891).

Mortgagee. — Mortgagee in possession, with right to buy if mortgagor did not pay by specified time, was not subject to garnishment, in aid of execution, at instance of mortgagor's judgment creditor. Garland v. Sperling Bros., 6 N.M. 623, 30 P. 925 (1892), aff'd, 7 N.M. 121, 32 P. 499 (1893).

Third party may intervene in garnishment proceeding arising under execution, and set up rights legal or equitable, in the funds sought to be recovered. Field v. Sammis, 12 N.M. 36, 73 P. 617 (1903).

Judgment against garnishee void. — As there is no provision, whatever, allowing a court to render judgment against a garnishee for more than could be recovered against him by the principal debtor, and none for judgment solely because of default, it follows that judgment rendered against the garnishee because he failed to answer within the time required by law and not upon a showing of actual indebtedness owed by the garnishee to the defendant was void on the face of the record. Hinds v. Velasquez, 63 N.M. 282, 317 P.2d 899 (1957).

Exemption. — The $500 exemption in lieu of homestead may be claimed out of current wages which have been garnished. McFadden v. Murray, 32 N.M. 361, 257 P. 999 (1927).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 30 Am. Jur. 2d Executions § 203 et seq.

Garnishment in other state of debt or claim as ground for suspension of execution on judgment on debt in proceeding in state, 91 A.L.R. 967.

Priority right of creditor who institutes supplementary proceedings over other creditors in respect of proceeds of judicial sale, 92 A.L.R. 1435, 153 A.L.R. 211.

Special bank deposits as subject of attachment or garnishment to satisfy depositor's general obligations, 8 A.L.R.4th 998.

Garnishee's duty to give debtor notice of garnishment prior to delivery of money without judgment against the garnishee on the debt, 36 A.L.R.4th 824.

Sufficiency, as to content, of notice of garnishment required to be served upon garnishee, 20 A.L.R.5th 229.

38 C.J.S. Garnishment § 19.

39-4-4. Filing notice of levy on real estate; recording and indexing; release of levy.

A. Any peace officer making a levy on real estate under execution or writ of attachment shall file a notice of the levy in the office of the county clerk of the county where located, describing the real estate levied upon, the title and number of the case and the amount of the debt or judgment. A certificate of the facts recited in the notice, under the hand and seal of the peace officer, shall be sufficient to entitle the instrument to record.

B. The county clerk shall record the notice of levy and shall index it in the records of the county clerk's office, and when so filed it shall be notice to the public of the facts therein recited.

C. When the debt for which a levy is made has been satisfied, or if directed by the plaintiff or the plaintiff's attorney, the peace officer shall file a release of the levy under the peace officer's official hand and seal, in the office of the county clerk.

History: Laws 1933, ch. 13, § 1; 1941 Comp., § 21-104; 1953 Comp., § 24-1-4; 2013, ch. 214, § 11.

ANNOTATIONS

The 2013 amendment, effective June 14, 2013, provided procedures for filing notices of levy; added the title; in Subsection A, in the first sentence, after "Any", added "peace" and in the second sentence, after "hand and seal of", deleted "such" and added "the peace"; and added Subsections B and C.

Substantial compliance. — This section makes no provision for service of writ and notice of levy on judgment debtor, and in the absence of a statute the levy on real estate under execution is made by filing notice of levy in the office of the county clerk where the land is located, describing it, etc.; there was substantial compliance where the sheriff went on the land, served the occupant with notice of levy and filed the return in the office of the county clerk. Inman v. Brown, 59 N.M. 196, 281 P.2d 474 (1955).

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

Am. Jur. 2d, A.L.R. and C.J.S. references. — 30 Am. Jur. 2d Executions § 240 et seq.

Judgment lien or levy of execution on one joint tenant's share or interest as severing joint tenancy, 51 A.L.R.4th 906.

33 C.J.S. Executions § 101.

39-4-5. Repealed.

ANNOTATIONS

Repeals. — Laws 2013, ch. 214, § 14 repealed 39-4-5 NMSA 1978, as enacted by Laws 1933, ch. 13, § 2, relating to recording and indexing notice, effective June 14, 2013. For provisions of former section, *see* the 2012 NMSA 1978 on *NMOneSource.com*.

39-4-6. Repealed.

ANNOTATIONS

Repeals. — Laws 2013, ch. 214, § 14 repealed 39-4-6 NMSA 1978, as enacted by Laws 1933, ch. 13, § 3, relating to filing release of levy, effective June 14, 2013. For provisions of former section, *see* the 2012 NMSA 1978 on *NMOneSource.com*.

39-4-7. [Bond to retain possession of goods until sale.]

The person whose goods are taken on execution, may retain possession thereof until the day of sale, by giving bond in favor of the plaintiff with sufficient security to be approved by the officer in double the value of such property, conditioned for the delivery of the property to the officer at the time and place of sale, to be named in such bond, which bond shall be returned with the execution.

History: Kearny Code, Executions, § 6; C.L. 1865, ch. 34, § 6; C.L. 1884, § 2162; C.L. 1897, § 3110; Code 1915, § 2193; C.S. 1929, § 46-104; 1941 Comp., § 21-107; 1953 Comp., § 24-1-7.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 30 Am. Jur. 2d Executions § 271 et seq.

33 C.J.S. Executions §§ 116 to 119.

39-4-8. [Failure to return bond; insufficient bond; liability of officer.]

Upon the failure of the officer to return such bond, or in case of its insufficiency, the officer shall be subjected to the same liability as is provided in the case of similar bonds in suits commenced by attachment.

History: Kearny Code, Executions, § 7; C.L. 1865, ch. 34, § 7; C.L. 1884, § 2163; C.L. 1897, § 3111; Code 1915, § 2194; C.S. 1929, § 46-105; 1941 Comp., § 21-108; 1953 Comp., § 24-1-8.

ANNOTATIONS

Cross references. — For officer's liability in connection with bonds in suits commenced by attachment, *see* 42-9-22 NMSA 1978.

39-4-9. [Time limit on return of district court executions; sale; control of writ.]

All the executions taken out of district courts shall be returned within sixty days from the date of the delivery thereof, to the sheriff or other officer, or person whose duty it is or who may be designated to serve the same; and such sheriff, or other officer or person, may offer for sale, and sell at public auction, at such time and place as may be designated, any real estate taken by virtue of such execution, complying with the provisions of the law, providing for appraisements, and by giving twenty days public notice of the time and place of the sale, in the manner provided by law. All personal property, taken by virtue of any execution, may be sold as provided by law. All executions may issue on application, and the service and return thereof shall be controlled by the plaintiff or his agent.

History: Laws 1873-1874, ch. 15, § 2; C.L. 1884, § 2168; C.L. 1897, § 3117; Code 1915, § 2200; C.S. 1929, § 46-111; 1941 Comp., § 21-109; 1953 Comp., § 24-1-9.

ANNOTATIONS

Cross references. — For further provisions relating to notice of judicial sale, *see* 39-5-1 to 39-5-4 NMSA 1978.

For appraisal of property to be sold at judicial sale, *see* 39-5-5 to 39-5-11 NMSA 1978.

For publication of "legal notice," *see* 14-11-1 NMSA 1978 et seq.

For similar provisions relating to time for return of writ of execution, *see* 42-9-16 NMSA 1978.

For rule relating to process and publication of notice, *see* Rule 1-004 NMRA.

For rule of procedure governing executions, *see* Rule 1-065.1 NMRA.

Section is directory and a failure of the officer serving the writ of execution to file his return within 60 days from the date of delivery did not destroy the legal effect of the return. Inman v. Brown, 59 N.M. 196, 281 P.2d 474 (1955).

Fees not authorized. — The sheriff is not authorized to charge or collect fees for the custody of real estate under levy of execution. Retsch v. Renehan, 16 N.M. 541, 120 P. 897 (1911).

Liability of sheriff. — A sheriff seizing goods in pursuance of a writ issuing out of a court of competent jurisdiction is protected against an action by the judgment debtor owning the property unless there has been an abuse of authority. Gallegos v. Sandoval, 15 N.M. 216, 106 P. 373 (1909).

Gross misconduct. — If an officer goes outside the mandate of his process and commits a tortious act, he is liable as a trespasser ab initio; but, to render him liable, the misconduct must be so gross as to indicate intent at the outset to use his process as a cover for wrongdoing. Gallegos v. Sandoval, 15 N.M. 216, 106 P. 373 (1909).

Service within prescribed period. — If writ of execution was placed in sheriff's hands within 60 days before the levy was made and the return filed, he cannot be held liable as a trespasser on the theory that the writ was functus officio. Gallegos v. Sandoval, 15 N.M. 216, 106 P. 373 (1909).

Exclusive control over service and return of the execution lies in the plaintiff or his agent. Rocky Mountain Ethanol Sys. v. Mann, Inc., 21 B.R. 707 (Bankr. D.N.M. 1981).

Law reviews. — For article, "Attachment in New Mexico - Part I," see 1 Nat. Resources J. 303 (1961).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 30 Am. Jur. 2d Executions § 295 et seq.

Effect of return made after return day, 2 A.L.R. 181.

Sheriff's deed as prima facie evidence of return, 36 A.L.R. 1001, 108 A.L.R. 667.

False return made by assistant or deputy, liability of sheriff, constable or marshal or his bond for, 71 A.L.R.2d 1140.

Issuance or levy of execution as extending period of judgment lien, 77 A.L.R.2d 1064.

Execution sale as affected by modification of judgment, 32 A.L.R.3d 1019.

33 C.J.S. Executions §§ 56, 196 to 200, 318.

39-4-10. [Execution against sureties.]

No execution shall issue against any security on any promissory note, bond, bond for costs, appeal bond or other obligation for the payment of money or property, until execution shall have been first issued against the principal in any such note or obligation, and levied upon all the real estate or other property of said principal, which may be within the jurisdiction of the court, in which the judgment may have been rendered: provided, that whenever the plaintiff in any such execution shall file in the court, in which the judgment is pending, an affidavit in relation to such security or securities similar to the one required by law to be filed previous to issuing an attachment, then in such case execution shall issue simultaneously against the principal and the security against whom the said affidavit be filed.

History: Laws 1856-1857, p. 42; C.L. 1865, ch. 34, § 18; C.L. 1884, § 2170; C.L. 1897, § 3118; Code 1915, § 2201; C.S. 1929, § 46-112; 1941 Comp., § 21-111; 1953 Comp., § 24-1-19.

ANNOTATIONS

Cross references. — For affidavit for issuance of attachment, *see* 42-9-5 NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 33 C.J.S. Executions § 15.

39-4-11. [Execution against corporation; information to be furnished.]

Every agent or person having charge or control of any property of a corporation, on request of any public officer, having for service a writ of execution against it, shall furnish to him the names of the directors and officers thereof, and a schedule of all its property, including debts due or to become due to it so far as he may have knowledge of the same.

History: Laws 1905, ch. 79, § 68; Code 1915, § 952; C.S. 1929, § 32-170; 1941 Comp., § 21-112; 1953 Comp., § 24-1-20.

39-4-12. [Assignment of debts due corporation.]

If any officer, holding an execution shall be unable to find other property belonging to the corporation liable to execution, he or the judgment creditor may elect to satisfy such

execution, in whole or in part, by any debts due to the corporation; and it shall be the duty of any agent or person having custody of any evidence of such debt to deliver the same to the officer, for the use of the creditor, and such delivery, with a transfer to the officer in writing, for the use of the creditor, and notice to the debtor, and [sic] shall be a valid assignment thereof; and such creditor may sue for and collect the same in the name of the corporation, subject to such equitable set-offs on the part of the debtor as in other assignments; and every agent or person who shall neglect or refuse to comply with the provisions of this and the last preceding section [39-4-11 NMSA 1978], shall be himself liable to pay to the execution creditor the amount due on said execution, with costs.

History: Laws 1905, ch. 79, § 69; Code 1915, § 953; C.S. 1929, § 32-171; 1941 Comp., § 21-113; 1953 Comp., § 24-1-21.

39-4-13. [Judgment lien on real estate; foreclosure suit; sale.]

Any person holding a judgment lien on any real estate situated in this state may subject said real estate to the payment of his judgment by a foreclosure suit in any court of competent jurisdiction, such suit to be instituted and prosecuted in the same manner as ordinary suits for the foreclosure of mortgages, and the sale thereunder to be held in the same manner and subject to the same rights of redemption as in sales held under mortgage foreclosure decrees.

History: Laws 1933, ch. 7, § 1; 1941 Comp., § 21-114; 1953 Comp., § 24-1-22.

ANNOTATIONS

Cross references. — For sales under execution and foreclosure, *see* 39-5-1 NMSA 1978 et seq.

Constitutionality. — Allegation that Laws 1933, ch. 7 (39-4-13 to 39-4-16 NMSA 1978) were unconstitutional on the ground that its title did not clearly express the subject of the bill and that it embraced more than one subject, contrary to the provisions of N.M. Const., art. IV, § 16, was without merit. Ballew v. Denson, 63 N.M. 370, 320 P.2d 382 (1958).

Enactment of procedure by reference valid. — Laws 1933, ch. 7 (39-4-13 to 39-4-16 NMSA 1978) does not contravene N.M. Const., art. IV, § 18 by attempting to revise, amend and extend substantive law by reference; the act grants an optional procedure for the enforcement of judgment liens, and procedural law may be adopted by reference. Ballew v. Denson, 63 N.M. 370, 320 P.2d 382 (1958).

Judgment lien on real estate is right established by statute and did not exist at common law. Curtis Mfg. Co. v. Barela, 76 N.M. 392, 415 P.2d 361 (1966).

Substantive and remedial rights. — Holder of a judgment lien on real estate has two or more rights, i.e., the right to the lien, which is a sort of substantive or property right, and a right to the remedies to enforce the lien. Pugh v. Heating & Plumbing Fin. Corp., 49 N.M. 234, 161 P.2d 714 (1945).

Manner of conducting ordinary suits for mortgage foreclosures. — There are no statutes prescribing the manner in which ordinary suits for the foreclosure of mortgages are to be conducted, so the reference in this section to the manner of conducting such suits must be to the general practice in prosecuting all suits, both legal and equitable, under our Rules of Civil Procedure. Armstrong v. Csurilla, 112 N.M. 579, 817 P.2d 1221 (1991).

Lien on equitable interest. — As neither this section nor 39-1-6 NMSA 1978 makes any distinction between legal and equitable interests in real estate, both sections allow a judgment lien to attach to an equitable interest. Mutual Bldg. & Loan Ass'n v. Collins, 85 N.M. 706, 516 P.2d 677 (1973).

Both 39-1-6 NMSA 1978 and this section broadly refer to "real estate" of the judgment debtor and, therefore, are broad enough to include equitable interests within their purview. Marks v. City of Tucumcari, 93 N.M. 4, 595 P.2d 1199 (1979).

Interest retained by vendor under executory contract of sale is personalty and not real estate. Marks v. City of Tucumcari, 93 N.M. 4, 595 P.2d 1199 (1979).

Wife's moiety in community real property is subject to foreclosure under a judgment lien against the wife arising from a tort during the marriage resulting from the negligent operation of a separately owned automobile. McDonald v. Senn, 53 N.M. 198, 204 P.2d 990 (1949).

Judgment lien and judgment. — Judgment lien and judgment, though related, are separate rights, and thus are separate causes of action. Curtis Mfg. Co. v. Barela, 76 N.M. 392, 415 P.2d 361 (1966).

Cross claim to enforce a judgment lien. — Dismissal of a cross claim to enforce a judgment lien against real estate was not a bar to suit on the small claims court judgment, as the issue in the cross claim was the judgment lien and the small claims court judgment was not an issue therein. Curtis Mfg. Co. v. Barela, 76 N.M. 392, 415 P.2d 361 (1966).

