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APPEALS FROM PARTS OF JUDGMENTS IN MONTANA

The authorities and statutes herein considered are those relating to this question: When may an appeal be taken to the Supreme Court from a part only of a District Court judgment? To lawyer and layman alike the problem is one of considerable interest. The lawyer is concerned not only with the economic side, but also with the legal need for laws which are reasonably definite and certain; on the other hand the layman is primarily concerned with the cost of his litigation and his right to have it conducted with the least possible expense.

It is to be noted, that at common law a writ of error had the effect of bringing up before the reviewing court, for examination of errors of law, the entire record. Consequently it would not lie to review a part only of a judgment.¹ In equity cases the rules of the high court of chancery in England permitted appeals from parts of judgments, but in so doing the party appealing admitted the correctness of other parts of the judgment.²

The prevailing rule in this country is, that the right of appeal is statutory³ and that an appeal cannot be taken from a part only of a final judgment, unless there is a statute permitting it, or unless such part from which the appeal is taken, is not connected with, or dependent upon, the remaining portion.⁴

During the existence of Montana Territory, the appellate jurisdiction of the Supreme Court of Montana was regulated by territorial laws, consistent with the constitution of the United States and the Organic Act.⁵ Following the adoption of the Constitution and the admission of Montana as a state, in 1899, judgments in the District Courts could be appealed from to the Supreme Court of the State of Montana, only un-

¹ R. C. L. *Appeal and Error* §12.

The pertinent portion of the common law writ of error recited: ". . . We . . . do command you, that, if judgment thereof be given, then under your seal you do distinctly and openly send the record and process of the complaint aforesaid with all things concerning them, and this writ . . ."

BLACKSTONE COMMENTARIES ON THE LAW OF ENGLAND Book III (4th ed. 1770) Ch. 25 p. 405, and appendix III, §6.

² DANL; CH. PR. p. 1547.

³ C. J. S. *Appeal and Error* §7.

⁴ C. J. S. *Appeal and Error* §109; 2 AM. JUR., APPEAL AND ERROR §20. *Appeal and Error*, 3 C. J. p. 466.

⁵ *Barkley v. Logan* (1875) 2 Mont. 296; *Plaisted v. Nowlan* (1876) 2 Mont. 359.

der the limitations and regulations as to time, manner and mode provided by statute, enacted in accordance with constitutional provisions.⁶

The Statutes:

The statutes involved provide:

(a) "An appeal may be taken to the supreme court from a district court in the following cases: . . . From a final judgment entered in an action or special proceeding commenced in a district court, or brought into a district court from another court . . ." This is Section 9731, R. C. M. 1935, and it is in substantially the same form as when it was first enacted in 1864. It was amended in 1877, by adding the words, "or any part thereof" after the word "judgment". Such words added by such amendment were deleted upon the inclusion of the section in the Code of Civil Procedure, 1895; it has remained unchanged since.⁷ The amendment was probably brought about through the harshness of the rule announced in the cases decided by the Supreme Court in 1875 and 1876.⁸

(b) "An appeal may be taken . . . From a final judgment in an action or special proceeding commenced in the court in which the same is rendered within six months after the entry of such judgment . . ." This is Section 9732, R. C. M., 1935, and it is in substantially the same form as when it was first enacted in 1864.⁹

(c) "An appeal is taken by filing with the clerk of the

⁶MONT. CONST.; Art VIII. §§2, 3, 15; R. C. M. 1935 §9729; *Finlen v. Heinze* (1902) 27 Mont. 107; 79 P. 829; 70 P. 617; *Pierson v. Daly* (1914) 49 Mont. 478; 143 P. 957.

⁷4 C. J. S. *Appeal and Error* §18.

⁸History: First appeared in Ch. II, §262, p. 95, LAWS OF MONTANA, 1864-5; unchanged in Ch. II, §331, P. 221, LAWS OF MONTANA 1867; re-enacted §830, p. 110, Cod. Stat. 1871; amended by adding words, "or any part thereof" after word "judgment" Ch. 2, §431, p. 157, LAWS OF MONTANA, 1877 re-enacted §431 (1st Div.) Rev. Stat. 1879; §444, (1st Div.) Comp. Stat. 1887; words, "or any part thereof," deleted, on adoption of §1722, Code of Civ. Proc. 1895; re-enacted §7096, Rev. Codes, 1907; amended Ch. 225, §10, LAWS OF MONTANA, 1921; re-enacted R. C. M. 1921, §9731; R. C. M. 1935, §9731.

