

# 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.

- I. General Consideration.
- II. Interlocutory Orders.
- III. Final Judgments and Control.
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- I. General Consideration.

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

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 - Sections 4227 and 4230 of Code 1915, referred to in this section, were superseded by Rules 60(c) and (d), N.M.R. Civ.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 (now see Paragraphs C and D of Rule 1-060). 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).

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

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*, 26 N.M. 146, 189 P. 652 (1919).

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*, 59 N.M. 51, 278 P.2d 790 (1955).

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.*, 80 N.M. 1, 450 P.2d 439 (Ct. App. 1969); *Martin v. Leonard Motor-El Paso*, 75 N.M. 219, 402 P.2d 954 (1965); *Bourne v. Bottom*, 99 N.M. 694, 662 P.2d 1361 (Ct. App. 1983) (now Rule 1-060B).

This section does not conflict with Rule 60(b), N.M.R. Civ. P. *Gengler v. Phelps*, 89 N.M. 793, 558 P.2d 62 (Ct. App. 1976).

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.*, 52 N.M. 289, 197 P.2d 875 (1948).

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 County Comm'rs v. Wasson*, 37 N.M. 503, 24 P.2d 1098 (1933).

And 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.*, 35 N.M. 232, 294 P. 324 (1930).

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*, 80 N.M. 519, 458 P.2d 594 (1969).

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*, 17 N.M. 193, 125 P. 609 (1912).

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*, 46 N.M. 159, 123 P.2d 726 (1942).

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*, 36 N.M. 250, 13 P.2d 553 (1932); *Singleton v. Sanabria*, 35 N.M. 491, 2 P.2d 119 (1931).

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. *Marinchek v. Paige*, 108 N.M. 349, 772 P.2d 879 (1989).

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*, 14 N.M. 205, 89 P. 267 (1907).

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*, 46 N.M. 159, 123 P.2d 726 (1942).

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.*, 64 N.M. 319, 328 P.2d 389 (1958).

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. 70.

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*, 83 N.M. 674, 496 P.2d 167 (Ct. App. 1972).

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*, 83 N.M. 628, 495 P.2d 1075 (1972).

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.*, 76 N.M. 132, 412 P.2d 559 (1966).

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* § 44; 46 *Am. Jur. 2d Judgments* §§ 52 to 55, 58, 59, 679.

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.

Judgment not conforming to pleadings and proof in action under statute imposing the liability for double the value of property of decedent embezzled, alienated, converted or the like, before granting of administration or letters testamentary, 29 *A.L.R.2d* 284.

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

21 *C.J.S. Courts* § 148; 49 *C.J.S. Judgments* §§ 100, 228.

## 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*, 89 N.M. 793, 558 P.2d 62 (Ct. App. 1976).

## III. Final Judgments and Control.

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.*, 80 N.M. 1, 450 P.2d 439 (Ct. App. 1969).

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*, 98 N.M. 322, 648 P.2d 780 (1982).

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*, 93 N.M. 89, 596 P.2d 858 (1979).

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.*, 80 N.M. 1, 450 P.2d 439 (Ct. App. 1969).

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.*, 52 N.M. 289, 197 P.2d 875 (1948).

Section is applicable to all final judgments unless by statute otherwise excepted. *Board of County Comm'rs v. Wasson*, 37 N.M. 503, 24 P.2d 1098 (1933).

Judgment passes from control if no motion in 30 days. - Judgment or decree of the district court which adjudicates the rights of the parties passes from the control of the court, if no motion directed to it is filed within 30 days, and it cannot be amended or corrected by a motion directed to it more than 30 days after the entry of such decree, which motion seeks other and different relief from that given by the decree. *Queen v. McKissor*, 26 N.M. 404, 193 P. 72 (1920).

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*, 25 N.M. 215, 180 P. 287 (1919); *Norment v. First Nat'l Bank*, 23 N.M. 198, 167 P. 731 (1917).

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

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. *Bourne v. Bottom*, 99 N.M. 694, 662 P.2d 1361 (Ct. App. 1983).

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*, 22 N.M. 502, 165 P. 213 (1916).

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*, 22 N.M. 24, 158 P. 1086 (1916); *Fullen v. Fullen*, 21 N.M. 212, 153 P. 294 (1915).

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*, 26 N.M. 440, 194 P. 883 (1920), 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*, 44 N.M. 105, 99 P.2d 106 (1940).

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*, 75 N.M. 219, 402 P.2d 954 (1965).

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.*, 35 N.M. 232, 294 P. 324 (1930).

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.*, 52 N.M. 289, 197 P.2d 875 (1948).

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*, 79 N.M. 377, 444 P.2d 288 (1968).

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*, 39 N.M. 273, 46 P.2d 50 (1935).

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*, 98 N.M. 322, 648 P.2d 780 (1982).

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*, 42 N.M. 350, 78 P.2d 153 (1938).

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*, 38 N.M. 389, 34 P.2d 670 (1934).

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*, 79 N.M. 377, 444 P.2d 288 (1968).

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.*, 80 N.M. 1, 450 P.2d 439 (Ct. App. 1969); *Gilbert v. New Mexico Constr. Co.*, 35 N.M. 262, 295 P. 291 (1930).

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*, 36 N.M. 122, 9 P.2d 385 (1932).

Which is 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., 80 N.M. 1, 450 P.2d 439 (Ct. App. 1969).

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 Mtg. Co.*, 38 N.M. 370, 34 P.2d 294 (1934).

