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DETERMINED IN

THE SUPREME COURT

OF THE

TERRITORY OF NEW MEXICO

FROM JANUARY 1, 1909, TO DECEMBER 31, 1910

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JUDGES AND OFFICERS

OF

THE SUPREME COURT

OF THE

TERRITORY OF NEW MEXICO.

June 1911.

HONORABLE WILLIAM H. POPE, CHIEF JUSTICE.

HONORABLE JOHN R. MCFIE, ASSOCIATE JUSTICE.

HONORABLE FRANK W. PARKER, ASSOCIATE JUSTICE.

HONORABLE IRA A. ABBOTT, ASSOCIATE JUSTICE.

HONORABLE MERRIT C. MECHEM, ASSOCIATE JUSTICE.

HONORABLE E. R. WRIGHT, ASSOCIATE JUSTICE.

HONORABLE C. J. ROBERTS, ASSOCIATE JUSTICE.

DAVID J. LEAHY, UNITED STATES ATTORNEY.

FRANK W. CLANCY, ATTORNEY GENERAL.

CHARLES M. FORAKER, UNITED STATES MARSHALL.

JOSE D. SENA, CLERK SUPREME COURT.

PAUL A. F. WALTER, REPORTER SUPREME COURT.

JUDICIAL DISTRICTS

OF THE

TERRITORY OF NEW MEXICO.

FIRST JUDICIAL DISTRICT—SANTA FE, HEADQUARTERS.

Honorable John R. McFie, Presiding Judge.
Edward L. Safford, District Clerk.
Santa Fe, Torrance, Taos, Rio Arriba, San Juan Counties.

SECOND JUDICIAL DISTRICT—ALBUQUERQUE, HEADQUARTERS.

Honorable Ira A. Abbott, Presiding Judge.
Thomas K. D. Maddison, District Clerk.
Bernalillo, McKinley and Sandoval Counties.

THIRD JUDICIAL DISTRICT—LAS CRUCES, HEADQUARTERS.

Honorable Frank W. Parker, Presiding Judge.
Jose R. Lucero, District Clerk.
Dona Ana, Grant, Luna Counties.

FOURTH JUDICIAL DISTRICT—LAS VEGAS, HEADQUARTERS.

Honorable Clarence J. Roberts, Presiding Judge.
John Joerns, District Clerk.
San Miguel, Colfax, Mora and Union Counties.

FIFTH JUDICIAL DISTRICT—ROSWELL HEADQUARTERS.

Honorable William H. Pope, Presiding Judge.
Samuel I. Roberts, District Clerk.
Chaves, Eddy, Roosevelt, Curry Counties.

SIXTH JUDICIAL DISTRICT—ALAMOGORDO, HEADQUARTERS.

Honorable Edward R. Wright, Presiding Judge.
Charles P. Downs, District Clerk.
Guadalupe, Otero, Lincoln, Quay Counties.

SEVENTH JUDICIAL DISTRICT—SOCORRO, HEADQUARTERS.

Honorable Merrit C. Mechem, Presiding Judge.
W. D. Newcomb, District Clerk.
Socorro, Sierra, Valencia Counties.

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Adultery.

In view of the Act of March 3, 1887, c. 397, sec. 3, 24 Stat. 635, U. S. Comp. St. 1901, p. 3636, which provides that when the "act is committed between a married woman and a man who is unmarried, both parties to such act shall be deemed guilty of adultery," a single man committing the act with a married woman may be convicted, though the indictment charges that he is a married man.—U. S. v. Cook, 124.

Affidavit.

Under U. S. Rev. St., sec. 4746, as amended by the Act of July 7th, 1898, which subjects to punishment one who knowingly certifies, when not true, that a witness has been sworn to an affidavit to be used in a pension case, administering the oath immediately before the taking down of the statement thereunder, equally with administering it after taking down such statement, is swearing the witness to such affidavit within the statute.—U. S. v. Medina, 204.

Affidavit.—Oath.—Witness.

It was error, therefore, for the trial court to reject testimony for the defendant tending to show that he administered the oath to the witness and the latter thereupon having taken such oath immediately dictated his statement to defendant, such testimony being material as showing a compliance with the law and this even though the signing by the witness may have been postponed by illness to the next day.—U. S. v. Medina, 204.

Affidavit.—Perjury.

Under U. S. Rev. St., sec. 4746, as amended by the Act of July 7th, 1898, which penalizes the making of a false or fraudulent affidavit, it is not sufficient simply to allege that the affidavit was false. There must be a clear averment of the respects in which it is false, equivalent to the assignment in perjury cases.—U. S. v. Medina, 204.

Agency.

Even if agent receives a greater price than that fixed by the principal, he is bound to account for it.—Duncan v. Holder, 323.

Agency—Money Had and Received.

In cases where a principal sues his agent for money had and received by the agent for a sale of the principal's property, the value of the property is quite immaterial.—Duncan v. Holder, 323.

Agent.—Factor.—Commission.

The facts of the case do not bring it within the decisions which hold that a sale by a party direct leaves the factor's right to the commission intact, where the latter has furnished the customer and has thus been the producing cause of the sale. Such cases presuppose and assume relationship of principal and agent which the court in this case finds did not exist.—Immigration Co. v. Cecil, 45.

Allocutus.

The allocutus is not necessary in criminal cases not capital.—U. S. v. Sena, 187.

Appeal.

Points not raised or insisted upon at the trial cannot be presented and urged on appeal.—Duncan v. Holder, 323.

Arraignment.—Plea.

Arraignment and a plea are elements necessary to a valid trial of one charged with crime.—U. S. v. Aurandt, 292.

Arraignment—Plea—Empaneling Jury.

Such araignment and plea must precede the empaneling and swearing of the jury as until plea there is no issue for the jury to try.—U. S. v. Aurandt, 292.

Arraignment.—Plea.—Trial.

If, after the trial is commenced, it be discovered that there has been no arraignment or plea, it is the duty of the trial court to begin the trial anew.—U. S. v. Aurandt, 292.

Assignment—Procedure.

The acts regulating both voluntary and involuntary assignments in this Territory, which were passed by the legislature of 1889, were designed to form a complete code of procedure for parties wishing to abandon their estates to their creditors, and in disposing of property conveyed to them by such assignments, assignees must follow the procedure laid down in said acts.—In re Zeiger, 150.

Attachment.—Error.

Error in the improper dissolution of an attachment is

harmless where finding in the main case was that defendant owed plaintiff nothing.—Melini v. Freige, 455.

Attorney.—Fee.

Attorney's fees properly allowed by trial court.—Gray v. Pumice Stone Co., 478.

Attorney—Fee—Judicial Discretion.

Allowance of attorney's fee not an abuse of judicial discretion under the facts stated.—Baldridge v. Morgan, 249.

Attorney, Improper Conduct.

Respondent wrote his client, who was in jail charged with murder, requesting him to sign notes to pay for respondent's services, stating that the client had a pretty hard case, but if the client would do as respondent said, he would bring him through, but money would have to be raised or the notes signed. The client did not send the notes, and employed other counsel, and respondent, hearing of it, wrote him as follows: "If you go to trial without me in your case, I will bet you, you hang. Will bet you the best suit of clothes made. You had better get busy." Held, that respondent's conduct was highly improper, warranting his suspension from practice for two years.—In Re Hittson, 6.

Bankruptcy.—Preference.

In an action brought by a trustee in bankruptcy to recover a voidable preference, the intent of the bankrupt in making the preference is immaterial.—Schmidt v Bank, 470.

Bankruptcy—Sale—Bona Fide Purchaser.

A bona fide purchaser for value at such sale is specifically protected by the proviso following Section 67, of the Bankruptcy Act of 1898, (Stat. L. 565.)—Jones v. Springer, 98.

Bankruptcy—Sale—Bona Fide Purchaser—Notice.

A purchaser of property sold under Section 2716, C. L., who was a bona fide purchaser for value, without notice, has a perfect title to such property.—Jones v. Springer, 98.

Bankruptcy—Sale, Proceeds of.

Where a state or territorial court sells attached property, as perishable or liable to be lost or diminished in value during the pendency of bankrupt proceedings against the attachment creditor, of which neither the court, the officer making the sale, or the purchaser had any notice

until after the sale was confirmed, the trustee in bankruptcy must take the proceeds of such sale in lieu of the property so sold.—Jones v. Springer, 98.

Bankruptcy—Set-Off.

Where creditor bank persuaded and induced a bankrupt to pay it money for the express purpose and with the intent to apply the same upon the indebtedness then owing by the bankrupt to the creditor bank, no question of the right of set-off for money deposited in the ordinary course of business arises.—Schmidt v. Bank, 470.

Bond, Appearance—Change of Venue.

Where there is no undertaking on the part of the sureties in an appearance bond that the defendant should appear elsewhere than in the county named or that the defendant should obey the further orders of the court, there could be no forfeiture of the bond if the defendant defaulted after having obtained a change of venue to another county.—Territory v. Woodward, 161.

Citation—Appeal.

A citation is one of the necessary elements of an appeal taken after the term, and if it is not issued and served before the end of the next ensuing term of this court, and not waived, the appeal becomes inoperative.—Paden v. Placer Co., 345.

Commission—Licenses.

When the treasurer of a county in this Territory retained a commission for the amounts collected by and paid to him by the sheriff of the county for gaming and liquor licenses, under the law of 1901, and the Board of County Commissioners, audited and approved the accounts of the treasurer, knowing all of the facts in the case, and allowed him to retain the commission, under a mistake of law, there being no fraud or improper conduct on the part of the treasurer, the money so retained cannot be recovered back, as the same was a voluntary payment made under a mistake or in ignorance of the law.—Territory v. Newhall, 141.

Continuance.

Motions for continuance are ordinarily to be decided by the trial court, and his discretion, viewed from the facts, is not ordinarily to be reviewed.—Perea v. Insurance Co., 399.

Continuance—Not Error to Refuse.

There was no error in the refusal of the court to grant a continuance of the case when the plaintiff amended his complaint by increasing the ab damnum clause. The granting of a continuance rests in the sound discretion of the court, and in the case at bar that discretion was not abused, and in any event the defendants were not damaged, as the jury only returned a verdict for the amount of damages asked by plaintiff, before the ab damnum clause was increased.—Ross v. Carr et al, 17.

Contempt.

While the border line between the two classes of proceedings is often indistinct, the question of whether the offender is a party to the suit, whether the proceedings are before final decree and whether the fine goes to the public or a party to the litigation are often determinative considerations.—Costilla Co. v. Allen, 528.

Contempt—Civil.

Where the purpose of such proceeding is primarily compensatory or by way of reimbursement to the opposite party for expenses growing out of the alleged contempt the proceeding is deemed civil.—Costilla Co. v. Allen, 528.

Contempt—Criminal.

Proceedings to punish for contempt are deemed criminal in their nature when the purpose is primarily punishment.—Costilla Co. v. Allen, 528.

Contempt—Criminal—Appeal.

No appeal lies in this Territory from a judgment for what is classed as a criminal contempt. Marinan v. Baker, 12 N. M. 451, followed.—Costilla Co. v. Allen, 528.

Contract.

Where a contract as a whole discloses a given intention, if certain words or clauses taken literally would defeat the intention, it will be construed, if possible, so as to be consistent with the general intention.—Telephone Co. v. Fields, 431.

Contract—Alternative Consideration—Performance.

If promises are made in the alternative and one alternative promise becomes impossible of performance, that does not impair the obligation of the other promise.—Chappell v. McMillan, 686.

Contract—Building—Reasonable Time.

Upon evidence of extrinsic facts showing uncertainty as to time of completion, it was a question of fact for the jury whether or not the building was completed within a reasonable time.—Neher v. Viviani, 460.

Contract—Consideration.

A promise to do or forbear from doing an act may be just as valuable consideration for a promise as the act or forbearance would be, and that the promise given for a promise is dependent on a condition does not affect its validity as consideration.—Chappell v. McMillan, 686.

Contract—Consideration—Release.

The holding of the trial court that the contract between the Carthage Coal Company, one of the appellees, and Delos A. Chappell, the appellant, had become null and void from failure of consideration, that both parties were wholly released therefrom, and its action in decreeing the cancellation of said contract, were not warranted as a matter of law under the circumstances appearing in the case.—Chappell v. McMillan, 686.

Contract—Furniture.

The "piano, furniture, carpets and similar articles, movable and practically as well adapted to use elsewhere," cannot be said to be a necessary part of a theater building.—Neher v. Viviani, 460.

Contract—Performance—Notice.

The appellee in notifying appellant to stop work took the responsibility of liability to pay, in the event of the court's finding that the contract had been performed within a reasonable time.—Cowles v. Hagerman, 600.

Contract—Performance—Payment.

Neither the payments made nor the failure of the appellee to stop the work sooner furnish any evidence of any intention by the appellee to accept the work or waive any defense he might have had under the law, growing out of the failure of the appellant to perform the contract.—Cowles v. Hagerman, 600.

Contract—Performance—Time.

The contract sued on is silent as to the time for complete performance and in such case the law requires the same to be performed within a reasonable time from the date of the contract.—Cowles v. Hagerman, 600.

Contract—Performance—Time—Jury.

Upon former trial of case upon the same evidence, the court held that it was for the jury whether the contract had been performed in reasonable time and upon this issue the former decision has become the law of the case. —Cowles v. Hagerman, 600.

Contract—Real Estate.

An instrument termed an "Improvement Contract," held to have conveyed all improvements on land claimed on the ground of continued adverse possession.—Jenkins v. Grant Co., 281.

Contract—Sale—Warranty.

Where it was impossible to test a plow purchased by appellant in accordance with the warranty first given, and it is mutually agreed that it should be tested on other lands, this amounts to the making of a new contract and a substitution of the place of test of the implement, all other terms of the sale remaining the same.—Hardware Co. v. McMurray, 562.

Contract—Public Service Corporation—Grant.

A grant to a public service corporation as well as a contract with it by a municipality, in case of ambiguity or doubt, are to be construed favorably to the rights of the public.—Telephone Co. v. Fields, 431.

Contract—Public Service Corporation—Rates.

In a contract between a public service corporation and a municipality, the municipality did not intend to prescribe maximum rental rates for only a portion of its inhabitants within the district mentioned in the contract. The words "per annum" were therefore inserted in the contract as furnishing a mode of computation for a rental charge for all of the people and not merely for the people who would make an annual contract.—Telephone Co. v. Fields, 431.

Contract, Written.

A written agreement is for the court to construe and not for the jury.—Neher v. Viviani, 460.

Contract, Written—Cause of Action.

As the sixth paragraph of the amended complaint sets up the making of a written contract; that such contract was extended and that the defendants authorized the plaintiff to continue his efforts and negotiations for a sale

of the land, and that he did so continue them with the result that a sale was made, it sets up a cause of action, and the court properly overruled the demurrer to this paragraph of the amended complaint.—Ross v. Carr et al, 17.