⁹*Barkley v. Logan* (1875) 2 Mont. 296; *Plaisted v. Nowlan* (1875) 2 Mont. 359.

¹⁰History: First appeared in Ch. 1, §251, p. 95, LAWS OF MONTANA, 1864-5; changed as to time for appeal in Ch. I, §320, p. 199, LAWS OF MONTANA, 1867; re-enacted as §369, (p. 107) Cod. St. 1871; changed as to time for appeal, certain cases, Ch. I, §408, p. 150, LAWS OF MONTANA, 1877; re-enacted §408, (1st. Div.) Rev. Stat. 1879; §421 (1st. Div.) Comp. Stat. 1887; §1723, Code of Civ. Proc. 1895; §7099, Rev. Codes, 1907; amended as to time for appeal, Ch. 225, §11, LAWS OF MONTANA, 1921; re-enacted R. C. M. 1921, §9732; amended as to time for appeal, Ch. 39 §1, LAWS OF MONTANA, 1925; re-enacted as R. C. M. 1935, §9732.

court in which the judgment . . . appealed from is entered, a notice stating the appeal from the same, or some specific part thereof, and serving a similar notice on the adverse party, or his attorney . . ." This is Section 9733, R. C. M., 1935, and it is in the same form as when it was adopted in 1864.¹⁰

Consideration of Said Statutes and Decisions:

The Statutes and decisions will be considered in three groups. Group I. Period to the amendment of what is now R. C. M. 1935, Section 9731, in 1877. Group II. Period during the life of such amendment, 1877 to 1895. Group III. Period since 1895 to the present time.

GROUP I.

The *first* decision was that of *Barkley v. Logan*.¹¹

The suit was one for an injunction. The appellant being satisfied with the greater portion of the decree, appealed from that part thereof awarding priority to Cedar Gulch Ditch over the South Bowman Ditch. The court dismissed the appeal, holding Sections 369 (p. 107) and 380 (p. 110), Codified Statutes, 1871, (R. C. M. 1935, Sections 9732 and 9731) "defined the appellate jurisdiction", and that the whole judgment must be appealed from in order to give the court jurisdiction over a part; that it had no jurisdiction over an appeal from part of a judgment. Though Section 370 (p. 107), Codified Statutes, 1871 (R. C. M. 1935, Section 9733) contained the words, "or some specific part thereof", the court held it did not "enlarge" the "jurisdiction" conferred by the two first mentioned sections, which must control.

The *second* decision was that of *Plaisted v. Nowlan*.¹²

No facts are stated in the opinion. A motion for rehearing of the case of *Barkley v. Logan* was also argued and submitted. The opinion declares, "It is claimed by the respondent and admitted by the appellant that this is an appeal from a certain

¹⁰History: First appeared as Ch. 1, §252, p. 95 LAWS OF MONTANA, 1864-5; re-enacted, without change, Ch. I, §321, p. 199, LAWS OF MONTANA, 1867; §370, p. 107, Cod. Stat. 1871; Ch. I, §409, p. 150, LAWS OF MONTANA, 1877; §409 (1st Div.) Rev. Stat. 1879; §422 (1st Div.) Comp. Stat. 1887; §1724, Code. Civ. Proc. 1895; §7100, Rev. Codes, 1907; R. C. M. 1921, §9735; R. C. M. 1935 §9733.

¹¹(1875) 2 Mont. 296.

¹²"A view contrary to the Montana cases prevails in California, South Dakota and New York. Hayne on New Trial & App. §185; Male v. Harlan, 12 S. D. 627, 82 N. W. 179; Van Loan v. Squires, 51 Hun. 360, 4 N. Y. S. 371." Cottier v. Sullivan (1934) 47 Wyo. 72, 31 P. (2d) 675.

¹³(1876) 2 Mont. 359.

part of a decree, and that the respondent relies upon the authority of *Barkley v. Logan*, ante 291 to sustain his position." The court adhered to its decision in the last cited case, dismissed the motion for rehearing thereof, and sustained the motion to dismiss the appeal in the instant cause.

GROUP II.