Nor constitute abuse. - Setting aside default judgment does not constitute abuse when the greatest degree of culpability with which party can possibly be charged in failing to appear, answer or otherwise plead to the complaint is that of carelessness and negligence. *Laffoon v. Galles Motor Co.*, 80 N.M. 1, 450 P.2d 439 (Ct. App. 1969).

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.

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 nonexistent judgment or because overruled by operation of law as not ruled upon within 30 days after it was filed. *Garcia v. Anderson*, 41 N.M. 517, 71 P.2d 686 (1937).

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*, 42 N.M. 350, 78 P.2d 153 (1938).

And 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*, 42 N.M. 350, 78 P.2d 153 (1938).

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*, 39 N.M. 428, 48 P.2d 1029 (1935).

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.*, 89 N.M. 786, 558 P.2d 55 (Ct. App. 1976).

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*, 67 N.M. 353, 355 P.2d 287 (1960).

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. Sias*, 44 N.M. 105, 99 P.2d 106 (1940).

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*, 106 N.M. 464, 745 P.2d 372 (1987).

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*, 31 N.M. 443, 247 P. 306 (1925).

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*, 37 N.M. 238, 21 P.2d 80 (1933).

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.

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).

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).

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. 1989).

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).

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. *National Am. Life Ins. Co. v. Baxter*, 73 N.M. 94, 385 P.2d 956 (1963); *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. *National Am. Life Ins. Co. v. Baxter*, 73 N.M. 94, 385 P.2d 956 (1963).

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).

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).

And 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).

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).

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).

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.); *New Mexico Sav. & Loan Ass'n v. Blueher Lumber Co.*, 80 N.M. 254, 454 P.2d 268 (1969).

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. *Board of County Comm'rs v. Wasson*, 37 N.M. 503, 24 P.2d 1098, followed in *Board of County 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 31-18-6 (now 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).

### **§ 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.

Cross-references. - As to entry of judgment, see Rule 1-058.

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).

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. - 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.

Cross-references. - For constitutional provision as to judgments against local officials, see N.M. Const., art. VIII, § 7. As to execution and foreclosure, see 39-4-1 NMSA 1978 et seq. As to new trials, see Rule 1-059. As to stay of proceedings to enforce a judgment, see Rule 1-062.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 46 Am. Jur. 2d Judgments §§ 161, 178; 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.

Cross-references. - As to supplementary judgment proceedings, see Rule 1-069.

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).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 46 Am. Jur. 2d Judgments § 898.  
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.

Cross-references. - As to confessed judgment liens, see 39-1-14 NMSA 1978. As to foreclosure suit and sale by one holding judgment lien on real estate, see 39-4-13 to 39-4-16 NMSA 1978. As to money allowance in divorce proceeding being lien on real estate, see 40-4-13 NMSA 1978.

The 1983 amendment inserted "transcript of judgment" in the catchline, divided the former first sentence into the present first two sentences, substituted "metropolitan" for "small claims" and "and a transcript or abstract of judgment may be issued by the clerk upon request of the parties" for "in a judgment docket book and" in the first sentence, deleted "docket of the" following "transcript of the" and "in the judgment record book" preceding "in the office" in the second sentence and substituted the present last sentence for the former last sentence, which dealt with the revival of a judgment.

Effective dates. - Laws 1983, ch. 89, contains no effective date provision, but was enacted at the session which adjourned on March 19, 1983. See N.M. Const., art. IV, § 23.

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. *Western 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).

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. 132.

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).

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).

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).

And 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).

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 §§ 237 to 244.  
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.

Effective dates. - Laws 1985, ch. 165 contains no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, is effective on June 14, 1985.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 46 Am. Jur. 2d Judgments § 305.  
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 [Chapter 7, Article 8 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.

Effective dates. - Laws 1985, ch. 150 contains no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, is effective on June 14, 1985.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 47 Am. Jur. 2d Judgments § 984.  
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.

The 1983 amendments. - Laws 1983, ch. 89, § 2, substituting "of judgment" for "from the judgment docket book in a judgment record book" in the first sentence and "recorded transcript of judgment" for "judgment record book" and "transcript of judgment issued" for "books required to be kept" in the second sentence and adding a third sentence on recording methods prior to July 1, 1984, was approved March 31, 1983. Laws 1983, ch. 169, § 1, rewriting the section to the extent that a detailed comparison is impracticable, was approved April 5, 1983. The section is set out as amended by Laws 1983, ch. 169, § 1. See 12-1-8 NMSA 1978.

Effective dates. - Laws 1983, ch. 89, contains no effective date provision but was enacted at a session which adjourned on March 19, 1983. See N.M. Const., art. IV, § 23.

Laws 1983, ch. 169, § 2, makes the act effective on July 1, 1983.

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. 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 §§ 152, 241. 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.

The 1983 amendment, in the catchline, substituted "transcript of judgment" for "judgment docket book" and added "fee for issuance" at the end, designated the formerly undesignated introductory paragraph as Subsection A and redesignated former Subsections A to G as Paragraphs (1) through (7) and substituted "transcript judgment issued" for "judgment docket book kept" and "metropolitan courts" for "small claims courts" in the introductory paragraph.

Effective dates. - Laws 1983, ch. 89, contains no effective date provision, but was enacted at the session which adjourned on March 19, 1983. See N.M. Const., art. IV, § 23.

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 § 172.  
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.