Irregularities ratified by debtor. — Where debtor was in possession at the time and was personally served with process but allowed judgment to go against him by default, remaining in possession as tenant under lease from purchaser at special master's sale, the court did not lack jurisdiction because of alleged irregularities in judgment; as debtor made no objection to foreclosure proceedings and outstanding judgments against him were partially reduced from proceeds of sale, he was deemed to have ratified the allegedly irregular proceedings. Ballew v. Denson, 63 N.M. 370, 320 P.2d 382 (1958).

Lien extinguished. — A judgment lien was extinguished and nonenforceable under a counterclaim in a suit to quiet title, where the time within which execution would normally issue on judgment lien had long expired and no steps for enforcement of the judgment had been taken. Pugh v. Heating & Plumbing Fin. Corp., 49 N.M. 234, 161 P.2d 714 (1945).

Sales by Internal Revenue Service distinguished. — Sales on execution or foreclosure are sales conducted under the auspices of the courts following entry of a judgment, order or decree, unlike sales conducted by the Internal Revenue Service after levy and seizure. Henderson v. Gibbany, 76 N.M. 674, 417 P.2d 807 (1966).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Oil and gas royalty as real or personal property, 56 A.L.R.4th 539.

49 C.J.S. Judgments § 502.

39-4-14. [Execution and appraisal not prerequisites to bringing of suit.]

Neither the issuance or levy of execution shall be a prerequisite to the bringing of such suit, nor shall any appraisal of the real estate be required.

History: Laws 1933, ch. 7, § 2; 1941 Comp., § 21-115; 1953 Comp., § 24-1-23.

ANNOTATIONS

Cross references. — For appraisal of property to be sold under judicial sale, *see* 39-5-5 to 39-5-11 NMSA 1978.

Rights of lien holder. — Holder of a judgment lien on real estate has two or more rights, i.e., the right to the lien, which is a sort of substantive or property right, and a right to the remedies to enforce the lien. Pugh v. Heating & Plumbing Fin. Corp., 49 N.M. 234, 161 P.2d 714 (1945).

39-4-15. [Pleading claim of exemption.]

The defendant, if he desires to claim such real estate or any part thereof as an exemption allowed by law, shall set up his claim of exemption by answer in such foreclosure suit.

History: Laws 1933, ch. 7, § 3; 1941 Comp., § 21-116; 1953 Comp., § 24-1-24.

ANNOTATIONS

Waiver of claim of exemption. — The defendant waives his claim of exemption in a foreclosure action when the defendant fails to appeal the denial of his claim of

exemption within thirty days after a foreclosure decree is entered. Grygorwicz v. Trujillo, 2008-NMCA-040, 143 N.M. 704, 181 P.3d 696, rev'd, 2007-NMSC-009, 145 N.M. 650, 203 P.3d 865.

Claim of exemptions. — The defendant's appeal was timely under Rule 12-201(D) NMRA because defendant's motion for claim of exemptions on execution, filed subsequent to the final foreclosure decree, tolled the time for filing a notice of appeal, and defendant properly appealed within thirty days from the express denial of that motion and did not waive the right to a homestead exemption by failing to file an appeal within thirty days of the foreclosure decree. Grygorwicz v. Trujillo, 2009-NMSC-009, 145 N.M. 650, 203 P.3d 865.

Failure to claim exemption. — Where homestead exemption had not been claimed in trial court, it would not be considered by appellate court on review. Chavez v. Chavez, 56 N.M. 393, 244 P.2d 781 (1952).

Mortgagors were not entitled to a homestead exemption against junior judgment lienholders when they had an opportunity to advance claims for such exemption in their answers to the cross claims which sought foreclosure of the liens, but failed to do so, and thereby failed to comply with this section. Speckner v. Riebold, 86 N.M. 275, 523 P.2d 10 (1974).

To be entitled to a homestead exemption under this section and 42-10-9 NMSA 1978 (prior to the 1979 amendment of 42-10-9 NMSA 1978), a party had to claim the exemption in his answer to a foreclosure action; otherwise, he could not claim it. US Life Title Ins. Co. v. Romero, 98 N.M. 699, 652 P.2d 249 (Ct. App.), cert. denied, 98 N.M. 336, 648 P.2d 794 (1982).

39-4-16. [Procedure not exclusive; existing remedies unaltered.]

The method of procedure provided by this act [39-4-13 to 39-4-16 NMSA 1978] shall be available to the holder of the judgment lien at his option, but shall not be exclusive. Nothing herein contained shall be construed as diminishing or altering any existing remedies, by execution or otherwise, now afforded by law to a judgment creditor.

History: Laws 1933, ch. 7, § 4; 1941 Comp., § 21-117; 1953 Comp., § 24-1-25.

ARTICLE 4A
Foreign Judgments

39-4A-1. Short title.

This act [39-4A-1 to 39-4A-6 NMSA 1978] may be cited as the "Foreign Judgments Act".

History: Laws 1989, ch. 256, § 1.

ANNOTATIONS

Lack of jurisdiction. — Where notice of action was mailed to the defendant by the clerk of the Texas court by return receipt mail as provided by the Texas Rules of Civil Procedure; the delivery receipt was not signed by the defendant as required by the Texas Rules, but by someone else; the defendant was aware of the Texas proceeding and entered into a letter agreement with the plaintiff in which the plaintiff granted the defendant an extension of time to respond to the Texas complaint, the Texas court did not have jurisdiction to enter a default judgment against the defendant and the Texas default judgment was not entitled to full faith and credit in New Mexico courts. Miller v. Morrison, 2008-NMCA-092, 144 N.M. 543, 189 P.3d 676.

39-4A-2. Definitions.

As used in the Foreign Judgments Act [39-4A-1 NMSA 1978] "foreign judgment" means any judgment, decree or order of a court of the United States or of any other court which is entitled to full faith and credit in this state.

History: Laws 1989, ch. 256, § 2.

ANNOTATIONS

39-4A-3. Filing and status of foreign judgments.

A. A copy of any foreign judgment authenticated in accordance with an act of congress or the statutes of this state may be filed in the office of the clerk of the district court of any county of this state in which the judgment debtor resides or has any property or property rights subject to execution, foreclosure, attachment or garnishment. The clerk shall treat the foreign judgment in the same manner as a judgment of the district court of this state. A judgment so filed shall have the same effect and is subject to the same procedures, defenses and proceedings for reopening, vacating, staying, enforcing or satisfying as a judgment of the district court of this state and may be enforced or satisfied in like manner, except as provided in Subsection B of this section.

B. All property in this state of a judgment debtor is exempt from execution issuing from a foreign judgment filed pursuant to Subsection A of this section that is in favor of any state for failure to pay that state's income tax on benefits received from a pension or other retirement plan.

History: Laws 1989, ch. 256, § 3; 1994, ch. 48, § 2.

ANNOTATIONS

The 1994 amendment, effective May 18, 1994, designated the previously undesignated language as Subsection A and added the exception clause at the end of the last sentence thereof; and added Subsection B.

Applicability. — Laws 1994, ch. 48, § 3 makes the act applicable to judgments filed with a court in New Mexico on or after the effective date of the act.

Full faith and credit not diminished. — The Foreign Judgments Act does not diminish the full faith and credit obligations due the final judgments of sister states. Conglis v. Radcliffe, 119 N.M. 287, 889 P.2d 1209 (1995).

Relief-from-judgment rule not applicable to foreign judgments. — New Mexico courts may not apply Rule 1-060 NMRA (relief from judgment or order) to foreign judgments in the same manner as the rule is applied to judgments of the courts of this state. The full faith and credit clause of the federal constitution limits the power of a court to reopen or vacate a foreign judgment, and foreign judgments cannot be collaterally attacked on the merits. Jordan v. Hall, 115 N.M. 775, 858 P.2d 863 (Ct. App. 1993).

Entitlement to full faith and credit. — A foreign divorce decree and subsequent child support orders were entitled to full faith and credit. Thoma v. Thoma, 1997-NMCA-016, 123 N.M. 137, 934 P.2d 1066, cert. denied, 122 N.M. 808, 932 P.2d 498 (1997).

Community property law. — New Mexico community property law controls enforcement of separate Arizona debt of a husband in New Mexico courts. Nat'l Bank of Arizona v. Moore, 2005-NMCA-122, 138 N.M. 496, 122 P.3d 1265, cert. denied, 2005-NMCERT-010, 138 N.M. 494, 122 P.3d 1263.

Challenge of foreign judgment. — The Foreign Judgments Act permits a judgment debtor to challenge a foreign judgment on the basis of the lack of jurisdiction. Mueller v. Sample, 2004-NMCA-075, 135 N.M. 748, 93 P.3d 769.

Revival of foreign judgment. — When a judgment by a federal bankruptcy court is domesticated in a district court in New Mexico, that court has jurisdiction to address and resolve issues concerning the judgment, including revival thereof; however, the district court lacks jurisdiction if the judgment has not been properly domesticated pursuant to this section. Walter E. Heller W., Inc. v. Ditto, 1998-NMCA-068, 125 N.M. 226, 959 P.2d 560, cert. denied, 125 N.M. 147, 958 P.2d 105 (1998).

Texas judgment reached the assets of the decedent's estate in New Mexico. — Where plaintiff, who was a beneficiary of the decedent's testamentary trust, obtained a Texas judgment against defendant individually and as the executor of decedent's estate and trustee of decedent's testamentary trust; the judgment provided that the award to plaintiff exhausted plaintiff's rights to inherit from the estate; plaintiff domesticated the judgment in New Mexico and obtained a writ of execution to satisfy the judgment from property owned by the estate in New Mexico; and defendant claimed that because

plaintiff sued defendant for malfeasance, defendant was personally liable to plaintiff and the judgment did not lie against the estate, the judgment lay against the estate, trust and defendant personally and reached assets owned by the estate in New Mexico. Williams v. Crutcher, 2013-NMCA-044, 298 P.3d 1184.

39-4A-4. Notice of filing.

A. At the time of the filing of the foreign judgment, the judgment creditor or his lawyer shall make and file with the clerk of the district court an affidavit setting forth the name and last known address of the judgment debtor and the judgment creditor.

B. Promptly upon the filing of the foreign judgment and the affidavit, the clerk of the district court shall mail a notice of the filing of the foreign judgment to the judgment debtor at the address given and shall make a note of the mailing in the docket. The notice shall include the name and address of the judgment creditor and his attorney, if any, in this state. In addition, the judgment creditor shall mail a notice of the filing of the judgment to the judgment debtor, certified mail, and shall file proof of the mailing with the clerk.

C. No execution or other process for enforcement of a foreign judgment filed pursuant to this section shall issue until twenty days after the date the judgment is filed.

History: Laws 1989, ch. 256, § 4.

ANNOTATIONS

39-4A-5. Stay.

A. If the judgment debtor shows the district court that a stay of execution has been granted, the court shall stay enforcement of the foreign judgment until the appeal is concluded, the time for appeal expires or the stay of execution expires or is vacated, upon proof that the judgment debtor has furnished the security for the satisfaction of the judgment required by the state in which it was rendered.

B. If the judgment debtor shows the district court sufficient grounds upon which enforcement of a judgment of any district court of this state would be stayed, the court shall stay enforcement of the foreign judgment for an appropriate period, upon requiring the same security for satisfaction that is required in this state.

History: Laws 1989, ch. 256, § 5.

ANNOTATIONS

39-4A-6. Optional procedure.

The right of a judgment creditor to bring an action to enforce his judgment instead of proceeding under the Foreign Judgments Act [39-4A-1 to 39-4A-6 NMSA 1978] remains unimpaired.

History: Laws 1989, ch. 256, § 6.

ANNOTATIONS

ARTICLE 4B
Foreign Money-Judgments Recognition

39-4B-1. Repealed.

ANNOTATIONS

Repeals. — Laws 2009, ch. 142, § 12 repealed 39-4B-1 NMSA 1978, as enacted by Laws 1991, ch. 180, § 1, the short title of the Uniform Foreign Money-Judgments Recognition Act, effective July 1, 2009. For provisions of former section, *see* the 2008 NMSA 1978 on *NMOneSource.com.*

39-4B-2. Repealed.

ANNOTATIONS

Repeals. — Laws 2009, ch. 142, § 12 repealed 39-4B-2 NMSA 1978, as enacted by Laws 1991, ch. 180, § 2, relating to definitions, effective July 1, 2009. For provisions of former section, *see* the 2008 NMSA 1978 on *NMOneSource.com.*

39-4B-3. Repealed.

ANNOTATIONS

Repeals. — Laws 2009, ch. 142, § 12 repealed 39-4B-3 NMSA 1978, as enacted by Laws 1991, ch. 180, § 3, relating to applicability, effective July 1, 2009. For provisions of former section, *see* the 2008 NMSA 1978 on *NMOneSource.com.*

39-4B-4. Repealed.

ANNOTATIONS

Repeals. — Laws 2009, ch. 142, § 12 repealed 39-4B-4 NMSA 1978, as enacted by Laws 1991, ch. 180, § 4, relating to recognition and enforcement, effective July 1, 2009. For provisions of former section, *see* the 2008 NMSA 1978 on *NMOneSource.com.*

39-4B-5. Repealed.

ANNOTATIONS

Repeals. — Laws 2009, ch. 142, § 12 repealed 39-4B-5 NMSA 1978, as enacted by Laws 1991, ch. 180, § 5, relating to grounds for non-recognition, effective July 1, 2009. For provisions of former section, *see* the 2008 NMSA 1978 on *NMOneSource.com.*

39-4B-6. Repealed.

ANNOTATIONS

Repeals. — Laws 2009, ch. 142, § 12 repealed 39-4B-6 NMSA 1978, as enacted by Laws 1991, ch. 180, § 6, relating to personal jurisdiction, effective July 1, 2009. For provisions of former section, *see* the 2008 NMSA 1978 on *NMOneSource.com.*

39-4B-7. Repealed.

ANNOTATIONS

Repeals. — Laws 2009, ch. 142, § 12 repealed 39-4B-7 NMSA 1978, as enacted by Laws 1991, ch. 180, § 7, relating to stay in cases of appeal, effective July 1, 2009. For provisions of former section, *see* the 2008 NMSA 1978 on *NMOneSource.com.*

39-4B-8. Repealed.

ANNOTATIONS

Repeals. — Laws 2009, ch. 142, § 12 repealed 39-4B-8 NMSA 1978, as enacted by Laws 1991, ch. 180, § 8, relating to saving clause, effective July 1, 2009. For provisions of former section, *see* the 2008 NMSA 1978 on *NMOneSource.com.*

39-4B-9. Repealed.

ANNOTATIONS

Repeals. — Laws 2009, ch. 142, § 12 repealed 39-4B-9 NMSA 1978, as enacted by Laws 1991, ch. 180, § 9, relating to uniformity of interpretation, effective July 1, 2009. For provisions of former section, *see* the 2008 NMSA 1978 on *NMOneSource.com.*

ARTICLE 4C
Foreign-Money Claims

39-4C-1. Short title.

Sections 1 through 16 [39-4C-1 to 39-4C-16 NMSA 1978] of this act may be cited as the Uniform Foreign-Money Claims Act.

History: Laws 1991, ch. 181, § 1.

ANNOTATIONS

Applicability. — Laws 1991, ch. 181, § 18 makes the Uniform Foreign-Money Claims Act applicable to actions and distribution proceedings commenced after July 1, 1991.

39-4C-2. Definitions.