Contractor, Independent.

The chief consideration which determines one to be an independent contractor is the fact that the employer has no right of control as to the mode of doing the work contracted for.—Ruppe v. Weinman, 68.

Contractor, Independent—Liability of Owner.

Though one excavating for lot owner is an independent contractor, owner would still be liable if the agreed method of excavating under the wall in question worked an injury to the rightful occupant of the building on a lot adjoining.—Ruppe v. Weinman, 60.

Contractor—Servant of Owner.

Contractor held to be servant of owner and not independent contractor where work was done under direction of superintendent who was agent of owner and had full control of the work.—Ruppe v. Weinman, 68.

Costs.

C. L. 1897, sec. 3148, regarding costs, applies to the Supreme Court as well as to the District Court in-so-far as actions at law are concerned.—King v. Tabor, 494.

Costs—Remittitur—Appeal.

Where on appeal or error appellee or defendant in error remits a portion of the amount recovered, he will be required to pay the costs of appeal or writ of error.—King v. Tabor, 494.

County Seat.

An action brought by a taxpayer to restrain a board of county commissioners from contracting for or erecting a court house or jail at a certain town because said town was not the lawful county seat of that county, for the reason that the act of the legislature designating said town to be the county seat is unconstitutional and void, is a collateral attack on the validity of the location of said county seat and therefore not maintainable.—Torres v. County Commissioners, 703.

County Seat—Pleadings.

Whether this is a collateral attack upon the location of the county seat, quaere.—Gray v. Taylor, 742.

County Seat—Petition to Remove.

Petition for election on proposition to remove county seat held sufficient.—Gray v. Taylor, 742.

County Seat—Public Buildings.

Subsequent repairs to public buildings at county seat should not be counted in determining whether cost of buildings was less than $30,000.—Gray v. Taylor, 742.

Court—Term.

A term of a District Court in this Territory, 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 sooner adjourned without day, although another term of the same court for another county has been held, as required by law, in the meantime, by the same or another judge.—Territory v. Barela, 520.

Cross-Examination.

The protection against needless humiliation through questions put in cross examination which courts should extend to witnesses testifying before them should not be carried so far as to exclude questions as to facts clearly affecting the credibility of the testimony which the witness has given on the direct examination.—Territory v. Garcia, 538.

Damages, Double.

In this case the jury gave as incident to the recovery by defendant of certain sheep "damages in double the amount of the value of the wool taken from the sheep replevined during their detention, Wool 520 pounds, 10 cents per pound," held that such damages are not recoverable under sub-section 239, chapter 107, Laws of 1907, which allows double damages for the use of the property from time of delivery.—Wirt v. Kutz, 500.

Damages—Judgment.

The amount of the judgment for damages rendered in the District Court is not warranted by the evidence, and the cause is remanded for the correction of the judgment in that particular.—Pring v. Goldenberg Co., 337.

Damages, Liquidated.

In an agreement for the sale of a stock in trade and that the seller for a time abstain from engaging in the

business in which it was employed, there was a provision that a sum named should be considered liquidated damages in case of a breach of the agreement by either party to it. Held, that it was for the court to determine from the circumstances of the case whether the sum named should be considered a penalty or liquidated damages. And the trial court having found actual damages only instead of the stipulated sum, for a breach of such a contract, it was at liberty, in addition to its judgment for damages, to enjoin the defendant from further violating the agreement in question.—Thomas v. Gavin, 660.

Damages, Measure of.

If appellants by their wrongful acts caused the destruction and injury of appellee's goods, appellee was entitled to recover the value of the stock and fixtures destroyed, damage to stock and fixtures not completely destroyed and reasonable expenses of moving to another location. —Ruppe v. Weinman, 68.

Damages—Trespass—Loss of Profits.

Where in consequence of a trespass, the plaintiff's business is destroyed, damages for loss of profits may be recovered.—Ruppe v. Weinman, 68.

Decree—Inference.

A mere inference cannot be held to contradict a plain recital in the decree to the effect that certain things were duly and regularly done.—Buddecke v. Trust Co., 634.

Easement—Street Railway.

"The right of the railway in the street is only an easement to use the highway in common with the public. It has no exclusive right to travel upon its track, and it is bound to use the same care in preventing a collision as is the driver of a wagon or other vehicle."—Thompson v. Traction Co., 407.

Election—Bonds, Municipal.

Two- thirds of those actually voting and not a two-thirds of all the voters of a municipality are required to authorize the issue of municipal bonds under the Act of Congress of March 4, 1898, 30 Stat. 252, and the Act of New Mexico of March 16, 1907, Chapter 35, page 38, Session Laws of 1907, authorizing municipal bonds notwithstanding the limitations on municipal indebtedness, if two-

thirds of the qualified voters as defined, shall vote therefor.—Fabro v. Gallup, 108.

Election—County Seat.

Held that only one illegal vote was cast and that was in favor of Lincoln.—Gray v. Taylor, 742.

Election—County Seat—Ballot.

Held, that ballot used at election for removal of county seat, which read "For County Seat....." was in exact accordance with C. L. 1897, sec. 631.—Gray v. Taylor, 742.

Election—Return—Quo Warranto—Mandamus.

Where judges in a municipal election show in making their return under C. L., secs. 1687, 1689, that a certain number of ballots have been cast which they have failed to count for any candidate, mandamus and not quo warranto, is the proper remedy to enforce compliance with the duty to count and make returns of such ballots, imposed by law.—Territory v. Suddith, 728.

Election—Registration—County Seat.

By the terms of the statute, (Laws 1909, Chapter 80), it is impossible to have registration within the time following the petition and the election.—Gray v. Taylor, 742.

Election Judges—Ballots.

After ballots have been tendered by the voter and deposited in the ballot box the quasi judicial function to reject ballots given election judges by C. L. secs. 1665, 1668, becomes exhausted and thereafter their powers as to such ballots become purely ministerial.—Territory v. Suddith, 728.

Election Judges—Return.

By making a partial return which, while disclosing the receiving of certain ballots, affirmatively shows that these have not been counted for any candidate and by thereupon adjourning sine die, election judges do not become functi officio but are still subject to mandamus requiring them to reassemble and count such omitted ballots.—Territory v. Suddith, 728.

Election Officers—Return.

Such ministerial duties include the obligations to count the ballots for the candidates whose names appear thereon and to make return thereof to the city clerk.—Territory v. Suddith, 728.

Eminent Domain—Condemnation.

The Territory in proceeding under Section 3693, C. L. 1897, to obtain legal title to land in private ownership to hold the same for the use and benefit of the University, thereby creates an express trust and under sub-sec. 3, of Section 1685, C. L. 1897, could maintain such suit, as trustee, without joining the University or the Board of Regents of the University.—Territory v. Crary, 213.

Eminent Domain—Condemnation—Petition.

The petition in proceeding under C. L. 1897, section 3693, authorizing the Board of Regents of the University of New Mexico to acquire by condemnation in the name of the Territory, whenever it deems such acquisition necessary, is subject to demurrer if it fails to allege that the acquisition of the land was deemed necessary by the Board of Regents of the University.—Territory v. Crary, 213.

Error.

The filing of too many assignments of error rebuked.—Gallegos v. Sandoval, 216.

Error—Appeal.

Assignments of error which do not point out the specific error of fact or law complained of, will not be considered on appeal. Cevada v. Miera, 10 N. M. 62.—Gregory v. Cassan, 496; Melini v. Freige, 455.

Error—Argument.

Assignments of error upon which no argument, either orally or upon the brief, is made, will be considered as waived.—Gregory v. Cassan, 496.

Error—Motion to Dismiss.

A motion to dismiss for failure seasonably to file assignments of error will be denied where such motion is not made until after such assignments have been filed.—Hagin v. Collins, 621.

Error—New Trial.

No alleged errors, unless they are jurisdictional, will be considered, except those which are set out in the motion for a new trial.—U. S. v. Cook, 124.

Error—New Trial—Appeal—Jurisdiction.

Errors not jurisdictional will unless set up in motion for new trial, not be considered on an appeal resulting from a trial by jury.—Hagin v. Collins, 621.

Escrow.

Under the circumstances set out in the statement of facts, the appellee as holder of an escrow was not justified in delivering it to either party.—Bank v. Owens, 680.

Evidence.

Evidence held to warrant conclusion that killing was knowingly done.—Territory v. Sais, 171.

Evidence—Accident.

A condition soon after an accident may sometime be shown where the circumstances are such as to justify the inference that the condition was the same as at the time of the injury.—Corcoran v. Traction Co., 9.

Evidence—Accident—Negligence.

When a condition or quality is once shown to exist the same will be presumed to continue until the contrary appears. Evidence of the condition of the step of the street car and the grating at the back of the step seven months prior to the accident admissible in an action against the street railway for injury to passenger alighting from a car.—Corcoran v. Traction Co., 9.

Evidence—Agreement.

While a single sale of lumber would not in itself amount to engaging in the lumber business, it would be evidence on the question whether the seller was engaging in that business and in connection with other circumstances might furnish sufficient proof that he was so engaged.—Thomas v. Gavin, 660.

Evidence—Agreement—Commission.

The court properly excluded evidence that plaintiff had entered into an agreement with outside parties who had supplied him with money, to give them a part of the commission which he might receive for services performed in the sale of the lands.—Ross v. Carr, 17.

Evidence—Books of Account.

Books of account shown to conform to the requirements of C. L., sec. 3031, are admissible and when so admitted in a suit against an administrator may constitute "other material evidence" corroborating the claimant as required by C. L., sec. 3021.—Radcliffe v. Chaves, 258.

Evidence—Books of Account—Clerk.

Under C. L., sec. 3031, admitting books of account where the party kept no clerk, the fact that a physician's wife

from time to time made entries in such books from his dictation did not constitute her a clerk so as to render the books inadmissible.—Radcliffe v. Chaves, 258.

Evidence—Proof—Books of Account.

Under C. L., sec. 3031, requiring, as a prerequisite to receiving books of account, proof by customers that the party usually kept correct books, it is sufficient if it be shown by customers that during a period of years they had always found their accounts as tendered correct, coupled with testimony that such accounts were taken from the books in question, it not being essential that such customers shall have actually examined such books and compared their accounts with them.—Radcliffe v. Chaves, 258.

Evidence—Brand.

It is equally as competent to establish the identity of a stolen animal by a brand, as by its color or by any distinguishing mark.—Territory v. Valles, 228.

Evidence—Broker's Commission.

In action for commission by real estate broker, evidence held that "the listing of defendant's property with plaintiff expired," before time of sale and that plaintiff did not have defendant's property for sale at the time of its sale.—Immigration Co. v. Cecil, 45.

Evidence, Circumstantial—Conspiracy.

Circumstantial evidence is competent to prove conspiracy from the very nature of the case and the rule which admits this class of evidence applies equally in civil and criminal cases.—Teritory v. Leslie, 240.

Evidence—Contract—Error.

There was no error committed by the court in excluding that part of the evidence of E. L. Medler, as to conversations he had had with Ross, concerning the timber contract of the Zuni Mountain Lumber Company, as the substance of the excluded testimony, was that Ross had never spoken to him (Medler) of the sale or assignment of the timber contract to Wirtz or others.—Ross v. Carr, 17.

Evidence—Crime.

Evidence sufficient to establish that a crime had been committed.—Territory v. Leslie, 240.

Evidence—Deposition—Commission—Error.

No error was committed by the court in excluding the admissions of Wirtz and the deposition of Gordon, as to Ross being entitled to a share of his (Wirtz) commission, for as Ross was a middle-man and did not act as a broker, he was entitled to receive compensation from both the buyer and the seller.—Ross v. Carr, 17.

Evidence—Error.

There was no error in the admission by the court of evidence as to the transactions with Clark M. Carr, prior to December 8th, 1905, for the amended complaint sets out that in June, 1904, plaintiff was employed by defendants to procure purchasers for the lands, and that such work was continued until April, 1906, when the lands were sold, for the evidence objected to goes to prove the transactions between June, 1904, and December 8th, 1905. —Ross v. Carr, et al, 17.

Evidence—Indictment.

Evidence held to warrant finding that animal unlawfully, knowingly, etc., killed, belonged to certain persons as co-partners, as charged in the indictment.—Territory v. Sais, 171.

Evidence—Jury.

The jury, although they are the judges of the creditability of the witnesses who testify before them, have no right arbitrarily to disbelieve the evidence of any witness, unless they believe that such witness has knowingly and wilfully sworn falsely as to some material fact at issue in the case, in which event they are at liberty to disregard the whole of any part of the evidence of such witness, except such parts thereof as are corroborated by other evidence or by facts and circumstances in evidence which they believe to be true.—Territory v. Leslie, 240.

Evidence—Larceny.

In a trial for the larceny of a mule, testimony that tended to establish the identity of the mule, the ownership by the prosecuting witness as administrator and the possession of the mule by the defendant was enough to make out a prima facie case of guilt.—Territory v. Valles, 228.

Evidence—Location.

Grazing of stock in this country has no value as evidence of practical location.—Jenkins v. Grant Co., 281.

Evidence—Lost Instrument.

Evidence held insufficient to establish the contents of a lost instrument.—Jenkins v. Grant Co., 281.

Evidence—Memorandum.

A written memorandum may not be used to aid or supplement the recollection of a witness unless its correctness when made is first established and a conviction based solely upon the contents of a memorandum which has not been so verified cannot be sustained.—Territory v. Harwood, 324.

Evidence—Memoranda—Loss of Profits.

There was not sufficient evidence to sustain a verdict for loss of profits, where there was no evidence of loss except a bald statement as to the net profits per month even though witness referred to some memoranda to refresh his memory but it nowhere appears what the memoranda were nor when and by whom made or that witness knew or believed them to be correct.—Ruppe v. Weinman, 68.

Evidence—Murder.

Evidence of what the defendants, jointly indicted for murder had said and done not long before the homicide in relation to the man with whose murder they were charged and another man associated with him in what they regarded as hostile acts toward themselves, was properly admitted as proof of their animus toward the man who was killed.—Territory v. Clark, 35.

Evidence—New Trial.

None of the evidence at the trial having been brought up by the record on appeal, the court cannot review the denial of the motion for new trial made on the ground that the conviction was based on the false testimony of a witness.—U. S. v. Cook, 124.

Evidence—Receipts.

Receipts are not the best evidence that the articles for which they were supposed to represent payment, were used in the construction of a building and formed a legitimate part of its alleged cost.—Neher v. Viviani, 460.

Evidence—Res Gestae.

Admission of evidence that hogs were eating beef at ranch of defendants, part of the res gestae in case charging larceny of cattle.—Territory v. Leslie, 240.

Evidence—Variance.