Cross-references. - As to confession of judgment term not affecting negotiability of commercial paper, see 55-3-112 NMSA 1978. As to partner not authorized to confess judgment for partnership, see 54-1-9. As to 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. - 47 Am. Jur. 2d Judgments §§ 1098 to 1106, 1126.

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.

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

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

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.

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. - 47 Am. Jur. 2d Judgments § 1099.  
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.

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. - 47 Am. Jur. 2d Judgments §§ 1110 to 1114, 1144.  
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.

The 1983 amendment added the catchline and, in the body of the section, substituted "confession of judgment" for "same," "issue the transcript of judgment or" for the language beginning with "make an entry of judgment" and ending with "and shall issue" as set forth in the original pamphlet and "pursuant to Section 39-1-13 NMSA 1978" for "as in the next section."

Effective dates. - Laws 1983, ch. 89, contains no effective date provision, but was enacted at the session which adjourned on March 19, 1983. See N.M. Const., art. IV, § 23.

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 §§ 152, 241, 1106.  
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.

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.

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 §§ 237 to 246; 47 Am. Jur. 2d Judgments §§ 1147 to 1149. 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.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 47 Am. Jur. 2d Judgments § 1105. 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.

Cross-references. - As to 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).

And 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).

And 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).

Even though 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. - 47 Am. Jur. 2d Judgments § 1108. 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.

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 § 929. 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.

Construction and application of Uniform Foreign Money-Judgments Recognition Act, 100 A.L.R.3d 792.

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.

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.

Cross-references. - As to confessed judgment term not affecting negotiability of commercial paper, see 55-3-112 NMSA 1978. As to 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. - 47 Am. Jur. 2d Judgments §§ 1107, 1108. 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.**

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

Laws 1983, ch. 259, contains no effective date provision, but was enacted at the session which adjourned on March 19, 1983. See N.M. Const., art. IV, § 23.

## **§ 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.

Cross-references. - As to execution and foreclosure generally, see 39-4-1 NMSA 1978 et seq. As to attachment and garnishment generally, see 42-9-1 NMSA 1978 et seq. As to stay of proceedings to enforce a judgment, see Rule 1-062. As to supplementary judgment proceedings, see Rule 1-069.

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).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 46 Am. Jur. 2d Judgments §§ 897, 901. 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 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.



Cross-references. - As to appellate costs, see 39-3-11 NMSA 1978. As to no costs being taxed against person seeking reinstatement in employment after leaving armed forces, see 28-15-3 NMSA 1978. As to costs of conviction, see 31-12-6 NMSA 1978. As to fees collected by supreme court clerk, see 34-2-5 NMSA 1978. As to fees and costs in magistrate courts, see 35-6-1 to 35-6-4 NMSA 1978. As to costs and attorney fees in garnishment proceedings, see 35-12-16 NMSA 1978. As to costs paid by county of origin in change of venue, see 38-3-11 NMSA 1978. As to costs in suit brought by representatives of infant, see 38-4-9 NMSA 1978. As to costs paid by guardians ad litem, see 38-4-17 NMSA 1978. As to witness fees, see 38-6-4 NMSA 1978. As to allocation of costs in partition action, see 42-5-8 NMSA 1978. As to costs in quieting title, see 42-6-7 NMSA 1978. As to bond for costs in habeas corpus proceeding, see 44-1-32 NMSA 1978. As to costs in quo warranto proceedings, see 44-3-11 NMSA 1978. As to costs of surety bonds, see 46-6-2 NMSA 1978. As to costs and attorney fees for prevailing party in suit under Uniform Owner-Resident Relations Act, see 47-8-48 NMSA 1978. As to costs and attorney fees in joinder of parties in action for mechanics' and materialmen's liens, see 48-2-14 NMSA 1978. As to each party paying own costs in review of public service commission orders, see 62-13-3 NMSA 1978. As to costs and attorney fees in joinder of action for liens on oil and gas wells and pipelines, see 70-4-9 NMSA 1978. As to costs in special proceedings determining validity of irrigation district bonds, see 73-9-59 NMSA 1978. As to jury fees, see Rule 1-038. As to costs on previously dismissed action, see Paragraph D of Rule 1-041. As to costs of judgments, see Paragraph D of Rule 1-054. As to magistrate court civil trial costs, see Rule 2-701. As to judgment costs in criminal cases, see Rule 5-701. As to costs on appeal, see Rule 12-403.

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. National Excess Ins. Co.*, 108 N.M. 625, 776 P.2d 1244 (1989).

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).

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).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 20 Am. Jur. 2d Costs § 79; 44 Am. Jur. 2d Insurance § 1772; 46 Am. Jur. 2d Judgments § 93.

Judgment, correction of clerical mistake in, respecting costs, 10 A.L.R. 612; 67 A.L.R. 828; 126 A.L.R. 956 .

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 costs of litigation by beneficiary respecting trust, 9 A.L.R.2d 1271.

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.

Against whom fees for guardian ad litem appointed for infant defendant are taxable as costs, 30 A.L.R.2d 1153.

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 § 411; 46 C.J.S. Insurance §§ 1406 to 1409.

## **§ 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.

Effective dates. - Laws 1981, ch. 10, contains no effective date provision, but was enacted at the session which adjourned on March 21, 1981. See N.M. Const., art. IV, § 23.

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.

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. *Southern Union Exploration Co. v. Wynn Exploration Co.*, 95 N.M. 594, 624 P.2d 536 (Ct. App. 1981), cert. denied, 455 U.S. 920, 102 S. Ct. 1276, 71 L. Ed. 2d 461 (1982).