As used in the Uniform Foreign-Money Claims Act [39-4C-1 NMSA 1978]:

A. "action" means a judicial proceeding or arbitration in which a payment in money may be awarded or enforced with respect to a foreign-money claim;

B. "bank-offered spot rate" means the spot rate of exchange at which a bank will sell foreign money at a spot rate;

C. "conversion date" means the banking day next preceding the date on which money, in accordance with the Uniform Foreign-Money Claims Act, is:

(1) paid to a claimant in an action or distribution proceeding;

(2) paid to the official designated by law to enforce a judgment or award on behalf of a claimant; or

(3) used to recoup, set-off or counterclaim in different moneys in an action or distribution proceeding;

D. "distribution proceeding" means a judicial or nonjudicial proceeding for the distribution of a fund in which one or more foreign-money claims is asserted and includes an accounting, an assignment for the benefit of creditors, a foreclosure, the liquidation or rehabilitation of a corporation or other entity and the distribution of an estate, trust or other fund;

E. "foreign money" means money other than money of the United States of America;

F. "foreign-money claim" means a claim upon an obligation to pay, or a claim for recovery of a loss, expressed in or measured by a foreign money;

G. "money" means a medium of exchange for the payment of obligations or a store of value authorized or adopted by a government or by intergovernmental agreement;

H. "money of the claim" means the money determined as proper pursuant to Section 5 [39-4C-5 NMSA 1978] of the Uniform Foreign-Money Claims Act;

I. "person" means an individual, a corporation, government or governmental subdivision or agency, business trust, estate, trust, joint venture, partnership, association, two or more persons having a joint or common interest or any other legal or commercial entity;

J. "rate of exchange" means the rate at which money of one country may be converted into money of another country in a free financial market convenient to or reasonably usable by a person obligated to pay or to state a rate of conversion; if separate rates of exchange apply to different kinds of transactions, the term means the rate applicable to the particular transaction giving rise to the foreign-money claim;

K. "spot rate" means the rate of exchange at which foreign money is sold by a bank or other dealer in foreign exchange for immediate or next-day availability or for settlement by immediate payment in cash or equivalent, by charge to an account or by an agreed delayed settlement not exceeding two days; and

L. "state" means a state of the United States, the District of Columbia, the commonwealth of Puerto Rico or a territory or insular possession subject to the jurisdiction of the United States.

History: Laws 1991, ch. 181, § 2.

ANNOTATIONS

Applicability. — Laws 1991, ch. 181, § 18 makes the Uniform Foreign-Money Claims Act applicable to actions and distribution proceedings commenced after July 1, 1991.

39-4C-3. Scope.

A. The Uniform Foreign-Money Claims Act [39-4C-1 NMSA 1978] applies only to a foreign-money claim in an action or distribution proceeding.

B. The Uniform Foreign-Money Claims Act applies to foreign-money issues even if other law under the conflict of laws rules of this state applies to other issues in the action or distribution proceeding.

History: Laws 1991, ch. 181, § 3.

ANNOTATIONS

Applicability. — Laws 1991, ch. 181, § 18 makes the Uniform Foreign-Money Claims Act applicable to actions and distribution proceedings commenced after July 1, 1991.

39-4C-4. Variation by agreement.

A. The effect of the Uniform Foreign-Money Claims Act [39-4C-1 NMSA 1978] may be varied by agreement of the parties made before or after commencement of an action or distribution proceeding or the entry of judgment.

B. Parties to a transaction may agree upon the money to be used in a transaction giving rise to a foreign-money claim and may agree to use different moneys for different aspects of the transaction. Stating the price in a foreign money for one aspect of a transaction does not alone require the use of that money for other aspects of the transaction.

History: Laws 1991, ch. 181, § 4.

ANNOTATIONS

Applicability. — Laws 1991, ch. 181, § 18 makes the Uniform Foreign-Money Claims Act applicable to actions and distribution proceedings commenced after July 1, 1991.

39-4C-5. Determining money of the claim.

A. The money in which the parties to a transaction have agreed that payment is to be made is the proper money of the claim for payment.

B. If the parties to a transaction have not otherwise agreed, the proper money of the claim, as in each case may be appropriate, is the money:

(1) regularly used between the parties as a matter of usage or course of dealing;

(2) used at the time of a transaction in international trade, by trade usage or common practice, for valuing or settling transactions in the particular commodity or service involved; or

(3) in which the loss was ultimately felt or will be incurred by the party claimant.

History: Laws 1991, ch. 181, § 5.

ANNOTATIONS

Applicability. — Laws 1991, ch. 181, § 18 makes the Uniform Foreign-Money Claims Act applicable to actions and distribution proceedings commenced after July 1, 1991.

39-4C-6. Determining amount of the money of certain contract claims.

A. If an amount contracted to be paid in a foreign money is measured by a specified amount of a different money, the amount to be paid is determined on the conversion date.

B. If an amount contracted to be paid in a foreign money is to be measured by a different money at the rate of exchange prevailing on a date before default, that rate of exchange applies only to payments made within a reasonable time after default, not exceeding thirty days. Thereafter, conversion is made at the bank-offered spot rate on the conversion date.

C. A monetary claim is neither usurious nor unconscionable because the agreement on which it is based provides that the amount of the debtor's obligation to be paid in the debtor's money, when received by the creditor, must equal a specified amount of the foreign money of the country of the creditor. If, because of unexcused delay in payment of a judgment or award, the amount received by the creditor does not equal the amount of the foreign money specified in the agreement, the court or arbitrator shall amend the judgment or award accordingly.

History: Laws 1991, ch. 181, § 6.

ANNOTATIONS

Applicability. — Laws 1991, ch. 181, § 18 makes the Uniform Foreign-Money Claims Act applicable to actions and distribution proceedings commenced after July 1, 1991.

39-4C-7. Asserting and defending foreign-money claim.

A. A person may assert a claim in a specified foreign money. If a foreign-money claim is not asserted, the claimant makes the claim in United States dollars.

B. An opposing party may allege and prove that a claim, in whole or in part, is in a different money than that asserted by the claimant.

C. A person may assert a defense, set-off, recoupment or counterclaim in any money without regard to the money of other claims.

D. The determination of the proper money of the claim is a question of law.

History: Laws 1991, ch. 181, § 7.

ANNOTATIONS

Applicability. — Laws 1991, ch. 181, § 18 makes the Uniform Foreign-Money Claims Act applicable to actions and distribution proceedings commenced after July 1, 1991.

39-4C-8. Judgments and awards on foreign-money claims; times of money conversion; form of judgment.

A. Except as provided in Subsection C of this section, a judgment or award on a foreign-money claim must be stated in an amount of the money of the claim.

B. A judgment or award on a foreign-money claim is payable in that foreign money or, at the option of the debtor, in the amount of United States dollars that will purchase that foreign money on the conversion date at a bank-offered spot rate.

C. Assessed costs must be entered in United States dollars.

D. Each payment in United States dollars must be accepted and credited on a judgment or award on a foreign-money claim in the amount of the foreign money that could be purchased by the dollars at a bank-offered spot rate of exchange at or near the close of business on the conversion date for that payment.

E. A judgment or award made in an action or distribution proceeding on both a defense, set-off, recoupment or counterclaim, and the adverse party's claim, must be netted by converting the money of the smaller into the money of the larger, and by subtracting the smaller from the larger, and specify the rates of exchange used.

F. A judgment substantially in the following form complies with Subsection A of this section: "It is the judgment of this court that Defendant _____(insert name)_____ pay to Plaintiff _____(insert name)_____ the sum of _____(insert amount in the foreign money)_____ plus interest on that sum at the rate of _____(insert rate - see Section 10 of the Uniform Foreign-Money Claims Act)_____ percent a year or, at the option of the judgment debtor, the number of United States dollars that will purchase the _____(insert name of foreign money)_____ with interest due, at a bank-offered spot rate at or near the close of business on the banking day next before the day of payment, together with assessed costs of _____(insert amount)_____ United States dollars.".

G. If a contract claim is of the type covered by Subsection A or B of Section 6 of the Uniform Foreign-Money Claims Act, the judgment or award must be entered for the amount of money stated to measure the obligation to be paid in the money specified for payment or, at the option of the debtor, the number of United States dollars that will purchase the computed amount of the money of payment on the conversion date at a bank-offered spot rate.

H. A judgment shall be filed, docketed and indexed in foreign money in the same manner, and has the same effect as a lien, as other judgments. It may be discharged by payment.

History: Laws 1991, ch. 181, § 8.

ANNOTATIONS

Applicability. — Laws 1991, ch. 181, § 18 makes the Uniform Foreign-Money Claims Act applicable to actions and distribution proceedings commenced after July 1, 1991.

39-4C-9. Conversions of foreign money in distribution proceeding.

The rate of exchange prevailing at or near the close of business on the day the distribution proceeding is initiated governs all exchanges of foreign money in a distribution proceeding. A foreign-money claimant in a distribution proceeding shall assert its claim in the named foreign money and show the amount of United States dollars resulting from a conversion as of the date the proceeding was initiated.

History: Laws 1991, ch. 181, § 9.

ANNOTATIONS

Applicability. — Laws 1991, ch. 181, § 18 makes the Uniform Foreign-Money Claims Act applicable to actions and distribution proceedings commenced after July 1, 1991.

39-4C-10. Pre-judgment and judgment interest.

A. With respect to a foreign-money claim, recovery of pre-judgment or pre-award interest and the rate of interest to be applied in the action or distribution proceeding, except as provided in Subsection B of this section, are matters of the substantive law governing the right to recovery under the conflict-of-laws rules of this state.

B. The court or arbitrator shall increase or decrease the amount of pre-judgment or pre-award interest otherwise payable in a judgment or award in foreign money to the extent required by the law of this state governing a failure to make or accept an offer of settlement or offer of judgment, or conduct by a party or its attorney causing undue delay or expense.

C. A judgment or award on a foreign-money claim bears interest at the rate applicable to judgments of this state.

History: Laws 1991, ch. 181, § 10.

ANNOTATIONS

Applicability. — Laws 1991, ch. 181, § 18 makes the Uniform Foreign-Money Claims Act applicable to actions and distribution proceedings commenced after July 1, 1991.

39-4C-11. Enforcement of foreign judgments.

A. If an action is brought to enforce a judgment of another jurisdiction expressed in a foreign money and the judgment is recognized in this state as enforceable, the enforcing judgment must be entered as provided in Section 8 [39-4C-8 NMSA 1978] of the Uniform Foreign-Money Claims Act, whether or not the foreign judgment confers an option to pay in an equivalent amount of United States dollars.

B. A foreign judgment may be filed and docketed in accordance with any rule or statute of this state providing a procedure for its recognition and enforcement.

C. A satisfaction or partial payment made upon the foreign judgment, on proof thereof, must be credited against the amount of foreign money specified in the judgment, notwithstanding the entry of judgment in this state.

D. A judgment entered on a foreign-money claim only in United States dollars in another state must be enforced in this state in United States dollars only.

History: Laws 1991, ch. 181, § 11.

ANNOTATIONS

Applicability. — Laws 1991, ch. 181, § 18 makes the Uniform Foreign-Money Claims Act applicable to actions and distribution proceedings commenced after July 1, 1991.

39-4C-12. Determining United States dollar value of foreign-money claims for limited purposes.

A. Computations under this section are for the limited purposes of the section and do not affect computation of the United States dollar equivalent of the money of the judgment for the purpose of payment.

B. For the limited purpose of facilitating the enforcement of provisional remedies in an action, the value in United States dollars of assets to be seized or restrained pursuant to a writ of attachment, garnishment, execution or other legal process, the amount of United States dollars at issue for assessing costs, or the amount of United States dollars involved for a surety bond or other court-required undertaking, must be ascertained as provided in Subsections C and D of this section.

C. A party seeking process, costs, bond or other undertaking under Subsection B of this section shall compute in United States dollars the amount of the foreign-money claimed from a bank-offered spot rate prevailing at or near the close of business on the banking day next preceding the filing of a request or application for the issuance of process or for the determination of costs, or an application for a bond or other court-required undertaking.

D. A party seeking the process, costs, bond or other undertaking under Subsection B of this section shall file with each request or application an affidavit or certificate

executed in good faith by its counsel or a bank officer, stating the market quotation used and how it was obtained, and setting forth the calculation. Affected court officials incur no liability, after a filing of the affidavit or certificate, for acting as if the judgment were in the amount of United States dollars stated in the affidavit or certificate.

History: Laws 1991, ch. 181, § 12.

ANNOTATIONS

Applicability. — Laws 1991, ch. 181, § 18 makes the Uniform Foreign-Money Claims Act applicable to actions and distribution proceedings commenced after July 1, 1991.

39-4C-13. Effect of currency revalorization.

A. If, after an obligation is expressed or a loss is incurred in a foreign money, the country issuing or adopting that money substitutes a new money in place of that money, the obligation or the loss is treated as if expressed or incurred in the new money at the rate of conversion the issuing country establishes for the payment of like obligations or losses denominated in the former money.

B. If substitution under Subsection A of this section occurs after a judgment or award is entered on a foreign-money claim, the court or arbitrator shall amend the judgment or award by a like conversion of the former money.

History: Laws 1991, ch. 181, § 13.

ANNOTATIONS

Applicability. — Laws 1991, ch. 181, § 18 makes the Uniform Foreign-Money Claims Act applicable to actions and distribution proceedings commenced after July 1, 1991.

39-4C-14. Supplementary general principles of law.

Unless displaced by particular provisions of the Uniform Foreign-Money Claims Act [39-4C-1 NMSA 1978], the principles of law and equity, including the law merchant, and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy or other validating or invalidating causes supplement its provisions.

History: Laws 1991, ch. 181, § 14.

ANNOTATIONS

Applicability. — Laws 1991, ch. 181, § 18 makes the Uniform Foreign-Money Claims Act applicable to actions and distribution proceedings commenced after July 1, 1991.

39-4C-15. Uniformity of application and construction.

The Uniform Foreign-Money Claims Act [39-4C-1 NMSA 1978] shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of that act among states enacting it.

History: Laws 1991, ch. 181, § 15.

ANNOTATIONS

Applicability. — Laws 1991, ch. 181, § 18 makes the Uniform Foreign-Money Claims Act applicable to actions and distribution proceedings commenced after July 1, 1991.

39-4C-16. Severability clause.

If any provision of the Uniform Foreign-Money Claims Act [39-4C-1 NMSA 1978] or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of that act which can be given effect without the invalid provision or application, and to this end the provisions of that act are severable.

History: Laws 1991, ch. 181, § 16.

ANNOTATIONS

Applicability. — Laws 1991, ch. 181, § 18 makes the Uniform Foreign-Money Claims Act applicable to actions and distribution proceedings commenced after July 1, 1991.

ARTICLE 4D
Uniform Foreign-Country Money Judgments Recognition Act

39-4D-1. Short title.

This act may be cited as the "Uniform Foreign-Country Money Judgments Recognition Act".

History: Laws 2009, ch. 142, § 1.

ANNOTATIONS

Effective dates. — Laws 2009, ch. 142, § 14 made the act effective July 1, 2009.

39-4D-2. Definitions.

As used in the Uniform Foreign-Country Money Judgments Recognition Act:

A. "foreign country" means a government other than:

(1) the United States;

(2) a state, district, commonwealth, territory or insular possession of the United States; or

(3) any other government with regard to which the decision in this state as to whether to recognize the judgments of that government's court is initially subject to determination under the full faith and credit clause of the United States constitution;

B. "foreign-country judgment" means a judgment of a court of a foreign country; and

C. "foreign court" means a court of a foreign country.

History: Laws 2009, ch. 142, § 2.

ANNOTATIONS

Effective dates. — Laws 2009, ch. 142, § 14 made the act effective July 1, 2009.

39-4D-3. Application.

A. Except as otherwise provided in Subsection B of this section, the Uniform Foreign-Country Money Judgments Recognition Act applies to a foreign-country judgment to the extent that the foreign-country judgment:

(1) grants or denies recovery of a sum of money; and

(2) under the law of the foreign country where rendered, is final, conclusive and enforceable.

B. The Uniform Foreign-Country Money Judgments Recognition Act does not apply to a foreign-country judgment, even if the foreign-country judgment grants or denies recovery of a sum of money, to the extent that the foreign-country judgment is:

(1) a judgment for taxes;

(2) a fine or other penalty; or

(3) a judgment for divorce, support or maintenance, or other judgment rendered in connection with domestic relations.

C. The party seeking recognition of a foreign-country judgment has the burden of establishing that the Uniform Foreign-Country Money Judgments Recognition Act applies to the foreign-country judgment.

History: Laws 2009, ch. 142, § 3.

ANNOTATIONS

Effective dates. — Laws 2009, ch. 142, § 14 made the act effective July 1, 2009.

39-4D-4. Standards for recognition of foreign-country judgment.