The *third* decision was that of *Largey v. Sedman*.¹³ Sedman appealed from a decree of foreclosure authorizing the sale of real estate in which he claimed an interest. Two of the defendants defaulted, and the decree was rendered upon issue joined by Sedman. The appeal was from the whole of the judgment for costs and the whole of the judgment affecting Sedman's interest in said property. Respondent moved to dismiss the appeal, as being from a part of a judgment only.

The court held:

"The only issue tried in the case had relation to his interest in the property . . . His appeal is therefore equivalent to, and is an appeal from the whole judgment and decree, and does not come within the principle laid down in *Barkley v. Logan* and *Plaisted v. Nowlan*."

No mention was made in the opinion of the amendment made to Section 380, Codified Statutes, 1871, by the incorporation of the words "or any part thereof", after the word "judgment" in Section 431, LAWS OF MONTANA 1877.

The *fourth* decision was that of *In re Davis' Estate*.¹⁴ An appeal was taken from a single order denying two motions for change of venue. One motion was on the ground of prejudice of the judge, the other was on the ground of prejudice of the inhabitants of the county. Two notices of appeal were filed. The body of one notice of appeal recited that appellants appealed from the order of the court overruling the motion for a change of venue on account of the prejudice of the judge; the other notice recited an appeal from the order of the court overruling a motion for a change of venue on account of the prejudice of the inhabitants of the county. Although each appeal appears to have been from the whole order, the court treated each as being from a portion thereof.

¹³(1880) 3 Mont. 472.

For same results reached on different rationale see *Everding & Farrell v. Toft* (1915) 92 Ore. 1; 150 P. 757; *McDonald v. White* (1907) 46 Wash. 334, 89 P. 891.

¹⁴(1891) 11 Mont. 1, 27 P. 342.

The court said:

“The court below could not abridge our right of appeal on both motions by refusing to decide them separately, and by entering but one order. The cases of *Barkley v. Logan*, 2 Mont. 296 and *Plaisted v. Nowlan*, 2 Mont. 359 on which respondent relies are easily distinguished. When they were decided, the statute relating to appeals was subsequently amended and now reads: ‘An appeal may be taken to the Supreme Court . . . First, From a final judgment, or any part thereof, entered in an action . . .’” (Code Civ. Proc. Section 444)

Though it was an appeal from a probate order, the case is cited in *Bank of Commerce, etc., v. Fuqua, et al.*, *infra* as an authority for an appeal from part of a judgment.

The *fifth* decision was that of *Bank of Commerce, etc., v. Fuqua, et al.*¹⁵ The action was upon a bill of exchange. The appellant was one of the acceptors and endorsers on the bill. The entire judgment was for \$4,000.00, principal amount and \$400.00 attorney’s fees. The appellant appealed from the portion thereof relating to attorney’s fees. Respondent moved to dismiss the appeal because it was from part of a judgment only.

The court held:

“Respondent contends that an appeal from part of a judgment is not proper practice, and cites . . . *Barkley v. Logan*, 2 Mont. 296 . . . and . . . *Plaisted v. Nowlan*, 2 Mont. 359 . . . These cases would support respondent’s position but for the fact that . . . the statute under which they were determined has been amended so as to provide for an appeal from the judgment ‘or some part thereof’ . . . Sections 408 and 431 (10th Sess. Laws) . . . The statute has since remained in that form. We therefore hold that an appeal may be prosecuted from part of a judgment. (See *In re Davis’ Estate*, ante, p. 1)”

GROUP III

The *sixth* decision was that of *In re Bitter Root Irri. Dist. et al.*¹⁶ The case was an appeal by the District from an order

¹⁵(1891) 11 Mont. 285, 28 P. 291. In an Oregon case, the plaintiff by judgment recovered the principal amount of a note, but was denied recovery as to attorney’s fees, though the note provided therefor. The judgment was settled as to the principal amount and plaintiff appealed from the part of the judgment denying attorney’s fees. The court held that as the answer of the defendant denied the allegations of the complaint the judgment was not “severable” and dismissed the appeal. *Bush v. Mitchell* (1895) 28 Ore. 92, 41 P. 155.

¹⁶(1923) 67 Mont. 436, 218 P. 945.

creating an irrigation district in which respondent Cooney's lands were sought to be embraced. The respondent moved to dismiss the appeal because it was from a portion of the judgment, instead of from the whole thereof. The court affirmed the judgment of the district court, thereby denying said motion, declaring the rule announced in *Barkley v. Logan*¹⁷ and *Plaisted v. Nowlan*¹⁸ was inapplicable.