"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. *Taber 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).

Retrospective application of section. - See *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. *New Mexico 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 Eng'r Corp. v. Grace*, 86 N.M. 727, 527 P.2d 322 (1974), and *Southwestern 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.

### **§ 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.

Cross-references. - As to joinder of claims and remedies, see Rule 1-018. As to consolidation and separate trials, see Rule 1-042.

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 §§ 257 to 259.

#### **§ 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.

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 § 20.  
20 C.J.S. Costs §§ 20, 25, 26.

#### **§ 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.

Office of justice of the peace abolished. - 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.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 5 Am. Jur. 2d Appeal and Error §§ 1009 to 1015.

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

20 C.J.S. Costs §§ 296, 299, 301, 302, 305, 308 to 311.

### **§ 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.

Cross-references. - As to costs on appeal from zoning decision of municipality, see 3-21-9 NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 5 Am. Jur. 2d Appeal and Error §§ 1009 to 1015.

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 §§ 296, 299, 310.

### **§ 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.

Cross-references. - As to fees to be endorsed on notary's certificate, see Paragraph J of Rule 1-030.

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 §§ 56 to 60. Costs and fees as affected by Rule 30(b) 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 758.

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

20 C.J.S. Costs § 194.

### **§ 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.

Cross-references. - As to recording fees, see 14-8-12 NMSA 1978. As to witness fees, see 38-6-4 NMSA 1978.

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 §§ 53, 54, 56, 57, 67. Costs and fees as affected by Rule 30(b) 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 758. 20 C.J.S. Costs § 194.

### **§ 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.

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.

Section has reference only to civil cases. 1915-16 Op. Att'y Gen. 361.

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).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 20 Am. Jur. 2d Costs § 53.  
20 C.J.S. Costs §§ 221, 242.

### **§ 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.

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 § 53.  
20 C.J.S. Costs §§ 221, 242.

### **§ 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.

Costs should be taxed before transcript is prepared and filed in the supreme court. Daily v. Fitzgerald, 17 N.M. 159, 130 P. 247 (1912).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 20 Am. Jur. 2d Costs § 95.  
20 C.J.S. Costs § 416.

### **§ 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.

Cross-references. - As to 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.

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

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 (1914).

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. - 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 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. - Sections 50-4-11 and 50-4-12 NMSA 1978 relating to wage-claim actions by the labor commissioner 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 §§ 37, 43.

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.

Injunction bond, recovery of costs in suit on, in addition to penalty, 70 A.L.R. 70.

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.

20 C.J.S. Costs §§ 125, 127, 171, 173, 174.

## **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.

Cross-references. - For constitutional provision as to appeals from probate courts and other inferior courts, see N.M. Const., art. VI, § 27. As to costs on appeal, see 39-2-5, 39-2-6 NMSA 1978. As to free process on indigent appeals, see 39-3-12 NMSA 1978. As to appeal of assessments for local improvements, to district court, see 3-33-35, 3-33-37 NMSA 1978. As to appeals from metropolitan court to district court, see 34-8A-6 NMSA 1978. As to appeals from magistrate court to district court, see 35-13-2 NMSA 1978. As to appeal of violation of municipal ordinances, see 35-15-10 NMSA 1978. As to appeal from commissioner of banking orders, see 58-1-45 NMSA 1978. As to review of supervisor's order regarding savings and loan associations, see 58-10-84 NMSA 1978. As to review of bank examiner's decisions on small loans, see 58-15-25 NMSA 1978. As to appeal from attorney general regarding private investigators, see 61-27-49 NMSA 1978. As to review of public service commission orders, see 62-11-1 to 62-11-7 NMSA 1978. As to appeal from decision of viewers awarding damages to county roads, see 67-5-19 NMSA 1978. As to appeals from orders of mine inspector, see 69-6-2 NMSA 1978. As to appeals from state engineer regarding water rights, see 72-7-1 to 72-7-3 NMSA 1978. As to appeal from determination of irrigation district concerning exemption from tax, see 73-11-29 NMSA 1978. As to appeal from county commissioners regarding electrical irrigation districts, see 73-12-4 NMSA 1978. As to appeal from board of directors of irrigation district regarding transfer of water rights, see 73-13-4 NMSA 1978. As to civil appeals from magistrate courts, see Rule 2-705. As to criminal appeals from magistrate courts, see Rule 6-703.

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).

And 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).

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 trammled 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).

Organic Act prohibited appeals other than from final judgments. - The Organic Act 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).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 4 Am. Jur. 2d Appeal and Error § 19. 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 § 47.

### **§ 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.

Cross-references. - As to supreme court jurisdiction, see N.M. Const., art. VI, § 2. As to court of appeals jurisdiction, see N.M. Const., art. VI, § 29. As to when appeals taken, see Rules 12-201 and 12-203. As to how appeals taken, see Rule 12-202.

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*, N.M. , 765 P.2d 1187 (Ct. App. 1988).

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. Atlantic & P.R.R.*, 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).

"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. 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. 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).

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).

And 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).

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. *Bartow v. Kernan*, 101 N.M. 382, 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. Board of Educ.*, 106 N.M. 673, 748 P.2d 516 (Ct. App. 1987).

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).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 4 Am. Jur. 2d Appeal and Error §§ 292 to 308.

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. 4A C.J.S. Appeal & Error §§ 428, 429, 439, 440.