A. Except as otherwise provided in Subsections B and C of this section, a court of this state shall recognize a foreign-country judgment to which the Uniform Foreign-Country Money Judgments Recognition Act applies.

B. A court of this state shall not recognize a foreign-country judgment if:

(1) the foreign-country judgment was rendered under a judicial system that does not provide impartial tribunals or procedures compatible with the requirements of due process of law;

(2) the foreign court did not have personal jurisdiction over the defendant; or

(3) the foreign court did not have jurisdiction over the subject matter.

C. A court of this state need not recognize a foreign-country judgment if:

(1) the defendant in the proceeding in the foreign court did not receive notice of the proceeding in sufficient time to enable the defendant to defend;

(2) the foreign-country judgment was obtained by fraud that deprived the losing party of an adequate opportunity to present its case;

(3) the foreign-country judgment or the cause of action on which the foreign-country judgment is based is repugnant to the public policy of this state or of the United States;

(4) the foreign-country judgment conflicts with another final and conclusive judgment;

(5) the proceeding in the foreign court was contrary to an agreement between the parties under which the dispute in question was to be determined otherwise than by proceedings in that foreign court;

(6) in the case of jurisdiction based only on personal service, the foreign court was a seriously inconvenient forum for the trial of the action;

(7) the foreign-country judgment was rendered in circumstances that raise substantial doubt about the integrity of the rendering court with respect to the foreign-country judgment; or

(8) the specific proceeding in the foreign court leading to the foreign-country judgment was not compatible with the requirements of due process of law.

D. The party resisting recognition of the foreign-country judgment has the burden of establishing that one of the grounds for nonrecognition stated in Subsection B or C of this section exists.

History: Laws 2009, ch. 142, § 4.

ANNOTATIONS

Effective dates. — Laws 2009, ch. 142, § 14 made the act effective July 1, 2009.

39-4D-5. Personal jurisdiction.

A. A foreign-country judgment shall not be refused recognition for lack of personal jurisdiction if:

(1) the defendant was served with process personally in the foreign country;

(2) the defendant voluntarily appeared in the proceeding, other than for the purpose of protecting property seized or threatened with seizure in the proceeding or of contesting the jurisdiction of the court over the defendant;

(3) the defendant, before the commencement of the proceeding, had agreed to submit to the jurisdiction of the foreign court with respect to the subject matter involved;

(4) the defendant was domiciled in the foreign country when the proceeding was instituted or was a corporation or other form of business organization that had its principal place of business in, or was organized under the laws of, the foreign country;

(5) the defendant had a business office in the foreign country and the proceeding in the foreign court involved a cause of action arising out of business done by the defendant through that office in the foreign country; or

(6) the defendant operated a motor vehicle or airplane in the foreign country and the proceeding involved a cause of action arising out of that operation.

B. The list of bases for personal jurisdiction in Subsection A of this section is not exclusive, and the courts of this state may recognize bases of personal jurisdiction other than those listed in Subsection A of this section as sufficient to support a foreign-country judgment.

History: Laws 2009, ch. 142, § 5.

ANNOTATIONS

Effective dates. — Laws 2009, ch. 142, § 14 made the act effective July 1, 2009.

39-4D-6. Procedure for recognition of foreign-country judgment.

A. If recognition of a foreign-country judgment is sought as an original matter, the issue of recognition shall be raised by filing an action seeking recognition of the foreign-country judgment.

B. If recognition of a foreign-country judgment is sought in a pending action, the issue of recognition may be raised by counterclaim, cross-claim or affirmative defense.

History: Laws 2009, ch. 142, § 6.

ANNOTATIONS

Effective dates. — Laws 2009, ch. 142, § 14 made the act effective July 1, 2009.

39-4D-7. Effect of recognition of foreign-country judgment.

If the court in a proceeding pursuant to Section 6 [39-4D-6 NMSA 1978] of the Uniform Foreign-Country Money Judgments Recognition Act finds that the foreign-country judgment is entitled to recognition under that act, then, to the extent that the foreign-country judgment grants or denies recovery of a sum of money, the foreign-country judgment is:

A. conclusive between the parties to the same extent as the judgment of a sister state entitled to full faith and credit in this state would be conclusive; and

B. enforceable in the same manner and to the same extent as a judgment rendered in this state.

History: Laws 2009, ch. 142, § 7.

ANNOTATIONS

Effective dates. — Laws 2009, ch. 142, § 14 made the act effective July 1, 2009.

39-4D-8. Stay of proceedings pending appeal of foreign-country judgment.

If a party establishes that an appeal from a foreign-country judgment is pending or will be taken, the court may stay any proceedings with regard to the foreign-country judgment until the appeal is concluded, the time for appeal expires or the party appealing has had sufficient time to prosecute the appeal and has failed to do so.

History: Laws 2009, ch. 142, § 8.

ANNOTATIONS

Effective dates. — Laws 2009, ch. 142, § 14 made the act effective July 1, 2009.

39-4D-9. Statute of limitations.

An action to recognize a foreign-country judgment shall be commenced within the earlier of the time during which the foreign-country judgment is effective in the foreign country or fifteen years from the date that the foreign-country judgment became effective in the foreign country.

History: Laws 2009, ch. 142, § 9.

ANNOTATIONS

Effective dates. — Laws 2009, ch. 142, § 14 made the act effective July 1, 2009.

39-4D-10. Saving clause.

The Uniform Foreign-Country Money Judgments Recognition Act does not prevent the recognition under principles of comity or otherwise of a foreign-country judgment not within the scope of that act.

History: Laws 2009, ch. 142, § 10.

ANNOTATIONS

Effective dates. — Laws 2009, ch. 142, § 14 made the act effective July 1, 2009.

39-4D-11. Uniformity of interpretation.

In applying and construing the Uniform Foreign-Country Money Judgments Recognition Act, consideration shall be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

History: Laws 2009, ch. 142, § 11.

ANNOTATIONS

Effective dates. — Laws 2009, ch. 142, § 14 made the act effective July 1, 2009.

Applicability. — Laws 2009, ch. 142, § 13 provided that actions commenced before July 1, 2009 in which the issue of the recognition of a foreign country judgment is raised are governed by the Uniform Money-Judgments Recognition Act as if that act had not been repealed; and, that the Uniform Foreign-Country Money Judgments Recognition Act applies to all actions commenced on or after July 1, 2009 in which the issue of recognition of a foreign-country judgment is raised.

ARTICLE 5
Sales Under Execution and Foreclosure

39-5-1. [Time and notice of judicial sales.]

That no lands, tenements, goods or chattels shall be sold by virtue of any execution or other process, including chattel or real estate mortgages, unless such sale be at public vendue, between the hours of nine in the morning and the setting of the sun of the same day, nor unless the time and place of holding such sale and full description of property to be sold shall have previously been published for four weeks preceding said sale in English or Spanish, as the officer conducting said sale in his judgment may deem will give the most extensive notice in the county in which said property is situate, or, if there be no newspaper printed in said county, then in the newspaper chosen as the official paper for said county, and also by posting six such notices printed or written or partly printed or written in six of the most public places in said county.

History: Laws 1895, ch. 37, § 1; C.L. 1897, § 3113; Code 1915, § 2195; C.S. 1929, § 46-106; 1941 Comp., § 21-201; 1953 Comp., § 24-2-1.

ANNOTATIONS

Cross references. — For commission and expenses due sheriff for judicial sale, *see* 4-41-17 NMSA 1978.

For publication of legal notice, *see* 14-11-1 NMSA 1978 et seq.

For prohibition against selling real property under power of sale, *see* 48-7-7 NMSA 1978.

For sale pursuant to "chattel mortgage," *see* 55-9-101 NMSA 1978 et seq., relating to secured transactions.

For foreclosure of mortgages on railroad property, *see* 63-5-1 to 63-5-4 NMSA 1978.

Applicability of article. — While 39-5-1 to 39-5-3 and 39-5-15 to 39-5-23 NMSA 1978 apply generally to foreclosures, 39-5-5 to 39-5-13 NMSA 1978 apply only to sales and levies under writs of execution. Armstrong v. Csurilla, 112 N.M. 579, 817 P.2d 1221 (1991).

Notice in foreclosure sales. — With respect to the kind of notice to be employed in cases of sales under execution and foreclosure, this section, rather than Rule 1-005, governs. Prod. Credit Ass'n v. Williamson, 107 N.M. 212, 755 P.2d 56 (1988).

Mortgagee first lienholder could not use the judicial system to enforce its rights in a foreclosure proceeding after deliberately failing to serve notice upon junior lienholders of record of its intention to hold the foreclosure sale, even though the junior lienholders were parties to a lawsuit brought by the mortgagee and were entitled to actual notice of the sale. W. Bank v. Fluid Assets Dev. Corp., 111 N.M. 458, 806 P.2d 1048 (1991).

Publication of notice of foreclosure sale. — Where guarantors entered into a guaranty agreement for a small business administration loan; the debtor defaulted and the SBA filed suit against the guarantors; the district court granted summary judgment for the SBA; and the SBA published notice of the sale of real property that secured the loan, but did not directly notify the guarantors of the sale, the SBA complied with the provisions of New Mexico law with respect to foreclosure sales and the district court did not err in refusing to set aside the foreclosure sale. United States v. New Mexico Landscaping, Inc., 785 F.2d 843 (10th Cir. 1986).

Newspaper publication sufficient. — Where notices of sale are published in a newspaper printed in the county where the property is situate, this section does not require the posting of notices. Pecos Valley Lumber Co. v. Friedenbloom, 23 N.M. 383, 168 P. 497 (1917).

Sale priorities. — Encumbered property retained by a mortgagor should be liable to sale before looking to portion conveyed by mortgagor to another party. Seasons, Inc. v. Atwell, 86 N.M. 751, 527 P.2d 792 (1974).

Property in custodia legis. — Clerk of justice of the peace court (now replaced by magistrate courts), charged with forgery of signature on title certificate appertaining to automobile which had been levied upon under a writ of execution issued out of that court, could not have come into legal possession through the execution, either in an individual capacity or as an employee, as the automobile was in custodia legis. State v. Weber, 76 N.M. 636, 417 P.2d 444 (1966).

Owner's rights after levy. — Owner of an automobile levied upon under a writ of execution issued out of justice of the peace court (now replaced by magistrate courts), was not, by reason of the levy of the execution, divested of all legal rights and interests in the vehicle. State v. Weber, 76 N.M. 636, 417 P.2d 444 (1966).

Effect of irregularity. — Foreclosure sales made otherwise than as herein provided are irregular and erroneous, but not void. McCloskey v. Shortle, 41 N.M. 107, 64 P.2d 1294 (1937).

Mortgagor waives irregularities by failure to object until after trial court has lost jurisdiction to set aside its confirmation of sale. McCloskey v. Shortle, 41 N.M. 107, 64 P.2d 1294 (1937).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 30 Am. Jur. 2d Executions § 456 et seq.

Effect of omission of seal from order of sale, 30 A.L.R. 735.

Recitals in sheriff's deed as prima facie evidence of giving notice, 36 A.L.R. 998, 108 A.L.R. 667.

Sunday or holiday: judicial, execution or tax sale on election day, holiday, or Sunday, 58 A.L.R. 1273.

Indefiniteness of notice as regards place of sale, 120 A.L.R. 660.

Right of purchaser in execution or judicial sale to value of use and occupation by judgment debtor or his successor in interest during period of redemption, 153 A.L.R. 739.

Title of stranger to litigation who purchased at judicial sale before appeal or pending appeal without supersedeas as affected by reversal of decree directing sale, 155 A.L.R. 1252.

Liability for use and occupation, or rents and profits of purchaser at execution or judicial sale who is required to restore property because of reversal or vacation of judgment or sale thereunder, 156 A.L.R. 905.

Interest of spouse in estate by entireties as subject to satisfaction of his or her individual debt, 166 A.L.R. 969, 75 A.L.R.2d 1172.

Right of purchaser at judicial sale to question validity of purported lien, 171 A.L.R. 302.

Enforceability as between the parties of agreement to purchase property at judicial sale for their joint benefit, 14 A.L.R.2d 1267.

Duties, rights, and remedies between attorney and client where attorney purchases property of client at or through tax, execution, or judicial sale, 20 A.L.R.2d 1280.

Rights of parties under an oral agreement to buy or bid in land for another, 27 A.L.R.2d 1285.

Inadequacy of price as basis for setting aside execution or sheriff's sale - modern cases, 5 A.L.R.4th 794.

Right of purchaser at execution sale, upon failure of title, to reimbursement or restitution from judgment creditor, 33 A.L.R.4th 1206.

Judgment lien or levy of execution on one joint tenant's share or interest as severing joint tenancy, 51 A.L.R.4th 906.

Right of debtor to "de-acceleration" of residential mortgage indebtedness under Chapter 13 of Bankruptcy Code of 1978 (11 USCS § 1322(b)), 67 A.L.R. Fed. 217.

33 C.J.S. Executions § 211; 50 C.J.S. Judicial Sales §§ 10, 17.

39-5-1.1. Judicial sales of perishable property; court order; petition; hearing.

In all cases of the sale of perishable goods by virtue of any execution or other process pursuant to the provisions of Section 39-5-1 NMSA 1978 or by virtue of the foreclosure of a landlord's lien pursuant to the provisions of Section 48-3-14 NMSA 1978, when the property being sold is of a perishable nature and liable to be lost or diminished in value before the time for the notice required for such sale has elapsed, the judgment creditor or the lienholder may petition the judge of the district court having jurisdiction, setting forth the kind, nature and condition of the property being sold, its approximate value and the possibility of damage to its value. If the judge finds the petition sufficient in form and conditions, he may hear testimony of witnesses as to the property and if he believes that the interests of both the owner of the goods and the lienholder or judgment creditor will be protected by the sale, he may order such sale to be made, may order the posting of appropriate security and may direct the manner of such sale.

History: Laws 1981, ch. 13, § 1.

39-5-1.2. ["Real estate" and "real property" defined.]

As used in Chapter 39, Article 5 NMSA 1978 "real estate" or "real property" includes leaseholds. As used in this section, "leasehold" means an estate in real estate or real property held under a lease.

History: 1978 Comp., § 39-5-1.2, enacted by Laws 1991, ch. 234, § 2.

ANNOTATIONS

Validating clauses. — Laws 1991, ch. 234, § 4 defines "leasehold" to mean an estate in real estate or real property held under a lease and validates as correct and legally effective filings or recordings to give constructive notice any actions taken prior to April

4, 1991 to file or record leases, memoranda, assignments or amendments thereto, leasehold mortgages or other writings affecting leaseholds or any interests in leaseholds in accordance with legal requirements for the filing or recording of writings affecting the title to real estate or real property.

Mechanic's liens. — The purpose of mechanic's lien statute is remedial in nature and is meant to protect those who, in good faith, have enhanced the value of another's property. Moreover, that statute is to be liberally construed. When these policy interests are viewed in light of the 1991 amendments to Sections 39-5-1.2 and 47-1-1 NMSA 1978, specifically providing that leaseholds are real estate, and in light of recent case law, a mechanic's lien may attach to a leasehold interest in real property. In re Furr's Supermarkets, Inc., 315 B.R. 776 (Bankr. D.N.M. 2004).

39-5-2. [Unlawful sales; liability of officer.]

If any sheriff or other person shall sell any lands, tenements, goods or chattels by virtue of any process otherwise than in the manner aforesaid or without such previous notice, the sheriff or other person so offending shall for every offense, forfeit and pay the sum of fifty dollars [($50.00)] with costs of suit in any district court in this territory [state], to be recovered by the person whose lands are sold.

History: Laws 1895, ch. 37, § 2; C.L. 1897, § 3114; Code 1915, § 2196; C.S. 1929, § 46-107; 1941 Comp., § 21-202; 1953 Comp., § 24-2-2.

ANNOTATIONS

Effect of irregularities. — This section and 39-5-1 NMSA 1978 are not limitations on power to sell unless they provide expressly or by necessary implication that sales made in violation thereof are void; irregularities may be waived by failure to object until after trial court has lost jurisdiction. McCloskey v. Shortle, 41 N.M. 107, 64 P.2d 1294 (1937).