Where it is evident that there is but one company of that name, there is no material variance between the indictments and the proofs where the former state merely the name of the company and the latter the name of the company inclusive of the place of business.—Territory v. Leslie, 240.

Exceptions.

Such order extending the time must, to be effectual, be made during the time the court could act upon such bill of exceptions without such order, to-wit, not less than ten days before the first day of such term.—U. S. v. Sena, 187.

Exceptions—Appeal.

Where an appeal is docketed to one term of this court and is thereupon dismissed and a second appeal sued out to the succeeding term, the former is the term at which said cause is first docketed within the meaning of section 896, and a bill of exceptions settled after ten days before such term will be stricken out unless an order made at least ten days before such term has enlarged the time for settling such bill of exceptions.—U. S. v. Sena, 187.

Exceptions—Criminal Case.

The bill of exceptions in a criminal case must under C. L. sec. 896, be settled and signed by the trial judge not less than ten days before the term of this court at which said cause shall be first docketed, unless the judge shall by order extend the time for settling such bill of exceptions.—U. S. v. Sena, 187.

Exceptions—New Trial—Appeal.

As a general rule, objections and exceptions to charges given or to the failure to instruct as requested must be taken at once when the charge is given and before the jury retire, or they will not be considered on appeal or on a motion for a new trial. A general exception on the entire charge of the court is deemed to be insufficient. Exceptions must be specific.—Territory v. Leslie, 240.

Exceptions—Record.

The Act of March 21, 1901, (L. 1901, Chap. 99), while extending the time for perfecting the record in certain cases, does not enlarge the time for settling bills of ex-

ception, which still remain governed by C. L. sec. 896.—U. S. v. Sena, 187.

Execution—"Oppressive"—Sheriff—Trespass.

The word "oppressive" in its ordinary sense means an act of cruelty, severity, unlawful exaction, domination or excessive use of authority, and if the finding that the defendant acted "oppressively" is sufficient to render him liable there is not conflict between the general verdict on the theory that the sheriff was a trespasser in making an execution levy, though the jury do not affirmatively find that the writ was in the sheriff's hands, more than 60 days before the levy so as to make him liable on the theory that the writ was functus officio.—Gallegos v. Sandoval, 216.

Execution—Sheriff.

The 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, 216.

Execution—Trespass—Sheriff.

The seizure of $700 worth of goods to satisfy a judgment of less than $100 is not sufficient per se to render the sheriff liable as a trespasser.—Gallegos v. Sandoval, 216.

Execution—Trespasser—Sheriff—Levy.

If the writ was placed in the sheriff's hands within sixty days from the time the levy was made and the returns filed he cannot be held liable as a trespasser on the theory that the writ was functus officio.—Gallegos v. Sandoval, 216.

Execution—Trespass—Sheriff—Negligence.

To render the sheriff liable as a trespasser ab initio it must be shown that in making the levy he was so grossly negligent as to indicate a wilful intention to exceed his authority or that his acts subsequent to the levy were of such character as to make it appear that he was influenced by motives of malice or corruption.—Gallegos v. Sandoval, 216.

Factor—Damages.

Where a principal instructed his factor to hold wool consigned by the principal at a certain price and factor failed to hold and sold at a lower price. Held, upon suit

brought by principal to recover damages from factor the principal is entitled to recover of the factor the difference between what the wool actually sold for, and the highest price attained by the wool up to the date of the trial, not to exceed the limit fixed by the principal.—Goesling v. Gross, Kelly & Co., 721.

Factor-Evidence.

The evidence in this case examined and held that appellant was appellee's factor.—Goesling v. Gross, Kelly & Co., 721.

Factor—Liability.

Where instructions given by principal to a factor were not contemporaneously with the advancement or consignment, but were given before the sale and were received, accepted and acquiesced in, such instructions were as binding upon the factor as if given at the time of the advancement or consignment.—Goesling v. Gross, Kelly & Co., 721.

Fences—Damages.

The Teritorial Statute, Chapter 96, Laws of 1884, as amended by Chapter 42, Laws of 1887, requiring the owners of cultivated lands in Lincoln County to protect them with fences of a prescribed kind and making the right to recover damages from the owners of animals injuring the crops on such lands depend on the maintenance of fences required by the law, is not invalid as a special law in contravention of the Act of Congress of July 30, 1886, known as the "Springer Act," nor has it been repealed or rendered void by section 144 of the Compiled Laws of 1897, or chapter 73 of the Laws of 1903.—Sears v. Fewson, 132.

Finding—Appeal.

This court will not disturb findings supported by substantial evidence.—Hardware Co. v. McMurray, 562.

Findings of Fact—Appeal.

Where there is substantial evidence to support them, findings of fact by the trial court will not be disturbed on appeal.—Immigration Co. v. Cecil, 45.

Forcible Entry and Detainer.

The main point on which every forcible entry and detainer suit must be maintained, is the fact that the defendant by his mode of entry or detention has committed a

wrong in the nature of a public offense.—Patten v. Balch, 276.

Fraud—Foreclosure.

There was no such showing of fraud as would have warranted the court in vacating the decree of foreclosure.—Buddecke v. Trust Co., 634.

Gambling—Counter Claim—Demurrer.

A demurrer to a counterclaim which pleaded a cause of action under the gaming statutes barred by the statutes of limitation was properly sustained.—Mann v. Gordon, 652.

Gambling—Instruction.

In an action under sec. 3199, C. L. 1897, to recover money lost at a gambling device, it was in evidence that the plaintiff did not settle the loss at the time of the play but about six weeks later he gave a check which defendant subsequently cashed. Held, that an instruction to the effect that the loss occurred at the time the game was played and not when the check was given or the money paid, was proper.—Mann v. Gordon, 652.

Gambling—Set-Off—Pleadings.

In a suit brought to recover money lost at gambling within one year prior to the bringing of such action, moneys won at gambling by the plaintiff from the defendant more than one year prior to the commencement of action by the plaintiff to recover his losses, are not within the terms of section 2927 of the Compiled Laws of 1897 and cannot be pleaded as a set-off or counterclaim to the original cause of action.—Mann v. Gordon, 652.

Idem Sonans.

A name pleaded as Munnison and proved as Munnicon is idem sonans and there is no variance.—U. S. v. Medina, 204.

Indictment—Assault.

On an indictment which charges that the defendant made an assault upon a person named, with a gun loaded with gunpowder and a leaden ball and discharged the loaded gun at and against such person with the premeditated intent of killing him, there may properly be a conviction of assault with a deadly weapon, as all the essential elements of that crime are alleged.—Territory v. Alarid, 165.

Indictment—Defective.

An indictment charging the unlawful killing of cattle, under sec. 79, C. L. 1897, which omits to allege that such killing was "knowingly" done, is fatally defective.—Territory v. Cortez, 92.

Indictment—Embezzlement.

In a prosecution under U. S. Rev. St., Sec. 5467, an indictment is fatally defective which fails to show that the letter embezzled came into the possession of the defendant officially, that is to say, as an employe of the postal service. Shaw v. United States, 165 Fed. 174, followed.—U. S. v. Aurandt, 292.

Indictment—Embezzlement—Description.

The allegation in the present case that the embezzled letter contained "an article of value" a more definite description of which "being to grand jurors unknown" considered in the light of the record; and doubted, but not decided, whether the allegation was sufficient under the rule last mentioned.—U. S. v. Aurandt, 292.

Indictment—Larceny.

An indictment charging the larceny of one mule of the property of Matias Contreras, administrator, etc., sufficiently describes the stolen property.—Territory v. Valles. 228.

Indictment—Larceny—Estate.

Where the owner of stolen property is deceased, an indictment for larceny should lay the ownership in his representatives and not in his estate.—Territory v. Valles, 228.

Indictment—Notice.

An indictment framed in the terms of the statute is sufficient only whereby the statutory language the defendant is put upon fair notice of the charge against him.—U. S. v. Medina, 204.

Indictment—Ownership.

Where the indictment alleges that the animal unlawfully killed was the property of co-partners, the ownership as laid in the indictment must be proved beyond a reasonable doubt.—Territory v. Sais, 171.

Indictment—Verdict.

A defect in the indictment which is one of substance and

not of form, merely, is not aided or cured by verdict.—Territory v. Cortez, 92.

Injunction.

From examination of complaint it is apparent that the injunction prayed for in the complaint cannot be treated as a mere incident to the action for damages.—Jemez Land Co. v. Garcia, 316.

Injunction—Interlocutory Order—Appeal.

An order imposing a fine, payable by way of reimbursement to the opposite party, for violation of a preliminary injunction is an interlocutory order in a civil proceeding and review of such an order can be entertained only after final decree and in connection with an appeal therefrom. —Costilla Co. v. Allen, 528.

Injunction—Lien—Sale.

Injunction against proposed sale under such a decree is the proper remedy.—Robertson et al, v. Supply Co., 606.

Injunction—Receiver—Appeal.

A decree granting an injunction and appointing a receiver for an insolvent corporation under the provisions of sections 72 and 73 of chapter 79, of the Laws of 1905, is a final decree within the terms of the Organic Act relating to appeals and writs of error.—Mining Co. v. Lund, 696.

Injunction—Receiver—Final Decree—Appeal.

A decree granting an injunction and appointing a receiver for an insolvent corporation under the provisions of sections 72 and 73, of chapter 79 of the Laws of 1905, is a final decree within the terms of the Organic Act relating to appeals and writs of error.—Irrigation Co. v. Lee, 567.

Insanity—Criminal Trial.

If, in the progress of a trial on a criminal charge, the trial judge concludes from observation or otherwise that there is reason to doubt the sanity of the defendant at that time he should submit that question to the jury along with the principal issue requiring a special verdict on that point.—Territory v. Kennedy, 556.

Insanity—Instruction—Error.

It is error to instruct a jury, in a criminal case, that if they believe from the evidence the defendant is insane at that time they should acquit him, but no error of which the defendant can, with reason, complain since it gives

him a chance of acquittal to which he is not entitled.—Territory v. Kennedy, 556.

Insanity—Instruction—Frenzy.

The word "frenzy" as used in an instruction on insanity may have been misleading and might better have been avoided.—Territory v. Kennedy, 556.

Instructions—Appeal.

The correctness of instructions given by the trial court will not be reviewed on appeal, unless exceptions are saved, and an opportunity for correction given.—U. S. v. Cook, 124.

Instruction—Assault.

An erroneous instruction as to assault with intent to kill does not vitiate a conviction of assault with a deadly weapon on the same indictment, unless it is made to apply to that crime as well as the other, and if it is made so applicable by request of the defendant, without calling the attention of the court to the erroneous feature of the instruction, the defendant is not entitled to a new rial on account of the error so induced.—Territory v. Alarid, 165.

Instruction—Due Care.

An instruction to the effect that, "in the absence of any provision of law regulating the speed at which a street car may be run or operated, those who operate it are bound by the same rule of due care which governs others using vehicles in the public streets; that is when, as in this case, the street car was operated in a public street," correctly states the law applicable to the facts in this case and is not subject to an objection of uncertainty and indefiniteness.—Thompson v. Traction Co., 407.

Instruction—Erroneous.

Where special finding of jury shows that they were not misled by erroneous instruction the error was harmless. The charge in the complaint was that by reason of both the starting of the car and the defective step and riser the appellee was thrown to the platform and her foot inserted in an opening in the defective riser, thereby receiving the injury, and the proofs were submitted in support of this theory and no other. The instruction, however, authorized a verdict for appellee in case of injury caused either by the starting of the car or by the defec-

tive step and riser. This instruction was clearly erroneous.—Corcoran v. Traction Co., 9.

Instructions—Error.

There is no error in the refusal of an instruction which even though sound is not applicable.—Schmidt v. Brewery Co., 232.

Instructions—Error—Law.

If instructions given cover and correctly state the law of the case, it is not error to refuse to give other instructions on the same points, although they may be correct statements of the law applicable thereto.—Territory v. Kimmick, 178.

Instruction—Error—Appeal.

Where a trial court fails to instruct the jury as to all the essential ingredients of the crime charged, and the defendant neither calls "the court's attention to such omission nor takes exception thereto," he cannot avail himself of such error on appeal. Territory v. Watson, 12 N. M. 419.—Territory v. Ayer, 581.

Instruction—Error—Civil.

The court is under no obligation in a civil case to instruct the jury unless requested so to do; and hence the fact that an instruction is insufficient is not available error unless a sufficient instruction was requested.—King v. Tabor, 488.

Instructions—Error—New Trial.

Alleged errors in the charge of the court not called to the latter's attention by motion for new trial will not be considered by this court.—Territory v. Harwood, 324.

Instructions—Evidence—Error.

Instructions must be based upon the evidence and where there was no evidence to warrant a requested instruction it was not error for the court to refuse to give it.—Cowles v. Hagerman, 600.

Instruction—Evidence—Murder.

There was evidence which made necessary an instruction that the jury had the right to find the defendant guilty of murder in the second degree, but none that would have justified a like instruction as to murder in the third degree.—Territory v. Kimmick, 178.

Instruction—Exception.

A general exception to an instruction which though in

part erroneous is in part correct cannot be sustained.—Hagin v. Collins, 621.

Instruction—"Extravagant and Unnecessary."

Use of the words "extravagant and unnecessary", in an instruction, as to the cost of a building, is supported by evidence disclosing that in the accounts submitted to show that the value of the building was $30,000, as required by the contract, numerous charges were included which had no relation to the construction of the building, such, for instance, as printing tickets, court costs, hack fare.—Neher v. Viviani, 460.

Instructions—Fixtures.

Requested instructions referring to furniture and appointments, which ignore the distinction drawn as to whether or not they were of a fixed and permanent nature or movable, declared incorrect upon the question of the value of the building.—Neher v. Viviani, 460.

Instructions—Judgment.

Instructions are to be construed together and the fact that any one taken by itself, apart from the others, may appear to be incomplete or incorrect, does not warrant reversal of judgment if they correctly state the law, as a whole.—Territory v. Kimmick, 198.

Instructions—Liability.

Instructions given in court below concisely stated the law applicable to liability or non-liability of the appellee. —Cowles v. Hagerman, 600.

Instructions—Murder.

In a trial for murder under sections 1060, et seq., C. L. 1897, charged in the indictment as murder in the first degree, it is not the duty of the court to give instructions covering murder in the third degree in the absence of evidence in the case that the homicide by the defendant was without intent on his part.—Territory v. Clark, 35.

Instruction—Pleadings.

It was not error for the court below to fail in instructing the jury on a point not raised by the pleadings.—Duncan v. Holder, 323.

Instruction—Reasonable Doubt—Error.

An instruction defining a "reasonable doubt" to be one for which a reason could be given, based on the evidence or want of it," though erroneous, does not in this par-

ticular case constitute reversible error where the jury might well have found the defendant guilty solely on his own testimony.—Territory v. Ayer, 581.