### **§ 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; 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.

Cross-references. - As to supreme court jurisdiction, see N.M. Const., art. VI, § 2. As to court of appeals jurisdiction, see N.M. Const., art. VI, § 29. As to how and when appeal as of right taken, see Rule 12-201. As to interlocutory appeals by permission, see Rule 12-203. As to appeals from orders regarding release entered prior to a judgment of conviction, see Rule 12-204.

Repeals and reenactments. - Laws 1972, ch. 71, § 2 repeals 21-10-2.1, 1953 Comp., relating to allowing appeals to defendants, and enacts the above section.

History of section. - See *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).

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).

Allowance of interlocutory appeal is discretionary with the appellate court. *State v. Hernandez*, 95 N.M. 125, 619 P.2d 570 (Ct. App. 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. 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).

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).

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 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).

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).

Post-conviction proceedings must be invoked before habeas corpus may be sought. In re *Martinez*, 99 N.M. 198, 656 P.2d 861 (1982).

Law reviews. - For article, "The Writ of Prohibition in New Mexico," see 5 N.M. L. Rev. 91 (1974).

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).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 4 Am. Jur. 2d Appeal and Error §§ 159 to 167, 292 to 308.

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.

Appeal from order on motion to vacate sentence in criminal case under federal statute (28 USC § 2255), 20 A.L.R.2d 997.

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.

4A C.J.S. Appeal & Error §§ 428, 429, 439, 440.

### **§ 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 these courts. Within ten 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. If an application has not been acted upon within twenty days, it shall be deemed denied.

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.

Cross-references. - As to appellate jurisdiction of supreme court, see N.M. Const., art. VI, § 2. As to jurisdiction of court of appeals, see N.M. Const., art. VI, § 29. As to appellate jurisdiction of court of appeals, see 34-5-8 NMSA 1978. As to when appeals taken, see Rules 12-201 and 12-203.

Allowance of interlocutory appeal is discretionary with the appellate court. *State v. Hernandez*, 95 N.M. 125, 619 P.2d 570 (Ct. App. 1980).

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. *Salazare 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. 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 appeal to denial of 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).

But not to 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).

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. *Bartow v. Kernan*, 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).

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 Appeal and Error §§ 47, 50, 357; 5 Am. Jur. 2d Appeal and Error § 1025.

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.

4 C.J.S. Appeal and Error §§ 92, 389; 4A C.J.S. Appeal and Error § 609.

### **§ 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.

Cross-references. - As to writs of error, see Rule 12-503.

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.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 4 Am. Jur. 2d Appeal and Error §§ 2, 49. 4A C.J.S. Appeal and Error §§ 577 to 579.

### **§ 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.

Cross-references. - As to supreme court terms, sessions and recesses, see N.M. Const., art. VI, § 7. As to disposition of cause, see Rule 12-402.

### **§ 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.

Cross-references. - As to appellate jurisdiction of supreme court, see N.M. Const., art. VI, § 2. As to court of appeals jurisdiction, see N.M. Const., art. VI, § 29. As to special statutory proceedings, see Rule 12-601.

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).

And 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 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 13, N.M.R. App. P. (Civ.)); although this section omitted a material portion of Supreme Court Rule 5(6) as adopted. *Gonzales v. New Mexico State Bd. of Embalmers & Funeral Dirs.*, 63 N.M. 13, 312 P.2d 541 (1957).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 4 Am. Jur. 2d Appeal and Error § 62.  
4 C.J.S. Appeal & Error §§ 22, 23, 100.

### **§ 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.

Cross-references. - As to when appeals taken, see Rule 12-201. As to how appeals taken, see Rule 12-202.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 4 Am. Jur. 2d Appeal and Error §§ 177, 294.

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 § 35; 4A C.J.S. Appeal and Error §§ 427, 435, 574.

### **§ 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.

Cross-references. - As to supersedeas and stay in civil action, see 39-3-22 NMSA 1978. As to supersedeas and stay, see Rule 12-207.

Compiler's notes. - N.M.R. App. P. (see Judicial Pamphlet 12), insofar as it limits the circumstances under which damages may be awarded on appeal, may affect this section.

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).

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).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 4 Am. Jur. 2d Appeal and Error §§ 364, 369.

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.  
4A C.J.S. Appeal & Error §§ 643 to 646.

### **§ 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.

Cross-references. - As to costs, see Rule 12-403.

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. New Mexico 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. American 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 (1883), *aff'd*, 124 U.S. 510, 8 S. Ct. 590, 51 L. Ed. 523 (1888) (decided under former law).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 5 Am. Jur. 2d Appeal and Error § 1009.

### **§ 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.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 4 Am. Jur. 2d Appeal and Error §§ 345, 349, 350.

### **§ 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.

Cross-references. - As to transmission of transcript and record, see Rule 12-211.

Compiler's notes. - This section may be affected by Rule 12-209, dealing with the record on appeal, and Rule 12-403, 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.

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), 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.

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 Appeal and Error § 919. 5 C.J.S. Appeal & Error § 1350.

## **§ 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.

Cross-references. - As to appellate jurisdiction of supreme court, see N.M. Const., art. VI, § 2. As to jurisdiction of court of appeals, see N.M. Const., art. VI, § 29. As to 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.

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 Appeal and Error §§ 167 to 170.

### **§ 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.

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 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. - 4 Am. Jur. 2d Appeal and Error §§ 276, 277.  
4 C.J.S. Appeal & Error §§ 392 to 397.