Setting aside prejudicial sale. — Although the grounds upon which an execution sale may be set aside are not specified by statute, nor is any reference made to court's right to set aside a sale, it is nevertheless recognized by all courts that in order to prevent abuses of their process they may set aside a sale for fraud, unfairness or irregularities of a prejudicial nature. Columbus Elec. Coop. v. Brown, 77 N.M. 102, 419 P.2d 757 (1966).

Confirmation of conditional bid. — A district court had power to confirm a mortgage foreclosure sale by master, notwithstanding bid was conditional, since court could in its original decree provide for payment in the same way. McCloskey v. Shortle, 41 N.M. 107, 64 P.2d 1294 (1937).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Violation of direction of decree or order as regards sale of land in parcels or in gross as affecting validity of sale and title of purchaser, 84 A.L.R. 324.

Liability of officer (or sureties on his bond) who conducted sale of property under execution, or other process, to creditors, other than one for whom sale was made, for failure to comply with statutory requirements in making sale, 125 A.L.R. 1147.

Duties, rights, and remedies between attorney and client where attorney purchases property of client at or through tax, execution, or judicial sale, 20 A.L.R.2d 1280.

80 C.J.S. Sheriffs and Constables § 87.

39-5-3. [Contents of sale notices.]

All notices of sale by sheriffs under execution, order or decree of any district court in this state shall contain as briefly as possible the style or title of the cause in which said judgment, order or decree was obtained, the nature of the action, the date of the rendition of said judgment, or the making of said order or decree, the amount thereof, with interest to date of sale, and the description of the property to be sold, sufficient for the complete identification thereof, together with a statement of the date, hour and conditions of said sale.

History: Laws 1887, ch. 36, § 4; C.L. 1897, § 3115; Code 1915, § 2198; C.S. 1929, § 46-109; 1941 Comp., § 21-203; 1953 Comp., § 24-2-3.

ANNOTATIONS

Failure to state principal and interest. — Where the amount is stated for which the property will be sold, but the statement is informal in not stating the amount of principal and interest, it is not sufficient to avoid the sale. Dewitz v. Joyce-Pruitt Co., 20 N.M. 572, 151 P. 237 (1915).

Specific property. — This execution is not one for enforcement of liens upon specific property, such as mortgages and the like. Crowell v. Kopp, 26 N.M. 146, 189 P. 652 (1919).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 30 Am. Jur. 2d Executions § 465 et seq.

33 C.J.S. Executions § 211; 50 C.J.S. Judicial Sales § 10.

39-5-4. [Notice of sale for personal property not exceeding three hundred dollars.]

That hereafter when personal property shall be sold under execution issued out of any justice court [magistrate court], or from the district court, when the property seized under execution does not exceed three hundred dollars, ($300.00), notice of such sale may be given by posting written or printed notices of such sale at least ten days prior to the date of sale in at least five public places in the county, one of which places shall be at the courthouse in said county, and one at the place where said sale is to be held.

History: Laws 1931, ch. 8, § 1; 1935, ch. 68, § 1; 1941 Comp., § 21-204; 1953 Comp., § 24-2-4.

ANNOTATIONS

Cross references. — For publication of "legal notice," *see* 14-11-1 NMSA 1978 et seq.

Bracketed material. — The bracketed reference to "magistrate courts" was inserted by the compiler, as the office of justice of the peace was abolished by 35-1-38 NMSA 1978, which provides that reference in the laws to justices of the peace shall be construed to refer to the magistrate courts. The bracketed material was not enacted by the legislature and is not part of the law.

Compiler's notes. — Laws 1935, ch. 68, § 1, identifies the section being amended as Laws 1931, ch. 8, § 1.

Due process requirements. — Where a party with a recorded interest in property has been properly served and has had actual notice of a complaint in foreclosure and participates in the proceedings to the extent of approving a judgment and decree of foreclosure directing sale of the foreclosed property, and thereafter is on constructive notice of the time and place of sale, he has received all due process to which he is entitled before being deprived of his interest in the property. Prod. Credit Ass'n v. Williamson, 107 N.M. 212, 755 P.2d 56 (1988).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 30 Am. Jur. 2d Executions § 465 et seq.

33 C.J.S. Executions § 211.

39-5-5. [Limit on sale price of real estate.]

No real property shall be sold on any execution issued out of any court in any case at law for less than two-thirds of the appraised cash value thereof, exclusive of liens and encumbrances.

History: Laws 1856-1857, p. 66; C.L. 1865, ch. 34, § 21; Laws 1884, ch. 11, § 1; C.L. 1884, § 2171; C.L. 1897, § 3119; Code 1915, § 2202; C.S. 1929, § 46-113; 1941 Comp., § 21-205; 1953 Comp., § 24-2-5.

ANNOTATIONS

Applicability of article. — While 39-5-1 to 39-5-3 and 39-5-15 to 39-5-23 NMSA 1978 apply generally to foreclosures, 39-5-5 to 39-5-13 NMSA 1978 apply only to sales and levies under writs of execution. Armstrong v. Csurilla, 112 N.M. 579, 817 P.2d 1221 (1991).

This section does not apply to court-supervised foreclosure sales. Armstrong v. Csurilla, 112 N.M. 579, 817 P.2d 1221 (1991).

Sales price did not shock the conscience of the court. — Where the appraised value of defendant's home was $206,000 and the property sold for $100,000 or 48.7% of appraised value at the foreclosure sale; defendant did not have any meritorious defenses to the foreclosure judgment; although the special master did not publish and file notices of postponements of the sale, the special master published the original date, time and place of the sale for four weeks in a newspaper and each subsequent notice of postponement assured that the parties present at the postponed sale would be notified and the new date and time would be confirmed as acceptable to all parties present; and the sales price was greater than the amount defendant owed on the loan, including costs and fees and the sale did not result in a deficiency judgment against defendant, the circumstances of the sale did not lead to an unfair result to defendant and the district court did not abuse its discretion in determining that the sales price did not shock the conscience of the court. Charter Bank v. Francoeur, 2012-NMCA-078, 287 P.3d 333, cert. granted, 2012-NMCERT-008.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 30 Am. Jur. 2d Executions § 521 et seq.

Right of officers conducting sale under execution to refuse to accept bid because inadequate, 110 A.L.R. 1077.

Inadequacy of price as basis for setting aside execution or sheriff's sale - modern cases, 5 A.L.R.4th 794.

Propriety of setting minimum or "upset price" for sale of property at judicial foreclosure, 4 A.L.R.5th 693.

33 C.J.S. Executions § 233.

39-5-6. [Sheriff to ascertain value.]

The sheriff, between the days of levying the execution and the sale of the property, shall proceed to ascertain the cash value of such property as follows:

History: Laws 1856-1857, p. 66; C.L. 1865, ch. 34, § 22; C.L. 1884, § 2172; C.L. 1897, § 3120; Code 1915, § 2203; C.S. 1929, § 46-114; 1941 Comp., § 21-206; 1953 Comp., § 24-2-6.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — Inadequacy of price as basis for setting aside execution or sheriff's sale - modern cases, 5 A.L.R.4th 794.

39-5-7. [Selection of appraisers; appraisal.]

For that purpose two disinterested householders of the neighborhood where the levy is made shall be selected as appraisers, one of whom shall be selected by each of the parties or their agents, or in the absence of either party or his agent, or upon the refusal of either party, after three days' notice by the sheriff to make the selection, the sheriff shall proceed to select the appraisers, who shall proceed to appraise the property according to its cash value at the time, deducting liens and encumbrances; and in case of their disagreement as to the value thereof, they shall select a like disinterested appraiser, and with his assistance shall complete the valuation, and the appraisement of any two of them shall be deemed the cash value.

History: Laws 1856-1857, p. 66; C.L. 1865, ch. 34, § 23; C.L. 1884, § 2173; C.L. 1897, § 3121; Code 1915, § 2204; C.S. 1929, § 46-115; 1941 Comp., § 21-207; 1953 Comp., § 24-2-7.

ANNOTATIONS

Section not mandatory. — While this section provides that the judgment debtor shall have three days' notice to select an appraiser, it is not mandatory; there is no duty upon the officer to hunt up the judgment debtor or to await the judgment debtor's return before making an appraisement. Inman v. Brown, 59 N.M. 196, 281 P.2d 474 (1955).

Waiver. — Failure to object to the appraisement before sale waives the right to select an appraiser. Inman v. Brown, 59 N.M. 196, 281 P.2d 474 (1955).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 30 Am. Jur. 2d Executions § 291 et seq.

50 C.J.S. Judicial Sales § 9.

39-5-8. [Appraiser failing to act.]

In case any appraiser shall fail to act or to complete such valuation, another shall be chosen in his stead as above provided.

History: Laws 1856-1857, p. 66; C.L. 1865, ch. 34, § 24; C.L. 1884, § 2174; C.L. 1897, § 3122; Code 1915, § 2205; C.S. 1929, § 46-116; 1941 Comp., § 21-208; 1953 Comp., § 24-2-8.

39-5-9. [Schedule of property.]

The sheriff shall furnish the appraisers with a schedule of the property levied on with the encumbrances made known to him, and they shall proceed to fix, and set down opposite to each tract, lot or parcel of real estate, the cash value, deducting liens and encumbrances, which schedule shall be returned to the sheriff.

History: Laws 1856-1857, p. 68; C.L. 1865, ch. 34, § 26; C.L. 1884, § 2175; C.L. 1897, § 3123; Code 1915, § 2206; C.S. 1929, § 46-117; 1941 Comp., § 21-209; 1953 Comp., § 24-2-9.

ANNOTATIONS

Duty of appraisers. — Although neither the sheriff nor the appraisers were required to ascertain the amount of prior liens or encumbrances in arriving at the cash value of the land, the appraisers were charged with the duty of deducting all known liens and encumbrances in determining the cash value of the land. Columbus Elec. Coop. v. Brown, 77 N.M. 102, 419 P.2d 757 (1966).

Effect of noncompliance. — The appraisal is an essential step in the statutory judicial sale procedure, and a failure to comply with statutory provisions may well require disapproval of a sale in the interest of justice. Columbus Elec. Coop. v. Brown, 77 N.M. 102, 419 P.2d 757 (1966) (holding that vacating of sale by district court where appraisers failed to deduct liens and encumbrances of which they know was not an abuse of discretion).

39-5-10. [No duty to ascertain amount of liens.]

It shall not be the duty of the sheriff or appraisers to ascertain the amount of liens or encumbrances, but either party may furnish the sheriff with a list thereof, with the amount and nature of each.

History: Laws 1856-1857, p. 66; C.L. 1865, ch. 34, § 25; C.L. 1884, § 2176; C.L. 1897, § 3124; Code 1915, § 2207; C.S. 1929, § 46-118; 1941 Comp., § 21-210; 1953 Comp., § 24-2-10.

ANNOTATIONS

Appraiser's duty. — Although neither the sheriff nor the appraisers were required to ascertain the amount of prior liens or encumbrances in arriving at the cash value of the land, the appraisers were charged with the duty of deducting all known liens and encumbrances in determining the cash value of the land. Columbus Elec. Coop. v. Brown, 77 N.M. 102, 419 P.2d 757 (1966).

39-5-11. [Oath of appraisers.]

The appraisers shall take and subscribe an oath annexed to such appraisements, to the effect that the property mentioned in the schedule is, to the best of their judgment, worth the sums specified therein, that the same is the fair cash value thereof at the time, exclusive of liens and encumbrances; which oath the sheriff is authorized to administer and attest when taken and subscribed by the appraisers.

History: Laws 1856-1857, p. 68; C.L. 1865, ch. 34, § 27; C.L. 1884, § 2177; C.L. 1897, § 3125; Code 1915, § 2208; C.S. 1929, § 46-119; 1941 Comp., § 21-211; 1953 Comp., § 24-2-11.

ANNOTATIONS

39-5-12. [Unsold property; return.]

When any property levied on remains unsold, it shall be the duty of the sheriff, when he returns the execution, to return the appraisement therewith, stating in his return the failure to sell, and the cause of the failure.

History: Laws 1856-1857, p. 68; C.L. 1865, ch. 34, § 29; C.L. 1884, § 2179; C.L. 1897, § 3127; Code 1915, § 2210; C.S. 1929, § 46-121; 1941 Comp., § 21-212; 1953 Comp., § 24-2-12.

39-5-13. [Lien continues; alias writ.]

The lien of the levy upon the property shall continue until the debt is paid, and the clerk, unless otherwise directed by the plaintiff, shall forthwith issue another execution, reciting the return of the former execution, the levy and failure to sell, and directing the sheriff to satisfy the judgment out of the property unsold, if the same is sufficient, if not, then out of any other property of the debtor, subject to execution.

History: Laws 1856-1857, p. 68; C.L. 1865, ch. 34, § 30; C.L. 1884, § 2180; C.L. 1897, § 3128; Code 1915, § 2211; C.S. 1929, § 46-122; 1941 Comp., § 21-213; 1953 Comp., § 24-2-13.

ANNOTATIONS

Lien on personalty created by levy. — New Mexico follows the general law that a lien on personalty is created as the result of a levy under a writ of execution. Von Segerlund v. Dysart, 137 F.2d 755 (9th Cir. 1943).

New lien with each levy. — Examination of the entire chapter in which this section appears makes it clear that the "property" referred to means personalty as well as realty, and that each levy creates a new lien upon the property affected by it. Von Segerlund v. Dysart, 137 F.2d 755 (9th Cir. 1943).

Bankruptcy. — Lien on real estate having been obtained more than four months preceding filing of involuntary petition in bankruptcy against alleged insolvent debtor, an alias levy on debtor's personalty within the four months' period created a lien, the debtor's acquiescence therein being "an act of bankruptcy" authorizing an involuntary adjudication. Von Segerlund v. Dysart, 137 F.2d 755 (9th Cir. 1943).

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

39-5-14. [Reoffer of unsold property; costs; revaluation.]

Whenever any property levied upon remains unsold for want of buyers, the plaintiff may cause the same to be reoffered at any time before the return day of the execution, at his cost, as often as he may direct, but in case of the sale of the property, the costs of such offer and sale shall be taxed against the defendant; each party may have one revaluation of the property, at his costs, after the first offer to sell.

History: Laws 1856-1857, p. 68; C.L. 1865, ch. 34, § 31; C.L. 1884, § 2181; C.L. 1897, § 3129; Code 1915, § 2212; C.S. 1929, § 46-123; 1941 Comp., § 21-214; 1953 Comp., § 24-2-14.

ANNOTATIONS

Law reviews. — For article, "Judicial Adoption of Comparative Fault in New Mexico: The Time Is at Hand," see 10 N.M.L. Rev. 3 (1979-80).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Steps to be taken by officer before resale upon default of purchaser at judicial or execution sale, 24 A.L.R. 1330.

39-5-15. [Foreclosure; lien claimed by deceased; making unknown heirs and devisees parties defendant.]

In all actions brought for the foreclosure of any real estate mortgage or deed of trust where the plaintiff alleges in his complaint that any person who is now deceased, during his lifetime, claimed a lien upon the real estate described in said mortgage or trust deed and further alleges either that there has been no administration of such decedent's estate, or that the plaintiff is unable to ascertain the names, residences and whereabouts of the heirs, devisees or legatees of such deceased person he may make such unknown heirs, legatees and devisees of any such deceased person parties defendant to said cause under the name, style and designation of "unknown heirs, devisees, or legatees, of (here insert name of deceased person), deceased"; and service of process on and notice of said suit against such defendants shall be made as provided by law and the rules of court.

History: Laws 1937, ch. 134, § 1; 1941 Comp., § 21-216; 1953 Comp., § 24-2-16.

ANNOTATIONS

Cross references. — For rule of procedure relating to service of process, *see* Rule 1-004 NMRA.