Instructions—Record.

Requested instructions refused in a criminal case do not become a part of the record by virtue of C. L. sec. 2997, providing that "all instructions demanded must be filed and shall become a part of the record." To become subject to review they must be made a part of the record by bill of exceptions.—U. S. v. Sena, 187.

Instructions—Self Defense.

The instruction as to self-defense was sufficiently favorable to the defendant.—Territory v. Clark, 35.

Instructions—Self Defense.

The instructions on the right of self-defense were such as the evidence in the case required, and were sufficiently favorable to the defendant.—Territory v. Kimmick, 178.

Insurance.

Conditions for forfeiture in the printed forms of insurance now in general use should be strictly construed against the insurer, and in favor of the insured, when invoked by an insurance company to limit or avoid its liability. No intendment will be indulged in to invalidate a policy which the language used does not require.—Association v. Patton, 304.

Insurance—Assignment.

Even though an insurance policy is assigned, it is still the assignor's insurance, which he is entitled to have applied to the extinguishment of his indebtedness, and the payment to the assignee of the insurance operated to discharge the lien debt.—Association v. Patton, 304.

Insurance—Premium—Agents.

The conduct of the insurance company in charging the premium to the agent and the act of the agent in taking a note to himself, operated as a transfer of the insured's indebtedness to the agent, and consequently as a payment to the company.—Perea v. Insurance Co., 399.

Insurance—Medical Examination.

Evidence examined and held that answers of insured at the medical examination were true.—Perea v. Insurance Co., 399.

Insurance—Subrogation.

Cases cited to show that a contract of fire insurance being a contract of indemnity and no more, the insurer after paying the loss is entitled to be subrogated to all "the means of indemnity which assured held against the party primarily liable," held not applicable.—Association v. Patton, 304.

Interest—Instructions—Damages.

Interest is not allowable as a matter of law, except in cases of contract, or the unlawful detention of money, unless so provided by statute. In an action for damages to plaintiff's business and stock of merchandise through wrongful injury to his store building, it was error to instruct the jury to allow interest. In cases of tort the allowance of interest as damages rests in the discretion of the jury.—Ruppe v. Weinman, 68.

Interest—Open Account.

Under C. L., sec. 2550, interest runs on an open account against the estate of a deceased person, beginning six months after the date of the last item.—Radcliffe v. Chaves, 258.

Intoxicants—Legislature—Prohibition.

State legislatures have power to regulate or prohibit absolutely the sale of intoxicating liquors and may prohibit the manufacture of them.—Rapp v. Venable, 509.

Intoxicants—License—Statute.

Laws of 1905, chapter 115, section 2, operates to discontinue, upon their expiration, licenses within the prohibited limit in existence at the time of the passage of the act.—Rapp v. Venable, 509.

Intoxicants—License—U. S. Sanatorium—Statute.

Laws of 1905, chapter 115, section 2, providing that "no license shall be issued for such purpose (to establish or conduct a saloon for the vending or sale of spirituous, vinous, or malt liquors within a distance of five miles of any United States government sanatorium) but this section shall not apply to any saloon previously established," does not create a monopoly and is not contrary to the 14th amendment of the Constitution of the United States.—Rapp v. Venable, 509.

Irrigation—Appropriation.

Laws of 1907, chapter 49, sec. 12, relates to public and

unappropriated waters within the Territory flowing in streams and water courses.—Vanderwork v. Hewes, 439.

Irrigation—Artesian Well.

An artesian well is not "constructed works" under chapter 49, act of 1907.—Vanderwork v. Hewes, 439.

Irrigation—Constructed Works.

"Constructed works" refers to constructed reservoirs and ditches.—Vanderwork v. Hewes, 439.

Irrigation—Cost

The mere fact that irrigation under the former project would cost more per acre than under the latter is not conclusive that the former project should be rejected.—Norton v. Hinderlider, 666.

Irrigation—Evidence.

Cause remanded to obtain facts through the water commissioners and territorial engineer, or by agreement of counsel, or otherwise, essential to a satisfactory decision of the cause.—Norton v. Hinderlider, 666.

Irrigation—Injunction—Public Domain—Survey.

Injunction will not lie in favor of the government against defendants to enjoin them from going upon unsurveyed public lands and taking possession of them for the purpose of acquiring a right-of-way over the unsurveyed public lands of the United States for irrigation purposes without first filing maps and obtaining the approval and permission of the Secretary of the Interior so to do.—U. S. v. Lee, 382.

Irrigation—Percolating Water.

A small quantity of water percolating to the surface and forming a small basin and coming from a source unknown is part of the land and each land owner can do with it as he chooses.—Vanderwork v. Hewes, 439.

Irrigation—Public Domain—Survey.

Irrigation systems may be constructed and rights of way acquired upon unsurveyed land, without first seeking the consent of the Secretary of the Interior. This consent, however, would be necessary in case of parks and reservations where permanent rights cannot be acquired.—U. S. v. Lee, 382.

Irrigation—Seepage Water.

Section 1, chapter 49, Act of 1907, does not give the terri-

torial engineer the power to grant application for seepage water.—Vanderwork v. Hewes, 439.

Irrigation—Seepage—Constructed Works—Application.

It is not necessary for owner of lands on which there is seepage water not from "constructed works," to make application to the teritorial engineer for appropriation of it, and failure to make such application does not warrant another to make application for its appropriation.—Vanderwork v. Hewes, 439.

Irrigation—Seepage Water—Jurisdiction.

Where seepage or percolating waters are from an unknown source the territorial engineer has no jurisdiction over such waters and no power to grant a permit to use them.—Vanderwork v. Hewes, 439.

Irrigation—Seepage Water—Permit.

The owners of such land and such waters need not apply to the territorial engineer for a permit to appropriate the water and the applying of this water to their lands is an appropriation thereof.—Vanderwork v. Hewes, 439.

Irrigation—Seepage Water—Territorial Engineer.

Section 53, chapter 49, Laws of 1907, gives the territorial engineer power to grant permits for such seepage water only as comes from "constructed works" and this is true regardless of whether the owner of the land upon which the water appeared, applied for its appropriation or not.—Vanderwork v. Hewes, 439.

Irrigation—Surplus—Prior Appropriation.

Any surplus which may exist beyond the necessities of the owners indicated above, would not be subject to appropriation and distribution under chapter 49, Laws of 1907, but if subject to appropriation at all without the consent of the owners, it would be governed by the general law of prior appropriation which is applicable to the lands of the arid west.—Vanderwork v. Hewes, 439.

Irrigation—Surplus—Seepage—Prior Rights.

If any surplus exists, after owner of land on which seepage water exists, has appropriated all he desires to a beneficial use, and such seepage water is permitted to enter the land of another, that other has a perfect right to appropriate it also to a beneficial use, but his rights are subject to the prior right of first owner to apply all

of the water to a beneficial use on his own lands.—Vanderwork v. Hewes, 439.

Irrigation—Territorial Engineer—Public Interest.

The power of the territorial engineer to reject an application "if in his opinion the approval thereof would be contrary to the public interest," is not limited to cases in which the project would be a menace to the public health or safety.—Norton v. Hinderlider, 666.

Irrigation—Territorial Engineer—Seepage Water.

The Act of 1907, chapter 49, does not empower the territorial engineer to authorize another applicant to go upon lands held in private ownership, construct ditches and appropriate seepage water or waters from snows, rain or springs, not traceable to or from a stream or water course, or from constructed works.—Vanderwork v. Hewes, 439.

Jeopardy—Indictment.

The defendant is placed in jeopardy when after issue joined upon a valid indictment before a competent court the jury is empaneled and sworn to try his cause.—U. S. v. Aurandt, 292.

Jeopardy—Testimony.

Relatively to a given charge there is, however, no former jeopardy where the testimony necessary to sustain the latter charge would not be admissible to sustain the former.—U. S. v. Aurandt, 292.

Judgment—Appeal—Evidence.

Judgment rendered upon verdict by jury supported by substantial evidence should not be disturbed by appellate court.—Cowles v. Hagerman, 600.

Judgment, Joint—Contract, Joint.

The contract with Ross for the sale of the lands being a joint contract, a joint judgment against all of the defendants was proper.—Ross v. Carr, et al, 17.

Judgment—Jurisdiction.

A judgment of a district court will not be set aside by this court merely on the ground that the term of court at which it was rendered was not held at the de jure county seat of the county for which the term was held, as provided by law, if the term was held and the judgment rendered at the de facto county seat, as established by the Act of the Legislative Assembly of the Territory.—Territory v. Clark, 35.

Judgment—Witness.

The judgment of a court should not be set aside upon the testimony of a witness, when it is apparent that such testimony was given in a rather bungling and inaccurate manner and where the jury hearing the witnesses and understanding the circumstances under which the offense charged was committed, would have a much better opportunity of arriving at a correct conclusion, than would the appellate court upon the record alone.—Territory v. Sais, 171.

Jurisdiction—Appeal.

When the question of the court's jurisdiction to entertain an appeal necessarily involves the consideration of the validity of the proceedings complained of, the disposition of a motion to dismiss the appeal will be postponed to the hearing on the merits.—Weaver v. Weaver, 333.

Jurisdiction—Lien.

The Texas court had jurisdiction of the person of Patton, but not of the real estate in New Mexico. The lien which it attempted to reinstate, declare valid and in effect turn over, was a statutory lien enforceable only in New Mexico.—Fire Association v. Patton, 304.

Jurisdiction—Motion to Strike.

As there was want of jurisdiction, as concluded by the court below, there could be no error in sustaining the motion to strike the reply.—Land Co. v. Garcia, 316.

Jurisdiction—Pleadings.

The contention that C. L., sec. 2950, par. 5, confers jurisdiction upon the District Court of Bernalillo County to try the cause notwithstanding the fact that the complaint shows the land involved to be situated in the County of Sandoval would be correct, if the claim for damages was the sole object of the suit, but the claim for damages is not the sole object.—Jemez Land Co. v. Garcia, 316.

Jurisdiction—Real Estate—Demurrer.

As complaint shows that an interest in land is necessarily involved in the suit within meaning of C. L. 1897, sec. 2950, par. 4, and that the land is situated in Sandoval County, and not in Bernalillo County, there was a want of jurisdiction for which the demurrers were properly

overruled by the court below.—Jemez Land Co. v. Garcia, 316.

Jurors, Censurable Conduct of.

Conduct on the part of one or more of the jurors during the trial of a criminal case, although censurable, is not a sufficient ground for a new trial, unless it appears, or is at least presumable, that the defendant was prejudiced thereby.—Territory v. Clark, 35.

Jury—Assault.

Under the circumstances disclosed in the record it was properly left to the jury to determine whether a threat made by the defendant, according to evidence for the Territory, related to the man on whom it was alleged the defendant shortly after made the assault charged.—Territory v. Alarid, 165.

Jury—Error.

There was no error in the court having allowed the jury to separate, before the case was submitted to them, in the absence of a showing that accused was prejudiced thereby.—U. S. v. Cook, 124.

Jury—Evidence.

It was properly left to the jury to determine from the evidence whether the defendant was a deputy sheriff at the time of the murder with which he was charged.—Territory v. Kimmick, 178.

Jury—New Trial.

A motion for a new trial will not be granted on the unsupported affidavit of a defendant made on information and belief, that the jury while separated listened to discussions of the case by citizens and witnesses.—U. S. v. Cook, 124.

Jury—New Trial—Adultery.

A motion for new trial is properly denied where motion is on the ground supported only by affidavit of accused made on information and belief, that the jury found accused guilty of adultery, on the evidence of a witness that he had stolen a hen on the night of the alleged offense, and that a juror had stated after the verdict that, if accused had not stolen, he would not have been convicted. —U. S. v. Cook, 124.

Jury—Questions of Fact.

Held there were no disputed questions of fact requiring

the submission of the case to the jury.—Goesling v. Gross, Kelly & Co., 721.

Jury—Witness.

The jury may consider manner of witness in which testimony is given in determining its weight.—Territory v. Sais, 171.

Land, Public.

There is no law to support the contention of appellant that because appellee never ate or slept upon land he had purchased of grantee of original squatters, and because others occupied it, he forfeited his right to it.—Patten v. Balch, 276.

Lease—Abrogation—Consideration—Error.

Where the matter at issue was whether or not a valuable consideration was paid for the abrogation of a lease and evidence was introduced that certain articles of personal property were given in consideration of such abrogation, it is not error to allow the owner of such property to testify as to their cost as tending to show that they had some value.—Melini v. Freige, 455.

Legislature—Bills—Journals.

There is no legislative requirement that any bill shall receive the signature of the respective presiding officers of the two houses. The journals of the two houses may be judicially noticed in aid of the act.—Gray v. Taylor, 742.

Lessor, Liability for Damages to Lessee.

A lessor who permits an adjoining lot owner to enter the leased premises and excavate under the wall of the leased building, under a party wall agreement, was equally liable with such owner for damages to the lessee's goods through the falling of the wall.—Palma v. Weinman, 68.

License, Notice to Revoke.

Nor was notice necessary to revoke the license if owner of building were held to be a licensee.—Chavez v. Torlina, 53.

License—Not Transferable at Death.

The license ceased with death and was not transferable being a personal privilege of the licensee.—Chavez v. Torlina, 53.

Licensee—Encroaching Building.

The owner of an encroaching building is a licensee where

the owner of the land agrees that the former may continue to encroach until the owner demanded possession of the land encroached upon.——Chavez v. Torlina, 53.

Lien.

Claim of lien held sufficient on its face as to its terms where record shows that there were no other terms or conditions than: "Claimant agreed to and with the New Mexico Pumice Stone and Lithograph Company, to work for said company for the sum of $3 per day and board." —Gray v. Pumice Stone Co., 478.

Lien—Contractor.

Every person who deals directly with the owner of the property and who, in pursuance of a contract with him performs labor or furnishes material, is an original contractor within the meaning of the mechanics' lien statute —Gray v. Pumice Stone Co., 478.

Lien—Foreclosure—Service of Process.

A judgment of foreclosure of a material man's lien obtained without service of process upon the owner of the property is as to him void for want of jurisdiction.—Robertson et al, v. Supply Co., 606.

Lien—Labor—Mine.

Under New Mexico mechanics' lien law, labor of any class bearing a direct relation to the mining operations held sufficient to form a basis for a claim of lien, and labor expended by a lien claimant in care of the team of horses upon a mining claim, and which are used in the mining operations thereon, as well as labor performed in a lime kiln, closing lime bins and gathering up tools at the lime quarry and lime kiln, all on the mining claim, furnish a basis for a claim of lien upon the mining claim. —Gray v. Pumice Stone Co., 478.

Lien—Mechanic.