### **§ 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.

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.

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.

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.

Rule 12-301 provides that if a party dies before notice of appeal is filed, but after entry of judgment, the notice may be filed by his personal representative, or if he has none, by his survivor or survivors, successor in interest, or as the appellate court shall direct.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 4 C.J.S. Appeal & Error § 406.

### **§ 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.

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 provides that if a party dies after notice of appeal has been filed, the appeal shall not abate but the death may be suggested to the appellate court and such court may allow substitution of the personal representative, or if none, the proceedings may continue as to a survivor or survivors, successor in interest or as the court shall direct.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 4 Am. Jur. 2d Appeal and Error § 288. 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 § 407.

### **§ 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.

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.

Rule 12-301 provides that at any stage of an appeal the appellate court may add, drop or substitute parties on its own initiative or on motion, on such terms as it may deem proper.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 4 Am. Jur. 2d Appeal and Error § 287.  
4 C.J.S. Appeal & Error § 405.

### **§ 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 him, 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 him 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, he will comply with the judgment of the district court and pay all damages and costs finally adjudged against him 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. 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.

D. 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.

E. 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 which 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.

Cross-references. - As to 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.

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. New Mexico 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. New Mexico 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).

But it 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).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 4 Am. Jur. 2d Appeal and Error §§ 364, 365, 369.

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. 4A C.J.S. Appeal & Error §§ 643 to 646.

### **§ 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.

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. Memorial Gen. Hosp.*, 99 N.M. 60, 653 P.2d 891 (Ct. App. 1982).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 4 Am. Jur. 2d Appeal and Error § 385. 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. 4A C.J.S. Appeal & Error § 632.

### **§ 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.

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. - 4 Am. Jur. 2d Appeal and Error §§ 364 to 373, 394 to 396. 4A C.J.S. Appeal & Error §§ 625 to 632.

### **§ 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:

USE THE ZOOM COMMAND TO VIEW THE FOLLOWING FORM:

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.

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.

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 Whse. 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 Appeal and Error §§ 839, 897 to 904.  
5 C.J.S. Appeal and Error § 1460; 5B C.J.S. Appeal and Error § 1835.

### **§ 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.

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 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. New Mexico 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.

Cross-references. - As to execution after judgment, see 39-1-20 NMSA 1978. As to execution and foreclosure, see 39-4-1 NMSA 1978 et seq. As to issuance and stay of mandate, see Rule 12-402.

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.

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.

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).

And 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 Appeal and Error §§ 1049 to 1053.

### **§ 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.

Cross-references. - As to costs on appeal from probate or magistrate court, see 39-2-5 and 39-2-6 NMSA 1978. As to witness fees taxed as costs, see 39-2-9 NMSA 1978. As to taxing costs of additional witnesses, see 39-2-10 NMSA 1978. As to judgment costs, see Rule 1-054.

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 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.

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. New Mexico State Hwy. Dep't*, 97 N.M. 692, 643 P.2d 256 (Ct. App. 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).

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. Foundation 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, 32-1-41 NMSA 1978, controls, 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. 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. Board of Educ.*, 107 N.M. 56, 752 P.2d 248 (Ct. App. 1988).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 5 Am. Jur. 2d Appeal and Error §§ 1009 to 1024.

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 §§ 308 to 338.

## **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.

Cross-references. - For provisions that execution not issue against county commissioner or municipality, see N.M. Const., art. VIII, § 7. As to sheriff's fees for levy and sale, see 4-41-16 and 4-41-17 NMSA 1978, respectively. As to 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. For rule relating to examination of judgment debtor or others, see Rule 1-069.

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. 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.

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).

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. 4538.

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).

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.

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.

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.

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.  
Execution as lien on estate by entirety, 89 A.L.R. 499.  
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.  
Creditors' rights as affected by grant to one for life, and afterward, either absolutely or contingently, to grantor's heirs or next of kin, 16 A.L.R.2d 713.  
Liability insurance carried by a charity as subject to appropriation in satisfaction of judgment in tort, 25 A.L.R.2d 89.  
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.  
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.

Office of justice of the peace abolished. - 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.

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).

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 §§ 88, 89, 130 to 206.

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.

Money or other property taken from prisoner as subject of attachment, garnishment, or seizure under execution, 45 A.L.R. 574; 48 A.L.R. 583; 154 A.L.R. 758.

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.

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.

Vendee's interest under executory contract as subject to execution, 1 A.L.R.2d 730.

Solid mineral royalty as real or personal property for purposes of execution, 68 A.L.R.2d 735.

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.

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.

Cross-references. - As to taxing of bill of costs against defendant in execution, see 39-2-11 NMSA 1978. As to garnishment, see 35-12-1 NMSA 1978 et seq. As to attachment, see 42-9-1 NMSA 1978 et seq. For rule regarding proceedings supplementary to judgment, see Rule 1-069.

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. *Bachelor 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).

Law reviews. - For comment, "Wage Garnishment in New Mexico - Existing Debtor Protections under Federal and State Law and Further Proposals," see 1 N.M. L. Rev. 388 (1971).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 30 Am. Jur. 2d Executions §§ 221, 224, 774, 790.

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.  
38 C.J.S. Garnishment § 16.

#### **§ 39-4-4. [Filing notice of levy on real estate.]**

Any officer making a levy on real estate under execution or writ of attachment, shall file a notice of such levy in the office of the county clerk and recorder 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 such notice under the hand and seal of such officer shall be sufficient to entitle such instrument to record.