Applicability of article. — While 39-5-1 to 39-5-3 and 39-5-15 to 39-5-23 NMSA 1978 apply generally to foreclosures, 39-5-5 to 39-5-13 NMSA 1978 apply only to sales and levies under writs of execution. Armstrong v. Csurilla, 112 N.M. 579, 817 P.2d 1221 (1991).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Mortgage foreclosure forbearance statutes - modern status, 83 A.L.R.4th 243.

59 C.J.S. Mortgages § 630.

39-5-16. Foreclosure after March 15; growing crops.

In cases of mortgage foreclosures of property on which there is a growing crop and when the proceeding has been commenced after March 15 of any year, the mortgagor shall not be dispossessed by any means whatsoever until the crop has been fully harvested, and the mortgagor shall be entitled to retain the crops; provided, however, that the mortgage instrument may provide otherwise.

History: Laws 1934 (S.S.), ch. 26, § 1; 1941 Comp., § 21-217; 1953 Comp., § 24-2-17; 1991, ch. 229, § 1.

ANNOTATIONS

Cross references. — For right of purchaser upon redemption to growing crops, *see* 39-5-22 NMSA 1978.

The 1991 amendment, effective June 14, 1991, added the catchline; substituted "mortgagor" for "mortgagee"; inserted "the mortgagor"; and made stylistic changes throughout the section.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Judicial or execution sale of realty as affecting debtor's share in crops grown by tenant or cropper, 13 A.L.R. 1425, 113 A.L.R. 1355.

Mortgage foreclosure forbearance statutes - modern status, 83 A.L.R.4th 243.

59 C.J.S. Mortgages § 313.

39-5-17. Time for sale under judgment or decree of foreclosure; avoidance of sale.

No real property shall be sold under any judgment or decree of court foreclosing any mechanic's or materialman's lien, mortgage, mortgage deed, trust deed or any other written instrument which may operate as a mortgage, until thirty days after the date of entry thereof, within which time the then owner of the real estate, his heirs, personal representatives, assigns or any junior lienholder may pay off the judgment or decree

and avoid the sale by depositing in the office of the clerk of the district court in which the judgment, decree or order was entered the amount necessary to make payment thereof, including accrued interest and costs of suit.

History: Laws 1931, ch. 149, § 1; 1941 Comp., § 21-218; 1953 Comp., § 24-2-18; Laws 1971, ch. 88, § 1.

ANNOTATIONS

Cross references. — For provision making redemption unavailable after foreclosure of lien on oil and gas wells or pipe-lines, *see* 70-4-8 NMSA 1978.

Redemption period. — Construing the provisions of this section and 39-5-18 NMSA 1978 together, it is apparent that a person entitled to redeem is given at least 11 months (now 10 months) from the date of the foreclosure judgment within which to redeem. Springer Corp. v. Kirkeby-Natus, 80 N.M. 206, 453 P.2d 376 (1969).

Time of advertising. — Section 3938, 1897 C.L., which prohibited the sale of real property under or by any order, judgment or decree of any court until 90 days after its date, within which time the mortgagor or any one for him might pay off the decree and avoid the sale, nowhere provided that the advertisement of such sale should not begin until after expiration of the 90 days, and in case of foreclosed property, which was properly advertised and not sold until after expiration of 90 days' stay allowed by law, such sale was legal and valid, but expenses of advertising notices were unnecessary and could not be allowed where sale was avoided by payment of such decree. Neher v. Crawford, 10 N.M. 725, 65 P. 156 (1901).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 30 Am. Jur. 2d Executions § 473 et seq.

Mortgage foreclosure forbearance statutes - modern status, 83 A.L.R.4th 243.

56 C.J.S. Mechanic's Liens § 421; 59 C.J.S. Mortgages § 726.

39-5-18. Redemption of real property sold under judgment or decree of foreclosure; notice and hearing; redemption amount; priority of redemption rights.

A. After sale of real estate pursuant to the order, judgment or decree of foreclosure in the district court, the real estate may be redeemed by the former defendant owner of the real estate or by any junior mortgagee or other junior lienholder whose rights were judicially determined in the foreclosure proceeding:

(1) by paying to the purchaser, at any time within nine months from the date of sale, the amount paid at the sale, with interest from the date of sale at the rate of ten percent a year, together with all taxes, interest and penalties thereon, and all payments made to satisfy in whole or in part any prior lien or mortgage not foreclosed, paid by the

purchaser after the date of sale, with interest on the taxes, interest, penalties and payments made on liens or mortgages at the rate of ten percent a year from the date of payment; or

(2) by filing a petition for redemption in the pending foreclosure case in the district court in which the order, judgment or decree of foreclosure was entered and by making a deposit of the amount set forth in Paragraph (1) of this subsection in cash in the office of the clerk of that district court, at any time within nine months from the date of sale. Copies of the petition for redemption shall be served upon the purchaser of the real estate at the judicial foreclosure sale and upon all parties who appeared in the judicial foreclosure case; and

(3) the former defendant owner shall have the first priority to redeem the real estate. If the former defendant owner does not redeem the real estate as provided in this subsection, each junior mortgagee or junior lienholder shall have a right to redeem the real estate. The order of priority of such redemption rights shall be the same priority as the underlying mortgages or liens, as set forth in the court order, judgment or decree of foreclosure or as otherwise determined by the court. All redemptions must be made within the time periods set forth in Paragraphs (1) and (2) of this subsection.

B. The purchaser of real estate at a foreclosure sale, upon being served with the petition for redemption of the property, shall answer the petition within thirty days after service of the petition.

C. The hearing shall be governed by the rules of civil procedure and shall be set upon the earlier of the filing of a redemption by the former defendant owner or the expiration of the period for filing a redemption. At the hearing, the judge shall determine the amount of money necessary for the redemption, which shall include the money paid at the sale and all taxes, interest, penalties and payments made in satisfaction of liens, mortgages and encumbrances. If more than one redemption is filed, the court shall also determine which redemption has priority pursuant to Subsection A of this section and which party is therefore entitled to redeem the property. At the conclusion of the hearing, the district court may order the clerk of the court to issue the certificate of redemption upon such terms and conditions as it deems just.

D. As used in this section, the terms "owner", "junior mortgagee", "junior lienholder" and "purchaser" include their respective personal representatives, heirs, successors and assigns.

E. For the purpose of this section, "date of sale" means the date the district court order confirming the special master's report is filed in the office of the clerk of the court.

F. The nine-month redemption period provided in this section is subject to modification pursuant to the provisions of Section 39-5-19 NMSA 1978.

G. A trustee's sale pursuant to a power of sale in a deed of trust as provided in the Deed of Trust Act is not a sale of real estate pursuant to a judgment or decree of a court. A redemption after a trustee's sale is governed by the Deed of Trust Act.

History: Laws 1931, ch. 149, § 2; 1941 Comp., § 21-219; 1953 Comp., § 24-2-19; Laws 1957, ch. 109, § 1; 1977, ch. 85, § 1; 1987, ch. 61, § 24; 2007, ch. 156, § 1.

ANNOTATIONS

Cross references. — As to redemption of real property sold on execution, *see* 39-5-21 NMSA 1978.

For service of notice on parties, *see* Rule 1-005 NMRA.

The 2007 amendment, effective April 2, 2007, amends and redesignates former subsection B as Paragraph (3) of Subsection A to provide for service on all parties who appeared at the judicial foreclosure case; redesignates former Subsection C as Subsection B; redesignates former Subsection D as Subsection C and provides for the setting of hearings; adds new Subsections D and E to provide new definitions; deletes most of former Subsection E and redesignates the Subsection as Subsection G.

Applicability. — Laws 2007, ch. 156, §7 provided that Laws 2006, ch. 32, which is codified as Sections 48-10-3, 48-10-7, 48-10-10, 48-10-11, 48-10-13, 48-10-16, and 48-10-17 NMSA 1978, applies to deeds of trust on or after May 17, 2006 and that the provisions of Laws 2007, ch. 156 apply to deeds of trust executed on or after the effective date of Laws 2007, ch. 156, which is April 2, 2008.

Redemption by cotenant. — A foreclosure sale does not extinguish a cotenancy until the time for redemption has passed and one cotenant's redemption inures to the benefit of the other cotenant, subject to the right of contribution. Bankers Trust Co. v. Woodall, 2006-NMCA-129, 140 N.M. 567, 144 P.3d 126.

Hearing on a certificate of redemption. — In the absence of a debtor’s compliance with the redemption statute, which requires the debtor to petition the district court and to deposit the sum of money required by statute, the district court is not required to hold a hearing and issue a certificate of redemption. Chapel v. Nevitt, 2009-NMCA-017, 145 N.M. 674, 203 P.3d 889.

Extension of the redemption period. — A debtor must comply with the redemption statute before equity may be invoked to extend the redemption period. Chapel v. Nevitt, 2009-NMCA-017, 145 N.M. 674, 203 P.3d 889.

A court may use its equitable power to grant an extension to the redemption period where the debtor fulfills all of the requirements of the redemption statute, but the redemption is not complete because of a clerical error or technical mix-up or where

there has been fraud, deceit or collusion on the part of the person against whom relief is sought. Chapel v. Nevitt, 2009-NMCA-017, 145 N.M. 674, 203 P.3d 889.

Redemption does not ensure clear title. — The redemption statute does not guarantee that there will be clear title to the property after redemption or require the court to determine the extent of all judgments and liens against a debtor. Chapel v. Nevitt, 2009-NMCA-017, 145 N.M. 674, 203 P.3d 889.

Conditional redemption is ineffective. — To effectively redeem property, a debtor cannot impose any conditions upon the debtor's tender of money pursuant to the redemption statute. Chapel v. Nevitt, 2009-NMCA-017, 145 N.M. 674, 203 P.3d 889.

Amount to redeem. — To redeem property, the redemption statute requires a debtor to pay only the amount paid at the foreclosure sale, with interest from the date of purchase at the rate of ten percent a year; all taxes, interest and penalties that were paid by the purchaser; and all payments made by the purchaser to satisfy in whole or in part any prior lien or mortgage not foreclosed. The debtor is not required to pay any other sums owed by the debtor to the purchaser, including any deficiency judgment against the debtor, to redeem property. Chapel v. Nevitt, 2009-NMCA-017, 145 N.M. 674, 203 P.3d 889.

A junior mortgagee who forecloses its mortgage, along with foreclosure of the senior mortgage, and obtains a deficiency judgment has a right to redeem. Mortgage Elec. Registration Syss., Inc. v. Montoya, 2008-NMCA-081, 144 N.M. 264, 186 P.3d 256. (decided under former law)

First person with right of redemption to file for redemption has priority over all others seeking to redeem the property after a mortgage foreclosure. HSBC Bank USA v. Fenton, 2005-NMCA-138, 138 N.M. 665, 125 P.3d 644.

Redemption is a statutory right. Brown v. Trujillo, 2004-NMCA-040, 135 N.M. 365, 88 P.3d 881, cert. denied, 2004-NMCERT-004, 135 N.M. 562, 91 P.3d 603.

Redemption statutes essentially protect debtors. Brown v. Trujillo, 2004-NMCA-040, 135 N.M. 365, 88 P.3d 881, cert. denied, 2004-NMCERT-004, 135 N.M. 562, 91 P.3d 603.

Redemption statute describes what redeemer must pay in order to redeem the property. Chase Manhattan Bank v. Candelaria, 2004-NMSC-017, 135 N.M.527, 90 P.3d 985.

The costs that a redeemer must pay to redeem a property are circumscribed by the redemption statute. Chase Manhattan Bank v. Candelaria, 2004-NMSC-017, 135 N.M.527, 90 P.3d 985.

Only funds that purchaser may recover under the redemption statute are those funds that the purchaser paid to acquire the property. Chase Manhattan Bank v. Candelaria, 2004-NMSC-017, 135 N.M.527, 90 P.3d 985.

Debtor's placing redemption amount in escrow at title company was not the functional equivalent of paying purchaser. Brown v. Trujillo, 2004-NMCA-040, 135 N.M. 365, 88 P.3d 881, cert. denied, 2004-NMCERT-004, 135 N.M. 562, 91 P.3d 603.

By conditionally tendering money to purchaser and then filing petition without cash deposit with the trial court, debtor did not substantially comply with either procedure the legislature has created. Brown v. Trujillo, 2004-NMCA-040, 135 N.M. 365, 88 P.3d 881, cert. denied, 2004-NMCERT-004, 135 N.M. 562, 91 P.3d 603.

This section and 42-4-17 NMSA 1978 can be construed together. Chase Manhattan Bank v. Candelaria, 2004-NMCA-112, 136 N.M. 332, 98 P.3d 722, rev'd on other grounds, 2004-NMSC-017, 135 N.M. 527, 90 P.3d 985.

Redemption in entirety. — It is a general rule that a mortgage is an entire thing, and must be redeemed in its entirety, and that a mortgagee cannot be required to divide either his debt or his security. Seasons, Inc. v. Atwell, 86 N.M. 751, 527 P.2d 792 (1974); Springer Corp. v. Kirkeby-Natus, 80 N.M. 206, 453 P.2d 376 (1969).

Owners of subdivision lots included in foreclosure of the subdivision would not be allowed to redeem their lots by paying only a pro rata portion of the sale price. Seasons, Inc. v. Atwell, 86 N.M. 751, 527 P.2d 792 (1974).

Court need not grant reimbursement if doing so would, under equitable principles, fail to carry out the purposes of the redemption statutes. Chase Manhattan Bank v. Candelaria, 2004-NMCA-112, 136 N.M. 332, 98 P.3d 722, rev'd on other grounds, 2004-NMSC-017, 135 N.M. 527, 90 P.3d 985.

Improvements. — The redemption statute does not allow the purchaser to recover for any funds paid for improvements. Chase Manhattan Bank v. Candelaria, 2004-NMSC-017, 135 N.M.527, 90 P.3d 985.

Requiring the redeemer to pay for improvements would contravene the public policy embodied in the redemption statute. Chase Manhattan Bank v. Candelaria, 2004-NMSC-017, 135 N.M.527, 90 P.3d 985.

Reimbursement for improvements. — This section, while providing the exclusive procedure and remedy for redemption, does not bar a court from ordering a redeemer to reimburse a purchaser at foreclosure for improvements made by that purchaser before a petition for a certificate of redemption is filed or served, and the court had the authority to order such reimbursement under 42-4-17, NMSA 1978. Chase Manhattan Bank v. Candelaria, 2004-NMCA-112, 136 N.M. 332, 98 P.3d 722, rev'd on other grounds, 2004-NMSC-017, 135 N.M. 527, 90 P.3d 985.

Filing allowed in original foreclosure action. — A petition for redemption under this section may be filed in the original foreclosure action. Crown Life Ins. Co. v. Candlewood, Ltd., 112 N.M. 633, 818 P.2d 411 (1991).

Recordation of redemption. — The requirement of 39-5-23 NMSA 1978 for recordation of redemption applies to extra-judicial redemption procedure authorized under Paragraph A(1). W. Bank v. Malooly, 119 N.M. 743, 895 P.2d 265 (Ct. App. 1995).

Redemption period. — Construing 39-5-17 NMSA 1978 and this section together, it is apparent that a person entitled to redeem is thus given at least 11 (now 10) months from the date of the foreclosure judgment within which to redeem. Springer Corp. v. Kirkeby-Natus, 80 N.M. 206, 453 P.2d 376 (1969).

Time allowed for redemption cannot be extended, nor can any condition attached by statute be waived by judicial interpretation. Union Esperanza Mining Co. v. Shandon Mining Co., 18 N.M. 153, 135 P. 78 (1913).

The 30-day time limit set by 39-1-1 NMSA 1978 for the court's ruling on a motion does not apply to a petition for a certificate of redemption. Crown Life Ins. Co. v. Candlewood, Ltd., 112 N.M. 633, 818 P.2d 411 (1991).

Showing required for equitable jurisdiction. — Because of the strictness of the redemption statute and the beneficial purposes thereof, absent gross disparity between the property's value and the sale price, debtor must make a threshold showing of some causal connection between purchaser's alleged misconduct and debtor's inability to comply with the statute in order to invoke a trial court's exercise of discretion in equity. Brown v. Trujillo, 2004-NMCA-040, 135 N.M. 365, 88 P.3d 881, cert. denied, 2004-NMCERT-004, 135 N.M. 562, 91 P.3d 603.