The New Mexico Mechanics Lien Law, sections 2216, et seq., Compiled Laws of 1897, is constitutional.—Baldridge v. Morgan, 249.

Lien—Mine.

Where title to limestone mine was originally obtained from government by means of an agricultural patent, has New Mexico mechanics' lien statute any application to labor performed upon any such lands? Quaere.—Gray v. Pumice Stone Co., 478.

Lien—Mining Claim.

In the case under consideration, the specific character of the labor performed by the lien claimant is not stated further than to say that it was labor performed in the construction of the mining claim on the land. This seems to be sufficiently definite and may include many different kinds of labor, for all of which, a claimant would be entitled to a lien.—Gray v. Pumice Stone Co., 478.

Lien—Pleadings—Demurrer.

Separate demurrer directly raises question whether the complaint and claim of lien stated facts sufficient to constitute a cause of action against the defendant demurring. —Gray v. Pumice Stone Co., 478.

Lien—Sub-Contractor.

The clause in Section 2221, Compiled Laws of 1897, requiring a sub-contractor to file his claim of lien "within sixty days after the completion of any building, etc.," fixes a time after which such lien is not to be filed or in other words that the time for filing does not commence to run from or await the completion of the building.—Baldridge v. Morgan, 249.

Mandamus—Election.

The writ of mandamus will not require the performance of an act beyond the power of the respondent or dependent upon the will of a third person not a party to the suit.—Territory v. Suddith, 729.

Marriage—Age.

The penal provision of Chapter 31 of the Session Laws of 1876, (C. L. Sec. 1427), directed against the uniting of persons in marriage under age, were not repealed by Chapter 32 of the laws of the same session. (C. L., Sec. 1430.)—Territory v. Harwood, 324.

Marriage—Age—Knowledge.

Uniting in marriage a female under the age of fifteen is penalized by C. L., Sec. 1427, and knowledge by the officiating officer that such female is under such age is not a necessary element of the offense.—Territory v. Harwood, 324.

Master and Servant.

The master is liable, during the running of his promise to repair a known defect, in all cases, unless the servant, either by continuing the service an unreasonable length

of time or by the use of the appliance when in an imminently dangerous condition has by his own conduct released the master.—Schmidt v. Brewery Co., 232.

Master and Servant—Damages.

The master is liable for injury to servant by means of defective appliance where the defect was known to both master and servant, the defect being not so palpably dangerous that an ordinarily prudent, careful, cautious man would refuse to use it, the master having promised to repair and requested the servant to use the appliance until repaired, and where servant relied upon the promise of the master to repair.—Schmidt v. Brewery Co., 232.

Measurement, Hay.

In the absence of any specific agreement for the measurement of hay in stacks, the rule of measurement laid down in Chapter 34 of the Session Laws of 1901, entitled "An Act to establish a legal method of measuring hay," will control.—King v. Tabor, 488.

Mining Claim.

The words "mining claim" mean a portion of the public mineral lands of the United States, to which qualified persons may first obtain the right of occupancy and possession by means of location, and secondly, title by pursuing certain prescribed methods therefore.—Gray v. Pumice Co., 478.

Mining Claim—Agent—Fraud—Trustee ex Maleficio.

One who takes advantage of his position as agent and representative of another and thereby fraudulently obtains title to certain mining claims which in equity and good conscience belong to his principal, will be charged in equity as a trustee ex maleficio of his principal.—O'Neill v. Otero, 707.

Mining Claim—Assessment—Relocation—Fraud.

The attempt of an agent employed to do the annual assessment work on a mining claim, after failure or intentional neglect to do such work, to relocate the claim even though such attempted relocation is made in the name of a third party from whom the agent subsequently obtains title by deed, is fraud upon his principal.—O'Neill v. Otero, 707.

Minors, Sale of Intoxicating Liquor to.

Section 1235, Compiled Laws of 1897, making it illegal

to sell or give intoxicating liquors to minors, is still in force as to minors between the ages of eighteen and twenty-one years, and to that extent is not repealed by implication by Section 1270, Compiled Laws of 1897, and Section 1, Chapter 3, Laws of 1901, as those laws only legislate as to minors under the age of eighteen years, and not as to minors between the ages of eighteen and twenty-one years.—Territory v. Digneo, 157.

Municipalities.

Chapter 54, Laws 1899, contains a specific delegation of power to the city councils and boards of trustees of cities or incorporated towns.—Roswell v. Ingersoll, 525.

Municipalities—Delinquent Taxes.

Chapter 57 of the Laws of 1909, which provides that, "all delinquent taxes," for certain years shall be distributed to the general county fund and general school fund of the respective counties in which they are collected, does not include taxes levied for city purposes.—Territory v. Pinney, 625.

Municipalities—Public Improvements.

Chapter 31, Laws of 1909, contains no grant of power to the city council, nor does it take away any power theretofore granted. It permits a majority in value of the owners of real estate in a city or in a portion of a city, to make public improvements independently of the city government.—Roswell v. Ingersoll, 525.

Murder—Dying Declaration.

Where a dying person makes no declaration that he knows his danger or is conscious of his impending death and there is nothing in his conduct, or that of those present, understandingly acquiesced in by him, from which such consciousness of impending death may be ascertained; yet, where it is reasonably to be inferred from the terrible character of the wound and his state of illness that he was sensible of his danger and conscious of impending death, his statements, made under such circumstances, relative to the homicide are properly admitted as a dying declaration.—Territory v. Dick Eagle, 609.

Murder—Dying Declaration—Instructions—Jury.

Under a statute providing "When the jury retires to consider its verdict it shall be allowed to take the pleadings

in the cause, the instructions of the court, and any instruments of writing admitted as evidence, except depositions," it is error to permit the dying declaration which has been reduced to writing, to be taken to the jury room for investigation and examination by the jurors.—Territory v. Dick Eagle, 610.

Murder—Insanity—Evidence.

In a trial for murder the only evidence offered in behalf of the defendant was that he was insane at the time of the alleged homicide.—Territory v. Kennedy, 556.

Murder—Instructions—Error.

The trial court gave appropriate instructions as to the presumption of innocence and the burden of proof resting on the Territory, and provided for the jury three forms for a verdict; by one of which they could find the defendant guilty, as charged; by one not guilty on the ground of his insanity at the time of the alleged homicide; and by one not guilty on the ground of insanity at the time of the trial, but provided no form for a verdict of not guilty independent of the question of insanity, and, as appears by the record, refused the request of the defendant's counsel to provide such a form. Held reversible error.—Territory v. Kennedy, 556.

Negligence, Contributory.

On the evidence in the case, the negligence of the appellant contributed to the injury he received, and in the absence of evidence of any more than ordinary negligence on the part of the appellee, from which the appellant would not have suffered if he had exercised ordinary care, he is precluded from the recovery of damages against the appellee.—Price v. Railway Co., 348.

Negligence, Contributory—Damages.

"Although the general rule is that even if the defendant be shown to have been guilty of negligence, the plaintiff cannot recover if he himself be shown to have been guilty of contributory negligence which may have had something to do in causing the accident; yet the contributory negligence on his part would not exonerate the defendant, and disentitle the plaintiff from recovering, if it be shown that the defendant might by the exercise of reasonable care and prudence have avoided the consequences of plaintiff's negligence."—Thompson v. Traction Co., 407.

Negligence, Contributory—Proximate Cause—Jury.

The facts, and the inferences to be drawn therefrom, with reference to the contributory negligence of the plaintiff being doubtful, the question of proximate cause of the accident and the reasonable care of the defendant should be submitted to the jury for their determination under proper instructions from the court according to the circumstances of the case.—Thompson v. Traction Co., 407.

Negligence—Evidence.

Negligence may not be inferred from the mere fact that stock have been killed or injured by a railroad train. Negligence must be alleged and proved.—Reagan v. Railway Co., 270.

Negligence—Proximate Cause.

In an action by a passenger for injuries against a street railway, evidence held sufficient to show that defendant's negligence was the proximate cause of the accident.—Corcoran v. Traction Co., 9.

New Trial.

It is not the office of a motion for a new trial to raise any question not relied upon at the hearing.—Duncan v. Holder, 323.

New Trial—Discretion.

The granting or refusal of a motion for a new trial, being addressed to the sound discretion of the trial court, will not unless it plainly appears that such discretion has been abused, be reviewed on appeal.—Duncan v. Holder, 323.

New Trial—Judgment.

The court has a right to grant a new trial at any time during the term in which the judgment was entered.—Gallegos v. Sandoval, 216.

Nolle Prosequi—Statute—Constitutional Law.

In so far as a different rule is countenanced by the statute of this Territory (C. L. Sec. 2423) providing that "a nolle prosequi cannot be entered after any testimony has been introduced for the defendant," such statute is unconstitutional and void.—U. S. v. Aurandt, 292.

Objection—Error.

The trial court sustained an objection to the following question: "Was it common knowledge that this house

was being erected for sporting purposes before it was completed?" Held, that that ruling was correct.—Gregory v. Cassan, 496.

Officers—Commission—Governor.

If the commission of the governor reciting a vacancy and appointing defendant to fill it, was a nullity, it should not be permitted to stand unless grave public interests require it, and certainly not as between individuals. No such public reasons exist why the title of the defendant should stand unimpeachable.—Vigil v. Stroup, 544.

Officials—Fees—Quo Warranto.

A de jure officer may maintain an action to recover from a de facto officer the fees and emoluments of the office without having first his title established by a proceeding in quo warranto.—Vigil v. Stroup, 544.

Officials—Fees—Recovery.

A de jure officer may recover from a de facto officer, fees and emoluments of the office which the de facto officer had wrongfully intruded upon and held. Albright v. Sandoval, 14 N. M. 345.—Vigil v. Stroup, 544.

Partnership—Judgment—Omission.

Where an action is brought by certain persons described as a "copartnership doing business under the firm name and style of, etc.," and judgment is rendered against the copartnership and not against the individuals composing it; held that this court will supply the omission of the individual names by ordering them inserted in the judgment. Sub-sec. 94, sec. 2685, C. L. 1897.—Wirt v. Kutz, 500.

Pleadings—Amendment of Replication After Trial.

The court permitted plaintiff an amendment of the replication after trial, but before judgment and afterwards found in defendant's favor on the issue involved. On defendant's appeal plaintiff filed no cross-appeal, so that the finding could not be reviewed. Held, that the ruling as to the amendment was harmless as far as the defend-
as to the amendment was harmless as far as the defendant was concerned.—Chavez v. Torlina, 53.

Pleadings—Answer.

Under section 67 of the Code of Civil Procedure material averments of the complaint not denied by the answer are taken as true.—Street v. Smith, 95.

Pleadings—Answer, Amendment to.

The refusal of the trial court to permit an amendment of the defendant's answer, under the circumstances shown by the record, was not an abuse of discretion.—First National Bank v. Speed, 1.

Pleadings—Answer—Error.

The answers in this case being responsive to the complaint and challenging its allegations, are not obnoxious to either the demurrers or motion to strike interposed by the appellant, and therefore errors assigned upon their denial by the court below, cannot be sustained.—Jemez Co. v. Garcia, 316.

Pleadings—Answer—Ownership.

It cannot be contended successfully that the allegations of ownership and right of possession cannot be denied by the answer to such a complaint.—Jemez Co. v. Garcia, 316.

Pleadings—Answer—Witness.

A motion to strike out the whole answer of a witness, where part of the answer is good, is properly denied.—Radcliffe v. Chaves, 258.

Pleadings—Autrefois Acquit.

The present record examined in the light of the rule last stated and held that the defendant's plea of autrefois acquit was not well taken.—U. S. v. Aurandt, 292.

Pleadings—Complaint.

Complaint examined and found to contain both a legal and equitable cause of action which is permissible under the Code.—Jemez Land Co. v. Garcia, 316.

Pleadings—Complaint—Theory.

A complaint should proceed upon a definite and distinct theory and upon this theory the plaintiff's case must stand or fall.—Gallegos v. Sandoval, 216.

Pleadings—Count—Election of.

The court properly denied the motion made by the defendants that the plaintiff elect on which count of the amended complaint he would go to trial, for both counts set up but one cause of action, varying only the form of the statement of the action, so as to have them meet any state of proofs; and, when a plaintiff is in real doubt as to his relief, he has the right to set forth his cause of action in several counts.—Ross v. Carr et al, 17.

Pleadings—Demand—Trustee.

The complaint sufficiently states facts to constitute a cause of action as it properly and sufficiently alleges demand and requisition upon the trustee by a majority of the bond holders.—Buddecke v. Trust Co., 634.

Pleadings—Demurrer—Answer.

Failure to allege in a petition under section 3693, C. L. 1897, the possession of funds to pay for the land is not fatal either on motion to dismiss or on demurrer and is at most a matter of defense to be raised by answer.—Territory v. Crary, 213.

Pleadings—Denial.

Denial upon information and belief of matters necessarily within the knowledge of the pleader is not permissible. —C. R. & E. P. Ry. Co. v. Wertheim, 505.

Pleadings—Denial—Testimony.

In a suit against a railroad company a denial by such company upon information and belief that it was operating a railroad at the time and place alleged being a matter necessarily within defendant's knowledge, raises no such issue upon the pleadings as will admit testimony that it was not operating such railroad over an objection that such testimony was not admissible under the pleadings.—C. R. & E. P. Ry. Co. v. Wertheim, 505.

Pleadings—Dismissal.

As appellant declined to plead further in the court below the judgment of dismissal was properly rendered and error assigned as to this action is overruled.—Land Co. v. Garcia, 316.

Pleadings—Error.

Assignments of error must be specific.—Neher v. Viviani, 460.

Pleadings—Indictment.

While it is permissible under certain circumstances to allege elements of description as unknown to the grand jury, recourse to this method of pleading is justifiable only on grounds of a reasonable necessity.—U. S. v. Aurandt, 292.

Pleadings—Insolvency—Corporation.

The complaint in a proceeding under the provisions of sec. 72, chapter 79 of the Laws of 1907, which merely alleges: "That the said corporation is insolvent and has

suspended its ordinary business for want of funds to carry on the same," does not sufficiently state the facts and circumstances of such insolvency to make a case within the purview of the statute. The facts and circumstances must be set out in the complaint from which the insolvency of the company shall appear.—Irrigation Co. v. Lee, 567.

Pleadings—Liability.

Where the defendant admits liability and advises and requests plaintiff to bring suit in order to dispose of the conflicting claims of a third party and for no other purpose, he will not, after plaintiff has begun suit and incurred costs, be permitted to deny liability.—Irwin v. Woodmen, 365.

Pleadings—Motion to Strike.

The motion to strike because the answer of the appellee not only denies the ownership and right of possession of the appellant of the land involved, but also claims ownership and right of possession to be in the appellee was properly overruled.—Jemez Land Co. v. Garcia, 316.