History: Laws 1933, ch. 13, § 1; 1941 Comp., § 21-104; 1953 Comp., § 24-1-4.

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 § 245.  
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. [Recording and indexing notice.]**

The county clerk and recorder shall record such notice in a book kept for that purpose and shall index the same in the records of his office, and when so filed [it] shall be notice to the public of the facts therein recited, and [he] shall receive a fee of fifty cents [(\$50)] for filing, recording and indexing the same.

History: Laws 1933, ch. 13, § 2; 1941 Comp., § 21-105; 1953 Comp., § 24-1-5.

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

#### **§ 39-4-6. [Filing release of levy.]**

When said debt for which such levy is made has been satisfied, or if directed by the plaintiff or his attorney, the officer shall file a release of such levy under his official hand and seal, in the office of the clerk and recorder who shall record the same and shall receive a fee of fifty cents [(\$.50)] therefor.

History: Laws 1933, ch. 13, § 3; 1941 Comp., § 21-106; 1953 Comp., § 24-1-6.

### **§ 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.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 30 Am. Jur. 2d Executions §§ 277 to 285. 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.

Cross-references. - As to 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.

Cross-references. - For further provisions relating to notice of judicial sale, see 39-5-1 to 39-5-4 NMSA 1978. As to appraisal of property to be sold at judicial sale, see 39-5-5 to 39-5-11 NMSA 1978. As to 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.

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 Mt. Ethanol Sys. v. Mann, Inc.* 21 Bankr. 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 §§ 32, 50, 51, 303 to 309, 554 to 557.

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 before expiration of judgment lien as affecting execution sale after statutory period, 77 A.L.R.2d 1068.

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.

Cross-references. - As to 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.

Cross-references. - As to 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).

Lien on equitable interest. - As neither this section nor 36-1-6 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, 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).

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.

Cross-references. - As to 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.

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. *Uslife Title Ins. Co. v. Romero*, 98 N.M. 699, 652 P.2d 249 (Ct. App. 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.

Effective dates. - Laws 1989, ch. 256 contains no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, is effective on June 16, 1989.

#### **§ 39-4A-2. Definitions.**

As used in the Foreign Judgments Act [39-4A-1 to 39-4A-6 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.

Effective dates. - Laws 1989, ch. 256 contains no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, is effective on June 16, 1989.



### **§ 39-4A-3. Filing and status of foreign judgments.**

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.

History: Laws 1989, ch. 256, § 3.

Effective dates. - Laws 1989, ch. 256 contains no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, is effective on June 16, 1989.

### **§ 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.

Effective dates. - Laws 1989, ch. 256 contains no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, is effective on June 16, 1989.

### **§ 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.

Effective dates. - Laws 1989, ch. 256 contains no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, is effective on June 16, 1989.

### **§ 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.

Effective dates. - Laws 1989, ch. 256 contains no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, is effective on June 16, 1989.

## **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.

Cross-references. - As to commission and expenses due sheriff for judicial sale, see 4-41-17 NMSA 1978. As to 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 exemption of sales by public officers from article 6 of the Uniform Commercial Code, relating to bulk transfers, see 55-6-103 NMSA 1978. As to sale pursuant to "chattel mortgage," see 55-9-101 NMSA 1978 et seq., relating to secured transactions. As to foreclosure of mortgages on railroad property, see 63-5-1 to 63-5-4 NMSA 1978.

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. *Production Credit Ass'n v. Williamson*, 107 N.M. 212, 755 P.2d 56 (1988).

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 §§ 319, 332. 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.

Direct attack upon purchase by attorney of client's property at or through execution or judicial sale, 20 A.L.R.2d 1307.

Rights of parties under an oral agreement to buy or bid in land for another at judicial sale, 27 A.L.R.2d 1307.

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.

Effective dates. - Laws 1981, ch. 13, contains no effective date provision, but was enacted at the session which adjourned on March 21, 1981. See N.M. Const., art. IV, § 23.

### **§ 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.

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.

Direct attack upon purchase by attorney of client's property at or through execution of

judicial sale, 20 A.L.R.2d 1307.  
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.

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 § 321.  
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.

Cross-references. - As to publication of "legal notice," see 14-11-1 NMSA 1978 et seq.

Compiler's notes. - Laws 1935, ch. 68, § 1, identifies the section being amended as Laws 1931, ch. 8, § 1.

Office of justice of the peace abolished. - 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.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 30 Am. Jur. 2d Executions § 319.

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. *Production Credit Ass'n v. Williamson*, 107 N.M. 212, 755 P.2d 56 (1988).  
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.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 30 Am. Jur. 2d Executions §§ 370, 371, 372.

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.

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.

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.

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 §§ 299, 300. 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.

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.

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.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 30 Am. Jur. 2d Executions §§ 299, 302.

### **§ 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 appraisal 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.

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.

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.

Cross-references. - For rule of procedure relating to service of process, see Rule 1-004.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 59 C.J.S. Mortgages § 630.

## **§ 39-5-16. [Mortgage foreclosure commenced after March 15; growing crops.]**

That in cases of mortgage foreclosures of property whereon there is a growing crop and when such proceeding shall have been commenced after the 15th day of March of any year, the mortgagee [mortgagor] shall not be dispossessed by any means whatsoever until such crop has been fully harvested and shall be entitled to retain such 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.