Equitable extension of time for redemption. — The district court had discretion in equity to extend the mortgagor's time in which to redeem the property where the bank's actions in obtaining a release of its mortgage from the Small Business Administration increased the amount of redemption just days before the redemption period would expire. Plaza Nat'l Bank v. Valdez, 106 N.M. 464, 745 P.2d 372 (1987).

Reduction of redemption period. — Although the legislature initially granted a nine-month period of redemption for junior lienholders, the legislature also intended to give the parties to the instrument being foreclosed the power to reduce the statutory period to not less than one month by entering into a written agreement contained in the instrument being foreclosed. Sun Country Sav. Bank v. McDowell, 108 N.M. 528, 775 P.2d 730 (1989).

Motion for extension of redemption period must be filed before judgment or decree of foreclosure is entered. — In a foreclosure action, where appellant moved for a thirty-day extension of the one month redemption period so that he could assign

his right to redeem the foreclosed property, the district court did not err in denying appellant's motion to extend on the grounds that the motion was not filed before the foreclosure judgment was entered, because the deadline set forth in 39-5-19 NMSA 1978 does not render the opportunity to redeem, or at least to request an extension of the redemption period, unreasonable, and appellant, having been aware of the complaint for foreclosure for six months before the default judgment was entered, was not deprived of a reasonable opportunity to request an extension of the redemption period. Wells Fargo Bank v. Pyle, 2016-NMCA-046.

Redemption price calculated. — Facts required judicial calculation of redemption price and interest where first sale invalidated by court. See Morgan v. Texas Am. Bank/Levelland, 110 N.M. 184, 793 P.2d 1337 (1990).

Redemption amount. — In addition to taxes, interest and penalties as authorized by statute, a purchaser was entitled to additional interest from the date of the purchase to the date of a court ruling on redemption rights, taxes and irrigation assessments, rental proceeds, and insurance premiums. W. Bank v. Malooly, 119 N.M. 743, 895 P.2d 265 (Ct. App. 1995).

The trial court erred by not holding a hearing to determine "the amount of money necessary for the redemption" in violation of the mandatory langauge contained in Subsection D. W. Bank v. Malooly, 119 N.M. 743, 895 P.2d 265 (Ct. App. 1995).

Right not retroactive. — Right of redemption could not be applied to a foreclosed deed of trust, which was executed before statute was enacted. Bremen Mining & Milling Co. v. Bremen, 13 N.M. 111, 79 P. 806 (1905).

Payment to purchaser. — The redemptioner may redeem by paying the redemption money to the purchaser at the foreclosure sale, as shown by the court record, so long as he is not divested of the legal title. First State Bank v. Wheatcroft, 36 N.M. 88, 8 P.2d 1061 (1931) (decided under former law).

Under former law redemption from foreclosure could be effected only by payment to the purchaser or his assign, and not to the clerk of the court. Richardson v. Pacheco, 35 N.M. 243, 294 P. 328 (1930); Moise v. Timm, 33 N.M. 166, 262 P. 535 (1927), superseded by statute, Brown v. Trujillo, 2004-NMCA-040, 135 N.M. 365, 88 P.3d 881.

Tender invalidated by imposition of conditions. — As a general proposition, applicable at least where it appears that a larger sum than that tendered is in good faith claimed to be due, the tender is not effectual as such if coupled with conditions such that an acceptance of it, as tendered, will involve an admission by the party accepting it that no more is due; thus, where a release in full was demanded as a condition of the alleged tender, this attempt to enlarge the statutory right of redemption invalidated the tender. Union Esperanza Mining Co. v. Shandon Mining Co., 18 N.M. 153, 135 P. 78 (1913).

Cash deposit required. — A mortgagor's tender of an unendorsed cashier's check did not comply with the requirement of this section that cash be deposited to effect a redemption. Dalton v. Franken Constr. Cos., 1996-NMCA-041, 121 N.M. 539, 914 P.2d 1036.

Rights of junior encumbrances. — The only absolute right of a junior mortgagee, as against a senior mortgagee, is the right to redeem from the senior mortgagee and the rights of an omitted junior encumbrancer remain precisely as they were before the proceedings were instituted to foreclose the first mortgage; they are neither enlarged nor diminished by defective foreclosure. Springer Corp. v. Kirkeby-Natus, 80 N.M. 206, 453 P.2d 376 (1969).

Accrual of second mortgagee's redemption rights. — Since second mortgagee's rights, including its right of redemption, were not impaired or affected by original foreclosure to which it was not a party, its right of redemption only accrued upon the entry of a judgment foreclosing its rights. Springer Corp. v. Kirkeby-Natus, 80 N.M. 206, 453 P.2d 376 (1969).

Accounting to junior mortgagee. — Where a junior mortgagee purchased at his own foreclosure sale subject to senior mortgages, and during the redemption period was compelled to protect his title by making payments on the prior mortgages, such payments could not be included, under the usual statutory provisions, in the amount required to redeem the property; however, the junior mortgagee was entitled to an equitable lien for such payments, and the court had authority to grant mortgagee's motion for an accounting after redemption by the mortgagor. Leonard Farms v. Carlsbad Riverside Terrace Apts., Inc., 86 N.M. 241, 522 P.2d 576 (1974).

Purchase of property by junior lienholder. — Purchase of property at a mortgage foreclosure sale by a junior lienholder did not cut off the right of other persons to statutory redemption. W. Bank v. Malooly, 119 N.M. 743, 895 P.2d 265 (Ct. App. 1995).

Assignee's redemption authority. — Holder-by-assignment of a junior lien is authorized to redeem from the judicial sale of foreclosed property. W. Bank v. Malooly, 119 N.M. 743, 895 P.2d 265 (Ct. App. 1995).

Assignee takes free of judgment liens. — Because judgment liens attach only to the property of the debtor, the mortgagor's assignee takes property redeemed after foreclosure free of all prior junior judgment liens not his own. Turner v. Les File Drywall, Inc., 117 N.M. 7, 868 P.2d 652 (1994).

Redemption as estoppel. — The redemption of real estate from an execution sale by a judgment debtor estops him from questioning the validity of such sale. Springer v. Wasson, 25 N.M. 379, 183 P. 398 (1919).

Vendor's liens. — Code 1915, § 4775 had no application in a case where an implied vendor's lien was established and foreclosed by decree of the court. Eckert v. Lewis, 34 N.M. 13, 275 P. 767 (1929).

Where mortgagor's conveyance of the equity of redemption contained covenant that grantees assumed payment of vendor's lien notes, but they defaulted, and property was sold to satisfy lien, and deficiency judgments were secured, the maker of the vendor's lien notes could redeem from foreclosure. Watson v. First Nat'l Bank, 23 N.M. 372, 168 P. 488 (1917).

Unenforceable judgment. — Where a judgment embraced both a recovery in personam and an order of foreclosure and sale, but postponed sale under mechanic's lien for 60 days, it is ambiguous and unenforceable. Mozley v. Potteiger, 37 N.M. 91, 18 P.2d 1021 (1933).

Trial court's discretion. — The trial court is vested with discretion as to the method in which it chooses to apply insurance proceeds received by the purchaser. There is an abuse of discretion when the trial court's ruling is clearly against logic and effect of the facts and circumstances. Fed. Land Bank v. Burgett, 97 N.M. 519, 641 P.2d 1066 (1982).

Failure to set aside sale held erroneous. — Trial court erred in refusing to set aside a foreclosure sale based on inadequacy of price and other equitable circumstances, where the court made no finding as to the value of the property or even as to the approximate range of its worth, although, even under the lowest estimate, the purchase price was less than 23 percent of value, and in all probability represented only about 15 percent of the property's worth. Crown Life Ins. Co. v. Candlewood, Ltd., 112 N.M. 633, 818 P.2d 411 (1991).

Award of interest to date of sale not permitted. — The trial court cannot award interest from the date of the foreclosure judgment to the date of the foreclosure sale. Fed. Land Bank v. Burgett, 97 N.M. 519, 641 P.2d 1066 (1982).

Law reviews. — For note, "Real Estate Contracts - When Recording of a Lien Instrument Is Not Notice to the Whole World - Actual Notice Required to Protect Second Lien on a Real Estate Contract: Shindledecker v. Savage," see 13 N.M.L. Rev. 177 (1983).

For annual survey of New Mexico Law of Property, see 20 N.M.L. Rev. 373 (1990).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 30 Am. Jur. 2d Executions § 434 et seq.

Mortgagee's possession before foreclosure as barring right of redemption, 7 A.L.R.2d 1131.

Redemption rights of vendee defaulting under executory land sale contract after foreclosure sale or foreclosure decree enforcing vendor's lien or rights, 51 A.L.R.2d 672.

Redemption rights of mortgagor making timely tender but of inadequate amount because of officer's mistake, 52 A.L.R.2d 1327.

Judgment creditors, other than the one on whose execution the sale was made, who may redeem from execution sale, 58 A.L.R.2d 467.

Necessity and sufficiency of tender of payment by one seeking to redeem property from mortgage foreclosure, 80 A.L.R.2d 1317.

Right of junior mortgagee, whose mortgage covers only a part of land subject to first mortgage to redeem pro tanto, where he was not bound by foreclosure sale, 46 A.L.R.3d 1362.

Sufficiency of tender of payment to effect defaulting vendee's redemption of rights in land purchased, 37 A.L.R.4th 286.

Constitutionality, construction and application of statute as to effect of taking appeal, or staying execution, on right to redeem for execution or judicial sale, 44 A.L.R.4th 1229.

Mortgages: effect on subordinate lien of redemption by owner or assignee from sale under prior lien, 56 A.L.R.4th 703.

56 C.J.S. Mechanic's Liens § 430; 59 C.J.S. Mortgages §§ 813 to 850.

39-5-19. Application; shorter redemption period.

This section and Section 39-5-18 NMSA 1978 do not apply to any foreclosure sale made before the effective date of this section. The parties to any such instrument may, by its terms, shorten the redemption period to not less than one month, but the district court may in such cases, upon a sufficient showing before judgment that redemption will be effected, increase the period of redemption to not to exceed nine months notwithstanding the terms of such instrument.

History: 1953 Comp., § 24-2-19.1, enacted by Laws 1957, ch. 109, § 2; 1965, ch. 224, § 1.

ANNOTATIONS

Computation of redemption period. – A calendar month runs from the date of the court order triggering the right of redemption to the corresponding date of the subsequent month; this rule corresponds to the preference expressed in 12-2A-7C NMSA 1978 (enacted after this section), conforms with the requirements of Rule 1-006A NMRA governing court orders, and is consistent with the common understanding of

when a one-month period, beginning on a certain date, will expire. U.S. Bank Nat'l Ass'n v. Martinez, 2003-NMCA-151, 134 N.M. 665, 81 P.3d 608, cert. denied, sub nom. Bustos v. Haldeman, 2003-NMCERT-003, 135 N.M. 51, 84 P.3d 668.

Extension of redemption period. — There are two situations in which a court will use its equitable powers to grant a debtor an extension of the redemption period. In the first type of situation, the debtor fulfills all of the requirements of the redemption statute, but redemption is not complete because of a clerical error or technical mix-up. In the second type of situation, courts look for evidence of fraud, deceit, or collusion to justify the grant of a redemption period extension. Brown v. Trujillo, 2004-NMCA-040, 135 N.M. 365, 88 P.3d 881, cert. denied, 2004-NMCERT-004, 135 N.M. 562, 91 P.3d 603.

Reduction of redemption period. — Although the legislature initially granted a nine-month period of redemption for junior lienholders, the legislature also intended to give the parties to the instrument being foreclosed the power to reduce the statutory period to not less than one month by entering into a written agreement contained in the instrument being foreclosed. Sun Country Sav. Bank v. McDowell, 108 N.M. 528, 775 P.2d 730 (1989).

The 30-day time limit set by 39-1-1 NMSA 1978 for the court's ruling on a motion does not apply to a petition for a certificate of redemption. Crown Life Ins. Co. v. Candlewood, Ltd., 112 N.M. 633, 818 P.2d 411 (1991).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 55 Am. Jur. 2d Mortgages § 900.

Constitutionality of statute extending period for redemption from judicial or tax sale, or sale upon mortgage foreclosure, 1 A.L.R. 143, 38 A.L.R. 229, 89 A.L.R. 966.

59 C.J.S. Mortgages § 845.

39-5-20. Repealed.

ANNOTATIONS

Repeals. — Laws 1987, ch. 61, § 25 repeals 39-5-20 NMSA 1978, as enacted by Laws 1931, ch. 149, § 3, relating to redemption of real property sold under power of sale in an instrument, effective June 19, 1987. For provisions of former section, *see NMOneSource.com.* For present comparable provisions, *see* 39-5-18 NMSA 1978.

39-5-21. [Redemption of real property sold on execution.]

When any real estate shall be sold under a writ of execution issued out of the district court upon any money judgment against a defendant or defendants, the defendants or any one defendant, where there shall be more than one defendant, the heirs, personal representatives or assigns of said defendant or defendants may redeem the property within nine months after the sale thereof, by paying to the purchaser, his personal

representatives or assigns, the amount paid with interest thereon at the rate of ten per centum per annum from the date of sale, together with any and all taxes, penalties and interest thereon paid by the purchaser, together with ten per centum interest per annum upon the amount so paid for taxes, interest and penalties from the date of payment, or by making deposit of like amount in cash in the office of the clerk of the district court out of which such writ of execution was issued, at any time within nine months from the date of sale.

History: Laws 1931, ch. 149, § 4; 1941 Comp., § 21-221; 1953 Comp., § 24-2-21.

ANNOTATIONS

Cross references. — For redemption of real property sold under judgment or decree of foreclosure, *see* 39-5-18 and 39-5-19 NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 30 Am. Jur. 2d Executions § 434 et seq.

"Owner," scope and import of term, in statutes declaring who may redeem from sale under execution, 2 A.L.R. 794, 95 A.L.R. 1085.

Redemption by one having two or more liens on same property, 3 A.L.R. 163.

Redemption from mortgage or judicial sale as affecting lien intervening that under which property was sold and that under which it was redeemed, 26 A.L.R. 435.

Right of receiver to exercise or sell insolvent's right to redeem from judicial, execution, or tax sale, 35 A.L.R. 262.

Right of stockholder to redeem corporate property from execution or mortgage sale, 39 A.L.R. 1056.

Remedy for fraud preventing redemption from judicial sale, 44 A.L.R. 690.

Right of mortgagor or owner of equity of redemption to cut timber, 57 A.L.R. 451.

Effect of redemption by one who has assigned or parted with his interest in the property, 57 A.L.R. 1021.

Unexpired right of redemption as affecting status of purchaser at judicial or execution sale as sole unconditional owner within insurance policy, 91 A.L.R. 1439.

Constitutionality, construction, and application of statute as to effect of taking appeal, or staying execution, on right to redeem from execution or judicial sale, 107 A.L.R. 879.

Creditor's right to redeem from own sale, 108 A.L.R. 993.

Mechanic's lienholder's right to redeem from own sale, 108 A.L.R. 996.

Redemption by creditor from execution or foreclosure sale of debtor's property worth more than the redemption cost as satisfaction in whole or part of debt to redeeming creditor, 138 A.L.R. 949.

Doctrine of equitable conversion as affecting right of redemption from execution or judicial sale, 138 A.L.R. 1296.

Right of purchaser at execution or judicial sale to value of personal use and occupation by judgment debtor or his successor in interest during period of redemption, 153 A.L.R. 739.

Judgment creditors, other than the one on whose execution the sale was made, who may redeem from execution sale, 58 A.L.R.2d 467.

Sufficiency of tender of payment to effect defaulting vendee's redemption of rights in land purchased, 37 A.L.R.4th 286.