Pleadings—Severance.

Under the circumstances shown in the record, a severance was properly denied.—Territory v. Clark, 35.

Pleadings—Variance.

If advantage be not taken, of a variance between the pleadings and the allegations, at the trial such variance will be treated as waived.—Duncan v. Holder, 323.

Possession, Adverse.

To constitute adverse possession the occupancy of one so claiming must be (1) actual, (2) visible, (3) exclusive, (4) hostile, and (5) continuous. If any of these elements is lacking no title by adverse possession can ripen.—Jenkins v. Grant Co., 281.

Possession, Adverse—Appeal.

Appellant telling appellee, who is rebuilding wall encroaching on appellant's land but held adversely by appellee: "Your wall is on my ground. You cannot throw rubbish in this yard—you throw your rubbish on your own side," is of too casual a nature to be regarded as sufficient to suspend the operation of the law of adverse possession.—Chavez v. Torlina, 53.

Possession, Constructive.

The possession of all but a relatively insignificant part of this large area was constructive and not actual and such constructive possession was ineffectual against the true owner.—Jenkins v. Grant Co., 281.

Possession, Exclusive.

Possession held not to have been exclusive.—Jenkins v. Grant Co., 281.

Possession, Hostile.

Possession held not to have been hostile.—Jenkins v. Grant Co., 281.

Possession, Hostile—Title.

Where appellee relies upon an ownership and possession hostile to the true owner, there is no ground of liability of the true owner. If appellant was a stranger to the title it would be different.—Chavez v. Torlina, 53.

Possession—Seisin.

The law adjudges the seisin of all that is not in the actual occupancy of the adverse party to him who has the better title.—Jenkins v. Grant Co., 281.

Probate Law—Testimony.

Under Comp. Laws, sec. 3021, requiring corroboration of the claimant's testimony in a suit against the executor of a deceased person, there was error in allowing the item of $500 in defendant's counter claim.—Childers v. Hubbell, 450.

Procedure—Return Day—Writ of Error.

Section 1, Chapter 120 of the Laws of 1909, amending Sec. 20, Chapter 57, of the Laws of 1907, making the return day of a writ of error 130 days from date of the writ instead of 90 days as formerly, deals with procedure only, and, prima facie, applies to all actions—those which have accrued or are pending and future actions.—Irrigation Co. v. Lee, 567.

Procedure—Transcript, Certification By Trial Judge.

Under Laws of 1907, Chapter 57, Section 24, where causes are tried without a jury, the certificate of the official stenographer is not alone sufficient to make the transcript of the testimony an element in the review of the case. Such transcript must in addition be properly certified as correct by the trial judge.—Street v. Smith, 95.

Procedure—Transcript—Return Day—Error.

Where the plaintiff in error files a transcript of the record, but not, as required by Sec. 20, Chapter 57, of the Laws of 1907, ten days before the return day of the writ, and also files assignments of error, but not before the return day of such writ, a motion to dismiss the writ of error, on those grounds, not made until after such filing, will be denied. Armijo v. Abeytia, 5 N. M. 533.—Irrigation Co. v. Lee, 567.

Proof.

Before a plaintiff can recover he must prove his case.—Reagan v. Railway Co., 270.

Proof, Burden.

It is within the power of persons, under C. L. 1897, Sec. 242, whose stock has been injured to shift the burden of proof to the railroad by a ninety day notice of claim to a station agent in the county.—Reagan v. Railway Co., 270.

Proof—Description.

The description should be definite and certain enough so that the premises may be readily identified—reasonable and not absolute certainty being all that is required. —Patten v. Balch, 276.

Public Land—Relinquishment—Consideration for Note.

The waiver and relinquishment of a preference right to enter a certain tract of the public domain which preference right has been obtained as the result of a contest before the United States land office, is a good and valid consideration for a note given in payment therefor.—Macy v. Sunderman, 372.

Public Service Corporation—Rates.

A public service corporation cannot adopt a regulation which will result in increasing a rental charge above what has been fixed by contract as a maximum charge.—Telephone Co. v. Fields, 431.

Public Service Corporation—Telephone—Rates.

The obligation to furnish telephone service at not to exceed a specified rental charge must include the installation of a usable appliance connected with a system.—Telephone Co. v. Fields, 431.

Quantum Meruit.

Evidence did not warrant recovery upon quantum meruit

for the value of the labor performed.—Cowles v. Hagerman, 600.

Quo Warranto.

In this Territory the writ of quo warranto is a writ of grace and not of right and can only be obtained by permission of the attorney general, and a private person cannot have the writ to adjudicate his title to an office. The proceeding in the nature of a quo warranto goes only to removing the intruder.—Vigil v. Stroup, 544.

Quo-Warranto—Judgment.

The effect of a judgment of ouster in quo warranto would only have put the intruder out of office and would not have put plaintiff in.—Vigil v. Stroup, 544.

Railroad—Abandonment.

The defendant, the Eastern Railway Company of New Mexico, was the owner by purchase, from the Pecos Valley & Northeastern Railway Company, of a railroad about two hundred and twenty miles in length, extending from a point on the southern boundary line between New Mexico and Texas, northeasterly to a point in the town of Texico, at or near the easterly boundary line between New Mexico and Texas, and, by construction, a railroad extending from Rio Puerco station on the Santa Fe Pacific railroad, in Valencia County, easterly to a connection in Texico with the purchased railroad at its terminus there. It built a branch road from Clovis, on the railroad it had constructed a few miles west from Texico, to a point near the station of Cameo, on the first named road which point is also a few miles west from Texico, began running all trains to and from Texico which had theretofore been run over the Pecos Valley and Northeastern railroad, over said branch road and by way of Clovis. over the portion of said constructed railroad between Clovis and Texico, and abandoned the portion of the first named railroad between Texico and the point near Cameo where the branch road connected. The distance from Texico to the last named point is thirteen and two-tenths miles, and between the same points by way of Clovis is nineteen miles. Held, that the change was within the statutory authority of sub-sec. 17, sec. 3847, C. L. 1897.—Territory v. Eastern Ry., 591.

Railroad—Directors—Pleadings.

The directors of the defendant company did not take action to authorize the change specified in the preceding paragraph until after the change had been made and after suit was brought to prevent its consummation but did take such action before trial. Held, that the state of facts at the time of judgment and not that at the institution of the suit furnished the proper basis for the action of the trial court.—Territory v. Eastern Ry., 591.

Receiver—Injunction—Interlocutory Order—Appeal.

A decree appointing a receiver to take possession of all and every the estate, real, personal and mixed of an insolvent corporation with power to collect and take possession of all the properties and assets of the corporation and to make an inventory of the same and to abide the further orders of the court with relation thereto considered by itself, there having been no injunction previously granted by the court as provided in Section 72 of Chapter 79 of the Laws of 1905, is properly classified as an interlocutory order or decree and not subject to appeal or writ of error.—Mining Co. v. Lund, 696.

Record.

The present record examined and under the rules just stated the cause affirmed.—Street v. Smith, 95.

Record—Attorney's Improper Remarks.

It is fatal to appellant's objection to alleged improper remarks of counsel where the record fails to disclose any objection at the time of the alleged improper remarks.—Corcoran v. Traction Co., 9.

Record, Deficient.

Upon a doubtful or deficient record every presumption is indulged in favor of the correctness and regularity of the decision of the trial court.—Street v. Smith, 95.

Record—Proof.

Examination of the record fails to disclose any proof that the court did not take full and complete proofs.—Buddecke v. Trust Co., 634.

Records—Transcript—Administrator.

The administrator of the estate of such probate clerk cannot recover on behalf of such estate for work done by such administrator in connection with such transcripts

and after the death of the probate clerk.—Summers v. County Commissioners, 376.

Records—Transcript—Certification—Springer Act.

The present record affords no basis of fact upon which to entertain the suggestion that the probate clerk failed to certify each book prepared by him according to Sec. 2, of Chapter 70, of the Laws of 1899, nor for the contention that the claim as allowed will lead to a violation of the Springer Act, in so far as the latter controls the relation between the indebtedness of Sandoval County and the taxable property of such county.—Summers v. County Commissioners, 376.

Records—Transcript—Probate Clerk.

Such probate clerk having died in 1906 with the work only partially completed, the compensation which goes to his estate is fixed by Chapter 70 of the Laws of 1899 in connection with C. L., Sec. 1768, and not by the subsequently enacted Chapter 28 of the Laws of 1907, which latter as a part of the work compensated for imposes additional duties never performed by such probate clerk. —Summers v. County Commissioners, 376.

Records—Transcript—Probate Clerk—Printed Forms.

A probate clerk who, upon the formation of a new county, makes transcripts of the property records of the old county for the use of such new county pursuant to Chapter 70 of the Laws of 1899, and in so doing uses printed forms of conveyances which he must compare and in many instances correct and interline, is entitled to the folio rate upon the printed folios as well as upon those written.—Summers v. County Commissioners, 376.

Res Adjudicata.

A previous ruling by an appellate court upon a point distinctly made in a case before it, becomes the law of that case.—Palma v. Weinman, 68.

Restraint of Trade—Agreement.

An agreement not to engage in the business of buying and selling lumber in a certain town or its vicinity for two years in consideration of the purchase at stipulated prices of the entire stock of lumber of the seller then on hand in the business in which the seller is then engaged in the lumber business, is not void as being in restraint of trade.—Thomas v. Gavin, 660.

Sale—Foreclosure.

Not only is the price for which the property was sold, inadequate, but there are also additional circumstances which render it inequitable to permit the sale to stand. The purchaser is conceded to be a disinterested party and purchased in good faith. The sale should be set aside and a new sale ordered therefore only upon terms.—Buddecke v. Trust Co., 634.

Self-Defense—Instruction.

The evidence in this case considered and held not to tender a plea of self defense held, that an instruction as to self defense, though erroneous, was an error of which the appellant could not complain.—Territory v. Ayer, 581.

Special Findings—Error.

Failure of the trial court to make special findings, as provided by C. L., Sec. 2999, is not a tenable assignment of error where no request for such findings was made and denied in the court below. Bank v. Baird, 13 N. M. 431, followed.—Radcliffe v. Chaves, 258.

Special Findings—Variance.

When a jury, in answering special interrogatories submitted to them at the request of the defendant, which interrogatories call for answers upon material facts in issue in the case, disregard the evidence in the case, and in answer to such interrogatories find a fact or facts wholly unsupported by the pleadings or the evidence, it cannot be presumed, in view of such answers, that the defendant had a fair and impartial trial.—Thompson v. Traction Co., 407.

Special Findings—Verdict.

Special findings, in order to support a general verdict, must correspond to the proofs and be within the pleadings.—Thompson v. Traction Co., 407.

Special Findings—Verdict—Inconsistency.

Where there is a fatal inconsistency between the general verdict and the special findings the latter must control.—Gallegos v. Sandoval, 216.

Special Findings—Verdict—Presumption.

Every reasonable presumption in favor of the general verdict will be indulged in, while nothing will be pre-

sumed in favor of the special findings.—Gallegos v. Sandoval, 216.

Specific Performance—Judgment.

The judgment of the District Court that the plaintiff have specific performance of the defendant's written agreement to convey certain land to it, is not, strictly, open to reversal by this court, since it is based on substantial evidence; but even if it were so open, the weight of evidence would require the same judgment.—Pring v. Goldenberg Co., 337.

Statute—Conflict.

Repeals of a statute by implication are not favored, but if two statutes are in part positively repugnant to each other, the older statute is repeated by implication to the extent of the repugnancy.—Territory v. Digneo, 157.

Statute—Constitutional Law.

It is not within the competency of any court to question an act of a legislature on the ground that it is unreasonable, unjust, unequal or oppressive, as long as the act is within the limitations fixed by the fundamental law of the state or territory.—Baldridge v. Morgan, 249.

Statute—Construction.

That construction of a statute which declares the legislative intent, is the proper one.—Rapp v. Venable, 509.

Statute—Governor.

In the absence of any evidence to the contrary it is assumed that the executive acted lawfully and his message stating that he had allowed the act to become law by limitation will be assumed to imply the receipt by him of the act more than three days prior to the message.—Gray v. Taylor, 742.

Statute, Local, Special.

The effect and not the form of the law determines its character as to whether it is general or local and special.—Territory v. Beaven, 357.

Statute, Local, Special—County Seat.

Laws 1909, Chapter 80, not special or local by reason of the twenty mile limitation.—Gray v. Taylor, 742.

Statute, Local, Special—Springer Act.

Laws of 1905, Chapter 115, Section 2, is not a local and not a special act and not void under the Springer Act.—Rapp v. Venable, 509.

Statute—Repeal.

Chapter 31 of the Laws of 1909 does not repeal Chapter 54 of the Laws of 1899.—Roswell v. Ingersoll, 525.

Statute, Special.

Chapter 45, Laws of 1907, in so far it put the county classification into effect in Class A and suspending it as to the other classes, was special legislation.—Territory v. Beaven, 357.

Tenant—Landlord.

If the relation of landlord and tenant did not exist between owner of building encroaching and the owner of the land, it was not necessary for owner of land to give owner of building notice to quit and remove the encroaching wall from the land.—Chaves v. Torlina, 53.

Tenant—Licensee.

Appellee sought to establish his ownership by hostile possession. He thereby disclaims possession as a tenant or licensee, the two positions being inconsistent with each other, and cannot be maintained at the same time.—Chavez v. Torlina, 53.

Testimony, Admission.

A witness for the defendant was asked on cross-examination if he made certain statements when he testified at the preliminary hearing which he had made in his testimony at the trial, to which he replied as to one of them that he did. His entire testimony at the preliminary hearing was properly admitted to show whether it contained that statement.—Territory v. Clark, 35.

Testimony—Error.

In cases tried before the court it will be presumed that the court ultimately disregarded inadmissible testimony and the erroneous admission of testimony will afford no ground of error unless it is apparent that the court considered such testimony in deciding the case.—Radcliffe v. Chaves, 258.

Time—Proof.

Allegations as to time need not be proven with precision. Goesling v. Gross, Kelly & Co., 721.

Transcript—Return Day—Writ of Error.

Where the plaintiff in error files a transcript of the record, but not, as required by Sec. 20, Chapter 57 of the Laws of 1907, ten days before the return day of the writ, and

also files assignments of error, but not before the return day of such writ, a motion to dismiss the writ of error, on those grounds, not made until after such filing, will be denied. Armijo v. Abeytia, 5 N. M. 533.—Mining Co. v. Lund, 696.

Trees, Growing—Realty.

Growing trees are part of the realty and no part of the claim for damages for trees already cut.—Jemez Land Co. v. Garcia, 316.

Trespass.

An entry on lands of another without right and not in subordination to the title of the owner is a mere trespass, and no tenancy is created thereby.—Chavez v. Torlina, 53.