The court held that:

" . . . the instant case comes within the rule of *Largey v. Sedman*. The only contest here was between the petitioners and the objector . . . Cooney . . . In all essential particulars it was the same as though it was an independent proceeding between the petitioners and the objector, and therefore appears to us that the appeal is equivalent to, and is, an appeal from the whole judgment so far as those parties are concerned."

The *seventh* decision was that of *Lohman v. Poor et al.*¹⁹ Two joint notes were executed by Tracy E. Poor, (who defaulted) and Daniel H. Poor, in favor of X Company and Y Company, and as security for the payment of these notes separate mortgages were executed on their respective lands. The X Company assigned their note and mortgages to Lohman who brought foreclosure suit. Daniel H. Poor and wife, defended claiming non-delivery of the note and mortgages to the X Company and also non-delivery of the note and mortgages to the Y Company. The court adjudged that all of the notes and mortgages had been delivered; ordered foreclosure of the Daniel H. Poor mortgage to the X Company, subject nevertheless, to the note and mortgages given to the Y Company, as to which the court reserved the right to hear further evidence, permit further pleadings, and make further judgments. Lohman appealed from the parts of the decree adjudging that the Y Company's note and mortgage had been delivered, and from those ordering sale of said lands, subject to the amount due, if any, upon the Y Company's note and mortgage. In applying the rule announced in *Barkley v. Logan*²⁰ and *Plaisted v. Nowlan*²¹ the court held:

"The statute does not permit such an appeal to be taken . . . Since the attempted appeal is not authorized by the statute, it is dismissed."

¹⁷(1875) 2 Mont. 296.

¹⁸(1876) 2 Mont. 359.

¹⁹(1923) 68 Mont. 579; 220 P. 1094.

²⁰*Supra* note 17.

²¹*Supra* note 18.

The *eighth* decision was that of *Wills v. Morris, et al.*²² The action sought complete adjudication to the waters of Union Creek. A decree was rendered adjudicating the rights of all parties to such waters. Of the defendants, Morris and Bennett appealed from the part of the decree awarding water rights to plaintiff, and from the part thereof relating to the water awards to appellants (describing). Respondent moved to dismiss such appeal, because no appeal lies from part of a judgment.

The court held:

“ . . . if two or more of the parties are awarded a water right under the terms of the decree, each receiving such award recovers a judgment against the other or others. Such a judgment is divisible into parts. Accordingly, we hold that where a judgment is divisible into parts, an appeal will lie from a part of the judgment, and whatever is said in the case of *Lohman v. Poor*, *supra*, to the contrary is overruled.”

The court impliedly overruled its interpretation of Section 370 (p. 107) Codified Statutes, 1871, (R. C. M., 1935 Section 9733) announced in *Barkley v. Logan* and *Plaisted v. Nowlan*, in which cases it was held this statutory provision did not relate to jurisdiction. It held, the words, “or some specific part thereof” of Section 9733, first appearing in the Statutes of 1887, were meaningless, unless an appeal could be taken from a part of a judgment “in some circumstances”.²³ The court remarked that the courts of California have construed “Section

²²(1935) 100 Mont. 504; 50 P. (2d) 858. For a contrary holding see *In re Silvies River* (District Court, D. Ore.) 199 F. 495, 503, Mr. Justice Bean, saying: “The water is the . . . subject matter of the controversy. It is to be divided among the several claimants. . . . The proceeding is essentially a suit for partition of the waters of the stream . . . and is not a separable controversy between different claimants. . . . Each claimant is directly and vitally interested, not only in establishing the validity and extent of his own claim, but in having determined all of the other claims.”