Constitutionality, construction and application of statute as to effect of taking appeal, or staying execution, on right to redeem for execution or judicial sale, 44 A.L.R.4th 1229.

33 C.J.S. Executions §§ 253 to 265.

39-5-22. [Rights of purchaser upon redemption; growing crops; rents and profits; waste.]

Whenever any property shall be redeemed under the terms or provisions of any section of this act [39-5-17 to 39-5-23 NMSA 1978], the purchaser, his personal representatives or assigns shall have the growing crops upon such lands and shall not be responsible for rents and profits, but shall account only for waste.

History: Laws 1931, ch. 149, § 5; 1941 Comp., § 21-222; 1953 Comp., § 24-2-22.

ANNOTATIONS

Cross references. — For retention of growing crops where foreclosure commences after March 15, *see* 39-5-16 NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 30 Am. Jur. 2d Executions § 447 et seq.

Crops: right in respect of crops grown during period of redemption after judicial or execution sale, 66 A.L.R. 1420.

39-5-23. Duty to record redemption.

A. In all cases of redemption of lands from sale pursuant to the provisions of Sections 39-5-17 through 39-5-23 NMSA 1978:

(1) if the redemption is by payment to the purchaser, it is the duty of the purchaser within forty-five days of receiving payment to create an acknowledged instrument in writing evidencing the redemption; or

(2) if the redemption is by making deposit in the office of the clerk of the district court upon approval of the redemption by the district judge, it is the duty of the clerk of the court to create under the seal of the court an instrument evidencing the redemption.

B. It is the duty of the party redeeming to record the instrument evidencing the redemption in the office of the county clerk in the same manner as other instruments of writing affecting title to real estate.

History: Laws 1931, ch. 149, § 6; 1941 Comp., § 21-223; 1953 Comp., § 24-2-23; 2013, ch. 214, § 12.

ANNOTATIONS

The 2013 amendment, effective June 14, 2013, provided for the preparation and filing instruments of redemption; added the title; in Subsection A, in the introductory sentence, after "lands from sale", deleted "under the terms and" and added "pursuant to", after "provisions of" deleted "Section 39-5-17", and language that required the preparation and filing of instruments of redemption and payment of a filing fee, and added "Sections 39-5-17 through 39-5-23 NMSA 1978"; added Paragraphs (1) and (2) of Subsection A; and added Subsection B.

Payment cannot be conditioned. — This section does not indicate that a debtor or its financier can condition the payment to the purchaser required by 39-5-18 A(1) NMSA 1978 upon this section’s previous or contemporaneous satisfaction. Brown v. Trujillo, 2004-NMCA-040, 135 N.M. 365, 88 P.3d 881, cert. denied, 2004-NMCERT-004, 135 N.M. 562, 91 P.3d 603.

By conditionally tendering money to purchaser and then filing petition without cash deposit with the trial court, debtor did not substantially comply with either procedure the legislature has created. Brown v. Trujillo, 2004-NMCA-040, 135 N.M. 365, 88 P.3d 881, cert. denied, 2004-NMCERT-004, 135 N.M. 562, 91 P.3d 603.

Applicability to extrajudicial redemption procedure. — The requirement of this section for recordation of redemption applies to extra-judicial redemption procedure authorized under 39-5-18 NMSA 1978. W. Bank v. Malooly, 119 N.M. 743, 895 P.2d 265 (Ct. App. 1995).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 59 C.J.S. Mortgages § 852.

ARTICLE 6
Levy and Sale of Livestock

39-6-1. [Levy on range cattle; gathering; filing, noting, indexing, copy of writ.]

Whenever it shall be necessary to levy any writ of attachment, replevin or execution under the laws of this state upon any livestock or herd of cattle that are ranging at large with other livestock or cattle over any range country, and when it would be impossible or impracticable to round up, gather or take possession of the same under such process without, at the same time, rounding up and cutting out the livestock belonging to other owners, then and in such case, the sheriff or other officer holding such writ, shall only take possession of such stock as he may be able to get without interfering with the livestock of other owners, and as to the balance, it shall be sufficient, in order to subject them to the lien of said writ, that the officer shall file with the county clerk of the county in which the brand of such livestock is recorded, a certified copy of said writ, and immediately upon the filing thereof the county clerk shall note the same in the reception book of his office, and shall also note the same in red ink on the margin of the page of the book where such brand is recorded, and shall properly index the process in the general and other proper indices of his office: provided, that if said livestock range is in more than one county, then the officer may file a like certified copy of the writ and brand in any such county, and the same shall have like binding effect as a lien upon such livestock.

History: Laws 1889, ch. 54, § 1; C.L. 1897, § 3132; Code 1915, § 4533; C.S. 1929, § 106-104; 1941 Comp., § 21-401; 1953 Comp., § 24-4-1.

ANNOTATIONS

Cross references. — For provisions relating to execution, *see* 39-4-1 NMSA 1978 et seq.

For provisions relating to replevin, *see* 42-8-1 NMSA 1978 et seq.

For attachments, *see* 42-9-1 NMSA 1978 et seq.

Other cattle. — It is probable that the legislature intended that it would be necessary to gather such number of stock belonging to other owners as would do them some substantial injury or damage, before the prohibition under this section against gathering other cattle would apply. Schofield v. Territory ex rel. Am. Valley Co., 9 N.M. 526, 56 P. 306 (1899), appeal dismissed, 20 S. Ct. 1029, 44 L. Ed. 1222 (1900).

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

Am. Jur. 2d, A.L.R. and C.J.S. references. — 6 Am. Jur. 2d Attachment and Garnishment §§ 97, 296; 30 Am. Jur. 2d Executions § 254.

7 C.J.S. Attachment §§ 180, 181; 33 C.J.S. Executions § 97; 77 C.J.S. Replevin § 46 et seq.

39-6-2. [Effect of filing, noting, indexing, copy of writ.]

Such process, when so filed, noted and indexed, shall have all the binding force as a lien upon said livestock, as if the same had been levied against said livestock upon the range and the officer had taken possession of the same. Upon the next roundup after such levy, and at all times after such levy until such writ is satisfied, all persons coming into possession of any such livestock shall treat said officer as the owner thereof.

History: Laws 1889, ch. 54, § 2; C.L. 1897, § 3133; Code 1915, § 4534; C.S. 1929, § 106-105; 1941 Comp., § 21-402; 1953 Comp., § 24-4-2.

39-6-3. [Disposing of or killing livestock levied upon; larceny; penalty.]

After the filing, noting and indexing of such process in the office of the county clerk, as aforesaid, if any person or persons, including the defendant or defendants in such process, shall sell, drive away, dispose of or kill or butcher any of said livestock so levied upon, or shall attempt to sell, drive away, dispose of or kill, or butcher, any of said livestock, or shall gather or round up any of said stock with intent in any way to defeat the levy of said writ, he or they, shall be deemed guilty of grand larceny, and on conviction thereof, shall be subject to a fine of not less than two hundred dollars [($200)], nor more than one thousand dollars [($1,000)], or to imprisonment for not less than one year, nor more than two years, in the discretion of the jury trying the case.

History: Laws 1889, ch. 54, § 3; C.L. 1897, § 3134; Code 1915, § 4535; C.S. 1929, § 106-106; 1941 Comp., § 21-403; 1953 Comp., § 24-4-3.

ANNOTATIONS

Cross references. — For larceny generally, *see* 30-16-1 NMSA 1978.

39-6-4. [Sale of stock levied upon; recording satisfaction of writ.]

Any livestock taken under any process, as provided in the foregoing section [sections] [39-6-1 to 39-6-3 NMSA 1978], shall be disposed of by the sheriff, or officer, as provided by law: provided, that in the case of a levy of a writ of execution, under the three preceding sections [39-6-1 to 39-6-3 NMSA 1978], the officer shall forthwith proceed to sell any livestock so levied upon, as now provided by law, in lots, from time to time as he may come into possession of the same, until the writ is satisfied. And upon

such writ being satisfied he shall at once enter satisfaction thereof, in all cases, upon the margin of the record aforesaid, where such brand is recorded, and shall endorse such satisfaction upon all process filed as aforesaid.

History: Laws 1889, ch. 54, § 4; C.L. 1897, § 3135; Code 1915, § 4536; C.S. 1929, § 106-107; 1941 Comp., § 21-404; 1953 Comp., § 24-4-4.

ANNOTATIONS

Cross references. — For judicial sales under execution, *see* 39-5-1 NMSA 1978 et seq.

ARTICLE 7
Uniform Certification of Questions of Law

39-7-1. Short title.

This act [39-7-1 to 39-7-13 NMSA 1978] may be cited as the "Uniform Certification of Questions of Law Act".

History: Laws 1997, ch. 8, § 1.

ANNOTATIONS

Law reviews. — For article, "Certification and Removal: Practice and Procedures," see 31 N.M.L. Rev. 161 (2001).

39-7-2. Definitions.

As used in the Uniform Certification of Questions of Law Act [39-7-1 NMSA 1978]:

A. "state" means a state of the United States, the District of Columbia, the commonwealth of Puerto Rico or any territory or insular possession subject to the jurisdiction of the United States; and

B. "tribe" means a tribe, band or village of Native Americans that is recognized by federal law or formally acknowledged by a state.

History: Laws 1997, ch. 8, § 2.

ANNOTATIONS

39-7-3. Power to certify.

The supreme court or the court of appeals of this state, on the motion of a party to pending litigation or its own motion, may certify a question of law to the highest court of another state, a tribe, Canada, a Canadian province or territory, Mexico or a Mexican state if:

A. the pending litigation involves a question to be decided under the law of the other jurisdiction;

B. the answer to the question may be determinative of an issue in the pending litigation; and

C. the question is one for which an answer is not provided by a controlling appellate decision, constitutional provision or statute of the other jurisdiction.

History: Laws 1997, ch. 8, § 3.

ANNOTATIONS

Considerations in granting certification. — The degree of uncertainty in the law and prospects for judicial economy in the termination of litigation are considered in deciding whether to accept pretrial certification from federal court. These considerations, however, are appropriately weighed against the advantages of normal appellate review in determining whether to accept certification. Schlieter v. Carlos, 108 N.M. 507, 775 P.2d 709 (1989).

Avoidance of advisory opinions. — The intent of the certification of facts and determinative answer requirements is that the supreme court avoid rendering advisory opinions. Schlieter v. Carlos, 108 N.M. 507, 775 P.2d 709 (1989).

Requirements for certification. — It is sufficient if the certification of facts and the record contain the necessary factual predicates to the supreme court's resolution of the question certified, and it is clear that evidence admissible at trial may be resolved in a manner requiring application of the law in question. Schlieter v. Carlos, 108 N.M. 507, 775 P.2d 709 (1989).

Certification is a discretionary function of the federal court, to be utilized, when available, to determine unsettled questions of state law. Ormsbee Dev. Co. v. Grace, 668 F.2d 1140 (10th Cir.), cert. denied, 459 U.S. 838, 103 S. Ct. 84, 74 L. Ed. 2d 79 (1982).

Court's answer must be determinative. — The supreme court's answer must be determinative in that it resolves the issue in the case out of which the question arose, and the resolution of this issue materially advances the ultimate termination of the litigation. Schlieter v. Carlos, 108 N.M. 507, 775 P.2d 709 (1989).

Certification inappropriate where issue certified not determinative. — Certification to the supreme court of New Mexico is not appropriate when the issue certified would not be determinative of the issues before a federal court. Ormsbee Dev. Co. v. Grace, 668 F.2d 1140 (10th Cir.), cert. denied, 459 U.S. 838, 103 S. Ct. 84, 74 L. Ed. 2d 79 (1982).

Certification was declined, where certified questions regarding the constitutionality of the New Mexico Medical Malpractice Act, 41-5-1 NMSA 1978 et seq., were not accompanied by sufficient nonhypothetical evidentiary facts to allow the supreme court to adequately determine the constitutionality of the act, and even if the court were able to answer the questions certified, its answer would not be determinative of the issue out of which they arose. Schlieter v. Carlos, 108 N.M. 507, 775 P.2d 709 (1989).

Party's request for abstention and certification comes too late, where the case has been tried and the district court has made its decision, and where dismissal, abstention or certification would promote, not prevent, fragmentation of water adjudication proceedings. N.M. ex rel. Reynolds v. Molybdenum Corp. of Am., 570 F.2d 1364 (10th Cir. 1978).

39-7-4. Power to answer.

The supreme court of this state may answer a question of law certified to it by a court of the United States or by an appellate court of another state, a tribe, Canada, a Canadian province or territory, Mexico or a Mexican state if the answer may be determinative of an issue in pending litigation in the certifying court and there is no controlling appellate decision, constitutional provision or statute of this state.

History: Laws 1997, ch. 8, § 4.

ANNOTATIONS

Novel and untested questions. — The certification of a question to the New Mexico supreme court regarding the stacking of uninsured and underinsured motorist coverage would be inappropriate because question did not present a question that was novel or untested by New Mexico courts. Bonham v. Indem. Ins. Co. of N. Am., 507 F.Supp. 2d 1196 (D.N.M 2007).

39-7-5. Power to reformulate question.

The supreme court of this state may reformulate a question of law certified to it.

History: Laws 1997, ch. 8, § 5.

ANNOTATIONS

39-7-6. Certification order; record.

The court certifying a question of law to the supreme court of this state shall issue a certification order and forward it to the supreme court of this state. Before responding to a certified question, the supreme court of this state may require the certifying court to deliver all or part of its record to the supreme court of this state.

History: Laws 1997, ch. 8, § 6.

ANNOTATIONS

39-7-7. Contents of certification order.

A. A certification order must contain:

(1) the question of law to be answered;

(2) the facts relevant to the question, showing fully the nature of the controversy out of which the question arose;

(3) a statement acknowledging that the supreme court of this state, acting as the receiving court, may reformulate the question; and

(4) the names and addresses of counsel of record and parties appearing without counsel.

B. If the parties cannot agree upon a statement of facts, the certifying court shall determine the relevant facts and state them as part of its certification order.

History: Laws 1997, ch. 8, § 7.

ANNOTATIONS

Mineral lessee's implied surface right of reasonable ingress and egress to reach well located inside production unit that the lessee is operating pursuant to a pooling arrangement extends across lease boundaries within the unit to the surface of the entire area subject to the arrangement, regardless of where within the unit production is taking place. Eden v. Voss, 105 Fed. Appx. 234 (10th Cir. 2004).

39-7-8. Notice; response.

The supreme court of this state, acting as a receiving court, shall notify the certifying court of acceptance or rejection of the question and, in accordance with notions of comity and fairness, respond to an accepted certified question as soon as practicable.

History: Laws 1997, ch. 8, § 8.

ANNOTATIONS

39-7-9. Procedures.

After the supreme court of this state has accepted a certified question, proceedings are governed by the rules and statutes governing briefs, arguments and other appellate procedures. Procedures for certification from this state to a receiving court are those provided in the rules and statutes of the receiving forum.

History: Laws 1997, ch. 8, § 9.

ANNOTATIONS

39-7-10. Opinion.

The supreme court of this state shall state in a written opinion the law answering the certified question and send a copy of the opinion to the certifying court, counsel of record and parties appearing without counsel.

History: Laws 1997, ch. 8, § 10.

ANNOTATIONS

39-7-11. Cost of certification.

Fees and costs are the same as in civil appeals docketed before the supreme court of this state and must be equally divided between the parties, unless otherwise ordered by the certifying court.

History: Laws 1997, ch. 8, § 11.

ANNOTATIONS

39-7-12. Severability.

If any provision of the Uniform Certification of Questions of Law Act [39-7-1 NMSA 1978] or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of that act that can be given effect without the invalid provision or application, and to this end the provisions of that act are severable.

History: Laws 1997, ch. 8, § 12.

ANNOTATIONS

39-7-13. Uniformity of application and construction.

The Uniform Certification of Questions of Law Act [39-7-1 NMSA 1978] shall be applied and construed to effectuate its general purpose to make uniform law with respect to the subject of that act among states enacting it.

History: Laws 1997, ch. 8, § 13.

ANNOTATIONS