Trespass—Negligence, Liability for.

The owner is not liable to a trespasser, or one who is on his property by mere permission or sufferance for negligence of himself or agents.—Chavez v. Torlina, 53.

Trespass—Negligence—Sufferance.

The owner is not liable to a trespasser, or one who is on his property by mere permission or sufferance, for negligence of himself or agents.—Chavez v. Torlina, 53.

Trespass—Pleadings.

The cause is in form an action of "trespass to try title," which action is authorized by the laws of the state of Texas but not in New Mexico.—Jemez Land Co. v. Garcia, 316.

Trespass—Railroad.

The implied invitation to any one having business with a railroad company to go upon the premises where it transacts such business with the public, does not extend to portions of the premises which are obviously not adapted to, or used, or necessary for the transaction of the business for which such person is on the premises; and if he goes to such places he puts himself outside of the protection of his invitation and the railroad is not responsible for injuries he may receive unless it inflicts them purposely or wantonly.—Price v. Railway Co., 348.

Trespasser—Notice—Damage.

Where appellant notified the appellee that appellee's wall was upon appellant's ground at the time appellee was preparing to rebuild the fallen wall, the appellee being a

trespasser upon appellant's ground, no damages could be recovered for the rebuilding of the wall.—Chavez v. Torlina, 53.

Trial—Re-Empaneling Jury.

This last includes not only the retaking of any testimony but the re-empaneling and the re-swearing of the jury.—U. S. v. Aurandt, 292.

Trust, Deed of—Corporation—Demand.

Under articles of deed of trust the defaulting corporation should have, first, a written demand made upon them to cure any default, and then, a period of sixty days thereafter in which to devise ways and means of overcoming such default.—Buddecke v. Trust Co., 634.

Trust, Deed of—Foreclosure.

In the deed of trust there were no restrictions upon the rights and powers of the trustee to institute proceedings to foreclose such deed of trust.—Buddecke v. Trust Co., 634.

Verdict—Agency.

Record examined and verdict of the jury as to question of agency sustained.—Duncan v. Holder et al, 323.

Verdict—Appeal.

An appellate court will not disturb the verdict of the jury or the findings of fact made by a trial court on the ground that it is against the preponderance of evidence.—Jenkins v. Grant Co., 281.

The present record falls within that rule stated in Candelaria v. Miera, 13 N. M. 360, as to the finality of finding in the trial court when sustained by substantive evidence.—Gregory v. Cassan, 496.

This court will not on appeal disturb the verdict of a jury when supported by any substantial evidence. Candelaria v. Miera, 13 N. M. 361.—Wirt v. Kutz, 500.

Verdict—Duty of Court to Direct.

It is the duty of the court to direct a verdict where in the exercise of a sound judicial discretion it would be called upon to set aside a contrary verdict. Gildersleeve v. Atkinson, 6 N. M. 250, followed.—Childers v. Hubbell, 450.

Verdict—Evidence—Error.

An assignment of error that a verdict is against the weight of the evidence will not be considered on appeal.

Cunningham v. Springer, 13 N. M. 259.—Melini v. Freige, 455.

Verdict—Evidence—Error—Jury.

Under the general assignment of error that the verdict of the jury and the judgment thereon are contrary to the evidence in the case, the only question that can be considered by the court is whether there is any substantial evidence to support the verdict. Candelaria v. Miera, 13 N. M. 360.—King v. Tabor, 488.

Verdict—Excessive.

When a verdict is so excessive as to show that it was the result of passion and prejudice it must be set aside.—Corcoran v. Traction Co., 9.

Verdict, Excessive—Jury.

Verdict of $7,500 for plaintiff not excessive. Quaere? It was for the jury alone to choose between the testimony of the plaintiff and that of the physician who testified for the defendant.—Schmidt v. Brewery Co., 232.

Verdict—Finding of Fact.

Ordinarily, neither the verdict of a jury nor the finding of fact of a trial court will be disturbed by the Supreme Court when they are supported by any substantial evidence.—Territory v. Sais, 171.

Verdict—Judgment—Variance.

Error alleged in variance between verdict and judgment; the record in this case examined and held that the judgment was correct.—Wirt v. Kutz, 500.

Verdict, Substantial Evidence to Support.

Unless it can be said that there is no substantial evidence to support it, a verdict will not be disturbed.—Corcoran v. Traction Co., 9.

Witness—Conviction.

When conviction of a criminal offense is shown, in accordance with the provisions of Sec. 3025, C. L. 1897, to affect the credit of a witness, such conviction must stand as a fact not open to explanation by the witness.—Territory v. Garcia, 538.

Witness—Memoranda to Revive Memory.

It is not the law that a merchant must be able to recall from memory every article in his store and its value before he can recover damages for loss thereof by reason of some one's wrongful act. Any writing may under such

circumstances, be used for stimulating and reviving the memory of a witness, even though it was not made by witness himself and though it may be only a copy of the original writing. The memoranda may be read to the jury if the witness knows them to be correct, even though the writing itself cannot bring to his mind independently the separate items.—Palma et al, v. Weinman et al, 68.

Witness—Mileage.

Allowance of mileage for distance necessarily traveled in the Territory by witness who voluntarily appeared, was proper.—Duncan v. Holder, 323.

Witness—Testimony—Subpoena.

In laying a foundation for the introduction of the record of former testimony given by a witness claimed to be absent from the Territory, declarations made by the witness as to his intention to leave the Territory permanently and the return of the sheriff of "not found" endorsed on the subpoena issued for the witness, are each of them competent to prove that the witness was not available.—Territory v. Ayer, 581.

Words and Phrases—Clerk.

The word "clerk" as used in the statute implies more than a mere amanuensis. It means one having knowledge of the business so as to be able of his own knowledge to testify as to it.—Radcliffe v. Chaves, 258.

REPORTS OF CASES

DETERMINED IN

THE SUPREME COURT

OF THE

TERRITORY OF NEW MEXICO.

JANUARY TERM, 1909.

[No. 1192, January 12, 1909.]

FIRST NATIONAL BANK OF TUCUMCARI, Appellee, v. L. E. SPEED, Appellant.

SYLLABUS (BY THE COURT.)

The refusal of the trial court to permit an amendment of the defendant's answer, under the circumstances shown by the record, was not an abuse of discretion.

Appeal from the District Court for Quay County before EDWARD A. MANN, Associate Justice. Affirmed.

J. E. WHARTON for Appellant.

The real limitation to the power of amending pleadings seems to be that the amendment shall not bring a new cause of action. Reeder v. Sayre, 70 N. Y. 190; Scovil v. Glassner, 79 Mo. 449; Stevens v. Brooks, 23 Wis. 196; Cook v. Crosian, 36 Pac. 532; Jenne v. Burt, 121 Ind. 275, 22 N. E. 276.

The code makes it the duty of the court to permit amendments necessary to conform the pleadings to the proof and to refuse such amendment after proof offered of the chattel mortgage of defendant below, was error. Bliss Code Pleadings, 3 ed. sec. 430, 440; Robinson v. English, 34 Pa. St. 324; Pa. Salt Mfg. Co. v. Neal, 54 Pa. St. 9; Carpenter v. Small, 35 Cal. 346; Griffin v. Cohen, 8 How. Pr. 353; Rogers v. Rathbun, 8 How. Pr. 456; Thompson v. Manford, 11 How. Pr. 273; Slinger v. Davis, 30 Cal.

318; McMinn v. O'Connor, 27 Cal. 238; Halsley v. Black, 28 N. Y. 438; Bedford v. Forhum, 30 N. Y. 453; Rose v. Bell, 38 Barb. 25; Denman v. Prince, 40 Barb. 213; Valencia v. Conch, 32 Cal. 339; Walsh v. Washington Market Ins. Co., 32 N. Y. 427: Gates v. Alden, 41 Barb. 172; Van Buskirk v. Stow, 42 Barb. 9; Dunnigan v. Crummey, 44 Barb. 528; Hollister v. Livingstone, 9 How. Pr. 140; Cork v. Croisan, Ore., 36 Pac. 532; Flanders v. Cottrell, 36 Wis. 564; Chicago & G. S. Ry. Co. v. Jones, 103 Ind. 386, 6 N. E. 8; Compiled Laws 1897, Code of Civil Procedure, subsec. 82.

M. C. MECHEM and HAWKINS & FRANKLIN for Appellee.

There is nothing in the statutes of this Territory forbidding an officer or stockholder of a corporation to whom a conveyance is made from taking the acknowledgment to the same. 1 Cyc. 557; 1 A. & E. Enc. of Law, 2 ed. 489; Elliott et al v. The Lessee of Piersol, et al, 1 Pet. 328, 7 L. ed. 164; Bank v. Conway, 17 Fed. Cas. No. 1203; Eoree v. Abner, et al, 57 Fed. (C. C. A.) 159; Sackett v. McCaffrey, 131 Fed. C. C. A. 219; Keene Guaranty Savings Bank v. Lawrence, 73 Pac. 680, 32 Wash. 572; People v. Bartels, 138 Ill. 322, 27 N. E. 1091; Gibson v. Norway Sav. Bk., 69 Me. 582; Stevenson v. Brasher, 90 Ky. 23, 13 S. W. 242; Read v. Toledo Loan Co., 68 Ohio St 280, 62 L. R. A. 790; Morrow v. Cole, 58 N. J. Eq. 203, 42 Atl. 673; Cooper v. Hamilton, 97 Tenn. 285, 56 Am. St. 795; Genest v. Las Vegas Masonic Building Assn., 11 N. M. 251.

"An assignment of error which is directed against all the findings of fact made by the trial court is too general and will be disregarded." The Rio Grande Dam & Irrigation Co., 10 N. M. 617; Mogollon Gold & Copper Co. v. Stout, 91 Pac. 724; Territory v. Cordova, 11 N. M. 367; Weber v. Armijo, 11 N. M. 354; Territory v. Guillon, 11 N. M. 194; Cevada v. Miera, 10 N. M. 62; 2 Cyc. 996.

"The action of the trial court in amending or refusing to amend the pleadings is a matter within its sound dis-

cretion, and, in the absence of a clear abuse thereof, not reviewable on appeal." 3 Cyc. 327 and cases cited; Compiled Laws 1897, sec. 2983, sub-sec. 307; Laws of 1907, chap. 107; Compiled Laws 1897, sec. 85, sub-sec. 82; Home Savings Bank v. Woodruff, 94 Pac. 957; Puritan Mfg. Co. v. Toti & Gradi, 94 Pac. 1022; Sanchez v. Candelaria, 5 N. M. 400, 23 Pac. 239; Gormley et al v. Bunyan et al, 138 U. S. 625, 34 L. ed. 1086; Mandeville v. Wilson, 9 U. S., 5 Cranch 15, 17 (3:23:24); Chapman v. Barney, 129 U. S. 677 (32:800); Sawyer v. Piper, 189 U. S. 155, 47 L. ed. 758; Mexican Central R. Co. v. Pinkney, 149 U. S. 194, 37 L. ed. 699; Union Cent. Life Insurance Co. v. Philipps, 102 Fed. C. C. A. 19; Code Ga., sec. 5106; Rev. St. U. S., sec. 954; Compiled Laws 1897, p. 702, sub-sec. 96; Citizens St. Ry. Co. v. Heath, 62 N. E. 107, 29 Ind. App. 395; Stewart v. Stewart, 62 N. E. 1023, 28 Ind. App. 378; People v. New York Cent. Ry. Co., 29 N. Y. 418; Sharon v. Sharon, 16 Pac. 3-6, 75 Cal. 1; 1 Words and Phrases 49.

The granting or denial of a motion for a new trial rests in the sound discretion of the trial court and is not alone assignable as error in the courts of this Territory or in those of the United States. Schofield v. Territory, ex rel., etc., 9 N. M. 526; Coleman v. Bell, 4 N. M.; Buntz v. Lucero, 7 N. M. 220.

If under any conceivable theory of the evidence in the absence of a specific finding of fact the judgment of the trial court can be sustained, then it is the duty of the appellate court to sustain it. 2 Enc. P. & P. 428 and cases cited.

STATEMENT OF FACTS

This case is here by appeal from the Sixth District Court for Quay County, where it was tried by Associate Justice Edward A. Mann, without a jury. The action was brought by the plaintiff, here the appellee, to foreclose a chattel mortgage on certain cattle belonging to Cabe Adams; and L. E. Speed, here the appellant, was made defendant because of the fact that he claimed a prior lien on the same cattle through a mortgage from Adams,

but a copy of the mortgage was not filed with the answer. Later the defendant filed an amended answer setting out the same claim of a prior lien, but again failed to file or set out a copy of the mortgage under which he claimed. The case was sent to a referee to take the proofs, and the defendant offered in evidence a certified copy of his mortgage, which was not admitted. He then moved the court for leave to file an amended answer with a copy of the mortgage under which he claimed, which motion was denied, and the judgment was entered on the pleadings and the testimony taken by the referee.

OPINION OF THE COURT.

ABBOTT, J—(After stating the facts.)—The only question discussed in the brief for the appellant is that raised by the refusal of the trial court to allow him to amend his answer as above stated, to conform to sub-sec. 307 of Sec. 2685, C. L. of 1897, (See chapter 107, Laws of 1907) which provides that: "When an instrument of writing upon which the action or defense is founded is referred to in the pleadings, the original or a copy thereof shall be filed with the pleading, if within the power or control of the party wishing to use the same, and if such original or a copy thereof be not filed as herein required or a sufficient reason given for failure to do so, such instrument of writing shall not be admitted in evidence upon the trial." While it is true, as the appellant claims, that the power of the courts to allow amendments is very broad it is also true that they are allowed a very broad dicretion in exercising that power. The provision in sub-sec. 82, sec. 2685, Code of Civil Procedure, C. L. 1897, that the court may "at any time before final judgment in furtherance of justice, amend any pleading by conforming the pleading to the facts proved," puts on the trial court the duty of determining whether an amendment proposed will, on the whole, be "in furtherance of justice," not alone to the party proposing the amendment but to his opponent as well, who may, through an amendment, suffer injustice. In the case at bar the answer of the defendant had been once amended, and the case sent to a

referee and heard by him before the amendment in question was proposed. The plaintiff had the right to rely on the pleadings as they stood in the preparation of its case for trial, and on the protection of the court against injury from eleventh hour amendments.

There was, moreover, evidence tending to establish at least an equitable estoppel in favor of the plaintiff against the claim of the defendant under the mortgage which he sought to introduce through amendment. Under such circumstances, we cannot say it was an abuse of discretion for the trial court to refuse to permit the amendment. 3 Cyc. L. & P. 327, and cases cited; Gormley et al. v. Bunyan, et al., 138 U. S. 625; Sawyer v. Piper, 189 U. S. 155. The rule laid down by the Supreme Court of the United States has, as a matter of course been followed by this court and recently affirmed in Home Savings Bank v. Woodruff, 94 Pac. Rep. 957, and Puritan Mfg. Co. v. Toti, et al., 94 Pac. 1022.