²³The court cited Section 450 First Div. Comp. Statutes of 1887. This Section was wholly inapplicable to the point under discussion in the opinion, to which it was assigned. It relates only to appeals from Probate Courts, being found in the statutes mentioned in a “Chapter II,” entitled “Appeals from Probate to District Courts.” The provisions corresponding to R. C. M. 1935, 1921, §9733, in such statutes, is 422, Chap. I, First Div. Title II, Comp. Statutes of 1887. The statement in the court’s opinion that the language “or some specific part thereof” was no part of R. C. M. 1935, 1921, §9733, until it first appeared in the Compiled Statutes of 1887 is not sustained by enactments previous to the last mentioned statutes. Sections identical to R. C. M. 1935, 1921, §9733, are found in, Ch. I, §252, LAWS OF MONTANA 1864-5, Ch. I, §321, LAWS OF MONTANA, 1867; §370 (p. 107) Cod. St., 1871; Ch. I, (Title X) §409, LAWS OF MONTANA, 1877.

940 of the California Code of Civil Procedure . . . corresponding to . . . Sec. 9733," so as to permit an appeal from part of a judgment, where its provisions are severable.²⁴

Classification of Decisions, According to Holdings.

According to their holdings, the decisions reviewed fall into three groups:

Firsts Those in which it was held that an appeal could not be taken from a part of a judgment in any case.²⁵

Seconds Those in which it was held:

(a) That an appeal could be taken from part of a judgment, because of the existence of a statute authorizing it, (Ch. 2, TITLE X, Section 431, LAWS OF MONTANA, 1877.)²⁶

(b) That an appeal could be taken from part of a judgment, if the provisions thereof were divisible, pursuant to an interpretation of the words, "or some specific part thereof", in what is now R. C. M. 1935, Section 9733.²⁷

Third: Those in which it appeared that an appeal was taken from a portion of the judgment therein rendered, which determined an issue between some of the parties, and which issue was distinct, entire and complete between such parties, being the "whole judgment" insofar as such parties were concerned. In such cases such appeals have been sustained by the Supreme Court, as appeals from the whole of such judgments.²⁸

In concluding this review, it may be said, that in Montana, at this time, under the decision and statutes considered:

1. An appeal may be taken to the Supreme Court from part of a judgment, providing the terms of the judgment are divisible.

2. An appeal may not be taken to the Supreme Court, from part of a judgment, if the terms of the judgment are not divisible.

²⁴California Code provisions, similar to ours are as follows:

§940, Cal. Code Civ. Proc. is similar to, R. C. M. 1935, §9733;

§963, Cal. Code Civ. Proc. is similar to, R. C. M. 1935, §9731;

§939, Cal. Code Civ. Proc. is similar to, R. C. M. 1935, §9732.

Attention was called to some California decisions allowing appeals from parts of judgments, in the cases of *In re Davis' Estate* (1891) 11 Mont. 1; 27 P. 342, and *Bank of Commerce, etc. v. Fuqua, et al.* (1891) 11 Mont. 285, 28 P. 291. *Barkley v. Logan* (1875) 2 Mont. 296.

²⁵*Barkley v. Logan* (1875) 2 Mont. 296; *Plaisted v. Nowlan* (1876) 2 Mont. 359; *Lohman v. Poor, et al.* (1923) 68 Mont. 579, 220 P. 294.

²⁶*In re Davis' Estate* (1891) 11 Mont. 1, 27 P. 342; *Bank of Commerce, etc. v. Fuqua, et al.* (1891) 11 Mont. 285, 28 P. 291.

²⁷*Wills v. Morris, et al.* (1935) 100 Mont. 504, 50 P. (2d) 858.

²⁸*Largey v. Sedman* (1880) 3 Mont. 372; *In re Bitter Root Irri. Dist.* (1923) 67 Mont. 436, 218 P. 945.

3. An appeal may be taken to the Supreme Court from an issue decided in a judgment, where such issue is distinct, entire and complete between some of the parties to the action,—the court in such case viewing such an appeal as one from the whole judgment.

Regardless of whether the right to take an appeal from part of a judgment is found in the statutes,³⁰ or in the rule that such an appeal is permissible, where the appeal is from part of a judgment independent of, and in no way dependent upon the remaining portions,³¹ it is the judgment that is to be separated.³¹ The part of the judgment from which the appeal is taken, must be separable from the remaining portions, so that the reviewing court may render a decision of affirmance, modification or reversal thereon, which will in no way effect or disturb the unappealed part of such judgment, the subject thereof, or the rights of the parties involved.³² The separable issue determined by a judgment cannot be broken down or split and an appeal taken from one of the split portions or fragments.³³ The appellate court must be able to render a decision on the part appealed from, without bringing up the entire judgment for review.³⁴ The partial appeal does not give the appellate court jurisdiction of the portion of the judgment unappealed from.³⁵