Cross-references. - For right of purchaser upon redemption to growing crops, see 39-5-22 NMSA 1978.

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.

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.

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.

Saving clauses. - Laws 1971, ch. 88, § 2, provides that the act shall not apply to foreclosure proceedings commenced before its effective date.

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 § 332. 57 C.J.S. Mechanic's Liens § 337; 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.**

A. After sale of any real estate pursuant to any such judgment or decree of any court, the real estate may be redeemed by the former defendant owner of the real estate, his heirs, personal representatives or assigns or by any junior mortgagee or other junior lienholder:

(1) by paying to the purchaser, his personal representatives or assigns, at any time within nine months from the date of sale, the amount paid, with interest from the date of purchase 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, with interest on such 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 petitioning the district court in which the judgment or decree of foreclosure was entered for a certificate of redemption 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 the district court in which the order, judgment or decree under which the sale was made was entered, at any time within nine months from the date of sale.

B. Copies of the petition for redemption shall be served upon the purchaser of real estate under a foreclosure sale or his personal representatives or assigns.

C. Any purchaser of real estate under a foreclosure sale or his personal representatives or assigns, upon being served with the petition for redemption of the property, shall answer the petition within thirty days after service of the petition.

D. The hearing shall be governed by the rules of civil procedure. 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. 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.

E. A trustee's sale pursuant to a power of sale in a deed of trust as provided in the Deed of Trust Act [48-10-1 to 48-10-21 NMSA 1978] is not a sale of real estate pursuant to a judgment or decree of a court. Except as provided in this section as to the rights of an omitted junior encumbrancer, no real estate may be redeemed from a trustee's sale. A junior encumbrancer who does not have actual notice or knowledge of the trustee's sale and who has been otherwise omitted from the trustee's sale proceeding shall be entitled to redeem the trust real estate by petitioning the district court in the county where the trustee's sale was held. The action shall proceed as provided in Subsections B through D of this section. The purchaser of the trust real estate at the trustee's sale, or the successors and assigns of the purchaser may likewise petition the district court to terminate the right of redemption of an omitted junior encumbrancer. In any such action, the redemption period shall be nine months, or the period provided in the deed of trust, whichever is the lesser period, and shall begin to run from the date judgment is entered in the action.

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.

Cross-references. - As to redemption of real property sold on execution, see 39-5-21 NMSA 1978.

The 1977 amendment added "notice and hearing; redemption amount" at the end of the catchline of this section, designated the former provisions as Subsection A and added Subsections B to D, divided Subsection A into Paragraphs (1) and (2), inserted provisions as to the redemption period and payments on liens or mortgages in Paragraph (1) of Subsection A, added the provision as to petitioning the district court at the beginning of Paragraph (2) of Subsection A, and made other minor changes in such paragraph.

The 1987 amendment, effective June 19, 1987, near the middle of Subsection A(2), inserted "set forth in Paragraph (1) of this subsection"; added Subsection E; and made minor stylistic changes.

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).

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).

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).

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).

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).

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).

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. *Federal Land Bank v. Burgett*, 97 N.M. 519, 641 P.2d 1066 (1982).



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. Federal 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).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 30 Am. Jur. 2d Executions §§ 522 to 550. "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.

Trust arising from oral agreement to permit owner to redeem property or to redeem it for him, 42 A.L.R. 118; 135 A.L.R. 232; 27 A.L.R.2d 1285.

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.

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.

57 C.J.S. Mechanic's Liens § 347; 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.

Effective dates. - Laws 1965, ch. 224, contains no effective date, but was enacted at a session which adjourned on March 20, 1965. See N.M. Const., art. IV, § 23.

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).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 55 Am. Jur. 2d Mortgages § 888.

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.**

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 the original pamphlet. 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.

Cross-references. - As to redemption of real property sold under judgment or decree of foreclosure, see 39-5-18, 39-5-19 NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 30 Am. Jur. 2d Executions §§ 522 to 550.

"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.

Cross-references. - As to 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 § 543.

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.]**

In all cases of redemption of lands from sale under the terms and provisions of this act [39-5-17 to 39-5-23 NMSA 1978], it shall be the duty of the purchaser, his personal representatives or assigns, or the clerk of the district court, as the case may be, to make out an instrument in writing, under his hand and seal, evidencing such redemption, which shall be recorded in the office of the county clerk of the county wherein said land is situated, in the same manner as other instruments of writing affecting title to real estate are recorded, [for] which [a] recording fee, together with a fee of one dollar (\$1.00) to the clerk when the redemption is made by depositing the money in the office of the clerk, shall be paid by the party redeeming.

History: Laws 1931, ch. 149, § 6; 1941 Comp., § 21-223; 1953 Comp., § 24-2-23.

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.

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. As to attachments, see 42-9-1 NMSA 1978 et seq. As to filing and recording of brands, see 77-9-8 to 77-9-20 NMSA 1978.

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. American Valley Co.*, 9 N.M. 526, 56 P. 306 (1899), appeal dismissed, 20 S. Ct. 1029, 44 L. Ed. 1222 (1960).

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 §§ 258, 276.  
7 C.J.S. Attachment §§ 180, 181; 33 C.J.S. Executions § 97; 77 C.J.S. Replevin § 117.

### **§ 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.

Cross-references. - As to 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.

Cross-references. - As to judicial sales under execution, see 39-5-1 NMSA 1978 et seq. As to filing of brands, see 77-9-8 to 77-9-20 NMSA 1978.