It would seem that some method could be devised to eliminate the hazards of determining whether a portion of a judgment is divisible so as to be the subject of a separate appeal. It might be possible by Supreme Court rule,³⁶ or statute, to provide that a party could file his notice of appeal from the whole judgment and then petition the appellate court for permission to limit the appeal to a part only of the judgment. By this

³⁰Wills v. Morris, et al., (1935) 100 Mont. 504, 50 P. (2d) 858; Kramer v. Kramer, (1907) 75 Kan. 134, 90 P. 998, 91 P. 45; McDonald v. White (1907) 45 Wash. 334, 89 P. 891; Christ v. Johnstone (1913) 25 N. D. 6, 140 N. W. 678; Blaine Inv. Co. v. Guays (1932) 52 Idaho 381, 15 P. (2d) 734; 2 HAYNE, NEW TRIAL AND APPEAL, (1912 ed.) §185, p. 971; 2 SPELLING, NEW TRIAL AND APPELLATE PRACTICE, (1903 ed.) §493, p. 1030; 1 Cal. Jur. §25, p. 134.

³¹St. Paul Tr. Co. v. Kittson (1901) 84 Minn. 493, 87 N. W. 1012; Everding & Farrell v. Toft (1915) 88 Ore. 1, 150 P. 757; Gleiser v. McGregor (1892) 85 Iowa 489, 52 N. W. 366; Daniels v. Smith (1911) 252 Ill. 222, 96 N. E. 902; Belle Fourche Ry. Co. v. Belle Fourche Land. etc., Co. (1911) 28 S. D. 289, 133 N. W. 261.

³²Cottier v. Sullivan (1934) 47 Wyo. 72, 31 P. (2d) 675.

³³*Supra* note 29 and 30.

³⁴Cottier Case, *Supra* note 31.

³⁵St. Paul Tr. Co. v. Kittson (1901) 64 Minn. 493, 87 N. W. 1012.

³⁶Cottier Case, *Supra* note 31.

³⁷See Johnson, *Rules of Court*, 6 MONT. L. REV. 1 (Spring, 1945).

method the appellant would be secure, and at the same time would be enabled to avoid needless expense.²⁷

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²⁷At the present time, the R. C. M. 1935, §9746, as to abbreviated records, provides:

"The appellant may present to the Supreme Court or any justice thereof, a copy of the record from which are omitted those parts thereof which appellant believes to be immaterial to any question arising on the appeal, and thereupon, if it shall appear, prima facie, that the parts omitted are so immaterial, the court or justice shall make an order allowing such abbreviated record to be served and filed as the transcript on appeal, and directing the clerk of the district court to certify to such transcript, which order shall save to the respondent the right to suggest a diminution of the record in case he can show that without the parts omitted the appeal cannot be fairly and fully heard and determined."

A similar procedure might be followed in dealing with appeals from a part of a judgment, permitting appellant to prepare a record applicable to the portion of the judgment appealed from and submit it to the Supreme Court, or any justice thereof, for an order allowing it to be filed. Such abbreviation might avoid necessity of printing the record or save expense of printing the entire record. See Supreme Court Rules, Rule VI, Transcripts, page xxi, 101 Montana Reports.

INCORPORATION UNDER THE CIVIL CODE OF MONTANA CHAPTER 42

Does R.C.M. 1935, Chapter 42 of the Civil Code, and especially Section 6455, permit the successful incorporation of an organization, the activities of which will not extend beyond the county wherein it is located, by filing its articles of incorporation with the clerk and recorder only of the county wherein such organization is located?

An example of the type of association which it is contended in this article should incorporate by filing with the county clerk and recorder where located and *also* with the Secretary of State, is a "flying club" organized for the purpose of owning planes and teaching its members how to fly. Another is a "fire department relief association." The latter type is elsewhere referred to in this article.

A corporation is a creature of the law and can exist only with the permission of the State,¹ and furthermore, the right to engage in business can be exercised through the agency of a corporation only by express permission of the State, and only for such purposes as may be authorized.²

Section 6455, which is the section dealing with the forma-

¹Boca Mill Company v. Curry (1908) 154 Col. 326, 97 P. 1117.

²Bank of California v. San Francisco (1904) 142 Col. 276, 75 P. 832.