We have assumed that the trial court could have granted the defendant's motion to amend in the exercise of its power to permit amendments of pleadings, but it has been held in relation to a statute provision similar to the one under consideration, that such a paper as the defendant desired to file is not a part of the pleadings. As that view of the matter is not treated of in the briefs on which this case was submitted, and is of such importance that this court should not pass on it without full discussion and consideration, we go no further than to say that the reasoning in favor of it appears to have much force, and, if it is sound, it may follow that the defendant's motion could not have been rightfully granted. Han. & St. Jo. R. R. Co. v. Knudson, 62 Mo. 569, and cases cited; Chambers v. Carthel, et al., 85 Mo. 374.

The judgment of the District Court is affirmed.

POPE, J.—(Concurring)—I concur upon the ground that the appellant showed "no sufficient reason" or any reason at all for his failure to file with his pleading a copy of the mortgage relied upon as required by C. L. Sec. 2685.

(No. 1201, January 12, 1909.)

IN THE MATTER OF THE CHARGES AGAINST W. J. HITTSON, MEMBER OF THE BAR OF THIS COURT.

SYLLABUS.

Respondent wrote his client, who was in jail charged with murder, requesting him to sign notes to pay for respondent's services, stating that the client had a pretty hard case, but if the client would do as respondent said, he would bring him through, but money would have to be raised or the notes signed. The client did not send the notes, and employed other counsel, and respondent, hearing of it, wrote him as follows: "If you go to trial without me in your case, I will bet you, you hang. Will bet you the best suit of clothes made. You had better get busy." Held, that respondent's conduct was highly improper, warranting his suspension from practice for two years.

JAMES M. HERVEY, Attorney General, GEORGE S. KLOCK and A. B. RENEHAN, for the Relator.

T. B. CATRON for the Respondent.

No Briefs.

OPINION OF THE COURT.

ABBOTT, J.—This proceeding is based on certain charges filed with the clerk of this court, February 27, 1907, by the Attorney General of the Territory and the Committee on Grievances of the Bar Association. At the August session of the January 1908 term a hearing was given by this court at which evidence was taken and the arguments of counsel heard. At the close of the evidence in support of the charges the court dismissed the first and second charges on the ground that there was not sufficient evidence to sustain them. The third charge is based on two letters written by the respondent to one Cabe Adams, while he was confined in jail charged with the murder of Warren B. Middleton. It appeared from the evidence that Adams had a ranch about 18 miles from Tucumcari where Hittson was practicing law, and that he had been employed

as Adams' attorney in certain matters. He had also become surety on a bond for Adams. On or about May 1, 1905, he heard that Adams had taken a train with the intention of going to Montana to remain. He telegraphed the sheriff at Dalhart, the road Adams had taken to stop him, which the sheriff did. The respondent as he testified went the next day to Adams' ranch to learn whether he had property there sufficient to make him secure on his obligation for Adams. Being satisfied on that point he telegraphed the sheriff to allow Adams to go on his way, which he did. While at the ranch or in the neighborhood the respondent said he had a talk with Mrs. Adams about getting a divorce from her husband, but did not come to anything definite about it. On May 12th, however, he said she came to his office in Tucumcari and executed an application for a divorce. He wrote Adams asking him to accept service in the divorce proceeding. Adams wrote him two letters on the subject, the gist of them being that he had no objection to the divorce if his wife wanted it provided she made "no false accusations" against him. At about the same time the respondent began proceedings to obtain a divorce from Warren B. Middleton, a man living in the vicinity of Tucumcari, and evidently acting in concert with Mrs. Adams. The respondent in reply to one of Adams' letters wrote him: "And as for her, she never was here but once, and I never talked to her about the divorce in my life. When Middleton told me she wanted a divorce, I just made up the papers and sent them to her for her signature and she signed them." This statement his testimony in court squarely contradicts. Before the decrees for the divorces were actually signed, but as the respondent said through some misunderstanding, and with the belief on his part that they had been signed, he notified Middleton and Mrs. Adams that the divorces had been granted and they were married the same day. Not long afterwards Adams returned from Montana, killed Middleton by shooting him, was arrested, held for trial on a charge of murder, and while in jail awaiting trial had correspondence with the respondent in relation to defending him and procured

the payment of $50.00 to him, which the respondent said he regarded as a retainer. He sent Adams notes to be executed in further payment for his services as appears from the following letter:

"Commercial Law Collection solicited
a specialty Money to Loan

W. J. HITTSON
Attorney at Law.

Tucumcari, N. M., Dec. 8th, 1905.

Mr. Cabe Adams,
Raton, N. M.

Dear Friend:

I received your letter of the 5th today and I am answering it I sent you the notes the other day and have not heard from you since I sent you two notes by Ridley, and I want you to have them signed at once and return them to me for Cabe you have got a pretty hard case and it will take some money to beat it but if you will do as I tell you I will beat it, I know more about that case than any one and I will bring you thru but you must raise me some money or fix up those notes as everything I do costs me money, so get them signed at once and return them to me as soon as possible. I am.

Yours truly, W. J. HITTSON."

Adams did not send him the notes and employed other counsel, which fact was made known to the respondent who thereupon sent Adams this letter:

"A. A. Blankenship, Pres. M. H. Smith, Vice-Pres.
W. J. Hittson, Secy. and Treas.
Attorney at Law.
Money to Loan.
THE AMERICAN BLAB & RUBBER CO.
Incorporated for $200,000.
John J. Pace, Business Manager.

Tucumcari, N. M. Dec. 28th, 1905.

Cabe Adams:

If you go to trial without me in your case I will bet you you hang Will bet you the best suit of clothes made. You had better get busy. W. J. HITTSON."

That the last letter especially was under such circumstances highly improper and unprofessional there can, we think, be no question with honorable lawyers. In view of the respondent's youth and in the hope that he will profit by this experience to adopt and conform to a higher standard of professional conduct in the future, we refrain from disbarring him, but suspend him from practice in this court and in the several District Courts of the Territory for the period of two years, and, it is so ordered.

Mann, A. J., did not take part in this case.

[No. 1203, January 12, 1909.]

OLIVE CORCORAN, Appellee, v. ALBUQUERQUE TRACTION COMPANY, Appellant.

SYLLABUS.

1. In an action by a passenger for injuries against a street railway, evidence held sufficient to show that defendant's negligence was the proximate cause of the accident.

2. Unless it can be said that there is no substantial evidence to support it, a verdict will not be disturbed.

3. When a condition or quality is once shown to exist, the same will be presumed to continue until the contrary appears. Evidence of the condition of the step of the street car and the grating at the back of the step seven months prior to the accident admissible in an action against the street railway for injury to passenger alighting from a car.

4. A condition soon after an accident may sometime be shown where the circumstances are such as to justify the inference that the condition was the same as at the time of the injury.

5. When a verdict is so excessive as to show that it was the result of passion and prejudice it must be set aside.

6. It is fatal to appellant's objection to alleged improper remarks of counsel where the record fails to disclose any objection at the time of the alleged improper remarks.

7. Where special finding of jury shows that they were not misled by erroneous instruction the error was harmless. The charge in the complaint was that by reason of both the

starting of the car and the defective step and riser the appellee was thrown to the platform and her foot inserted in an opening in the defective riser, thereby receiving the injury, and the proofs were submitted in support of this theory and no other. The instruction, however, authorized a verdict for appellee in case of injury caused either by the starting of the car or by the defective step and riser. This instruction was clearly erroneous.

Appeal from the District Court for the County of Bernalillo before IRA A. ABBOTT, Associate Justice. Affirmed.

ALONZO B. MCMILLEN and THOMAS N. WILKERSON for Appellant.

If the evidence is so meagre as not in law to justify a verdict for the party upon whom the burden of proof rests, the court would be in the line of duty to so instruct the jury. Tex. & Pac. Ry. Co. v. Gentry, 163 U. S. 365; Commissioners v. Clark, 94 U. S. 284; Montclaire v. Dana, 107 U. S. 162; Marshal v. Hubbard, 117 U. S. 419; Gildersleeve v. Atkinson, 6 N. M. 266; Rosen v. U. S., 161 U. S. 43; Sparf v. U. S., 156 U. S. 100; Texas v. Gentry, 163 U. S. 365; Sou. Pac. Co. v. Johnson, 69 Fed. 265; Schofield v. Railroad Co., 114 U. S. 619; R. R. Co. v. Houston, 95 U. S. 697.

Incompetent or irrelevant evidence, though admitted without objection, will not justify the giving of instructions based thereon. Thompson v. Bowie, 4 Wall. 471; Hughes on Instructions to Juries, sec. 84 and cases cited, note 21, p. 75; Church v. Hubbart, 2 Cranch, star page 239; Michigan Bank v. Eldred, 9 Wall. 544-553; Ward v. U. S., 14 Wall. 28; Indianapolis, etc., R. R. Co. v. Horst, 93 U. S. 291-299; U. S. v. Breitling, 20 Howard 252.

It devolved upon plaintiff to plead and prove that the alleged accident was caused by defendant's negligence, and the burden of proof was on her to establish such negligence.

It is error for the court to refuse to instruct the jury to disregard improper assertions of counsel on the argument. Commercial Fire Insurance Co. v. Allen, 80 Ala. 571, 1 South, 202; Chicago, etc., Ry. Co. v. Brogonier,

13 Ill. Ap. 467; Chicago, etc., Ry. Co. v. Pelligreen, 59 Ill. Ap. 558; Wheeler & Wilson Mfg. Co. v. Sterrett, 94 Ia. 158, 62 N. W. 675; Elliott on Appellate Procedure, sec. 672 and cases cited, note 2 on page 622; Ill. Cent. R. R. Co. v. Borders, 61 Ill. App. 55; Conway v. Shelton, 3 Ind. 334; Blizzard v. Applegate, 77 Ind. 716; State v. McCartney, 65 Ia. 522, 22 N. W. 658.

"When a verdict is so flagrantly excessive as to be only accounted for on the grounds of prejudice, passion, or misconception, a remittitur by the trial court as a condition of entering judgment does not remove the prejudice, passion, or misconception. Pittsburg, etc., Ry. Co. v. Story, 82 Ill. App. 539; Nicholson v. O'Donald, 79 Ill. App. 195; Am. Car. Co. v. Clark, 32 Ind. App. 644, 70 N. T. 828; Louisville, etc., Ry. Co. v. O'Mara, 25 Ky. L. R. 819, 76 S W. 402; Johnson v. Heath, Neb., 98 N. W. 832; Rees v. Rasmussen, Neb. 98 N. W. 830; City of La Salle v. Wright, 56 Ill. 294.

KLOCK & OWEN for Appellee.

Neither the verdict of a jury nor the findings of fact of a court will be disturbed on appeal when supported by substantial evidence. Candelaria v. Miera, N. M. 1906, 84 Pac. 1020; Kitchen v. Schuster, N. M. 1907, 89 Pac. 261; Stringfellow & Tannehill v. Petty, N. M. 1907, 89 Pac. 258; Clark v. Apex Gold Mining Co., N. M. 1906, 85 Pac. 968; Chicago and Northwestern Ry. Co. v. Ohle, 117 U. S. 129.

No fixed rule can be prescribed as to the time or the condition within which a prior or subsequent existence is evidential. When the existence of an object, condition, quality or tendency at a given time is in issue the prior existence of it is in human experience some indication of its probable persistence or continuance at a later period. I Wigmore on Evidence, sec. 437, pp. 514, 517; Hunt v. Dubuque, 96 Iowa 314, 65 N. W. 319; Dean v. Shoran, 72 Conn. 667, 45 Atl. 963; Birmingham Ur. Co. v. Alexander, 93 Ala. 133, 136, 9 So. 525; Stewart v. Evarts, 76 Wis. 35, 44 N. W. 1092, 20 Am. St. Rep. 20; 2 Enc.

of Ev. 924; Kingman v. Boston, Lynn Ry. Co., 181 Mass. 387.

Negligence may be charged in general terms and such general allegation of negligence is good as against a general demurrer. Louisville Ry. Co. v. Palmer, 13 Ind. App. 161; Pittsburg Ry. Co. v. Jones, 86 Ind. 496; Oldfield v. New York & Harlem R. R. Co., 14 N. Y. 310; Taylor v. Felson, 63 Ill. App. 624; Knox Co. v. Montgomery, 109 Ind. 69; Pa. Co. v. Marion, 104 Ind. 239; Dyer v. Pacific Ry. Co., 34 Mo. 127; San Antonio St. Ry. Co. v. Cailloutte, 79 Tex. 341; Clark v. Dyer, 81 Tex. 339; Chicago and W. I. Ry. Co. v. Bengenheimer, 116 Ill. 226, 4 N. E. 840; Enc. of P. & P. vol. 11, p. 181; Indianopolis & St. Louis Ry. Co. v. Horst, 93 U. S. 291; St. Louis and S. F. Ry. Co. v. Beets, Kans. 1907, 89 Pac. 683; Mobile and Montgomery R. R. Co. v. Jurey, 11 U. S. 584; Hartranft v. Langfelt, 125 U. S. 128.

An Appellate Court will not set aside a verdict because of remarks of counsel in addressing the jury unless objection be made at the time such remarks are uttered. Crumpton v. U. S., 138 U. S. 361; U. S. v. Donlap, 165 U. S. 486.

The verdict was not excessive. Vicksburg & Meridian R. R. Co. v. Putnam, 118 U. S. 545, 554.

OPINION OF THE COURT.

PARKER, J.—Appellee brought an action for damages for personal injuries received by reason of the alleged negligence of appellant and the jury rendered a verdict for Two Thousand Dollars damages. They also made special findings as to whether the street car moved while appellee was in the act of boarding it and as to the number of the car in question. On motion for a new trial the court below compelled a remittitur down to Eleven Hundred Dollars damages and upon remittitur being filed overruled the motion and expressly refused to find the verdict for Two Thousand Dollars damages was the result of passion and prejudice on the part of the jury, holding, simply that the verdict was excessive for the injury suffered. Ap-

pellant presents several propositions which will be examined.

1. The first proposition is that there was not evidence to sustain the verdict. In support of this contention it is first urged that admitting the testimony of appellee to be true, she fails to show that the accident was the result of appellant's negligence. It is true that appellee does not, in so many words, say that her fall was caused by the starting of the car while she was in the act of stepping on, but, she does say "I then turned and raised my foot to step on the platform or the step and right in the act the car moved. And I stepped right into the back of the step and fell on to the platform all at the same time; and my right foot was fastened in the back of the step and twisted over that way (indicating), and my whole weight went down on my foot." Here a sufficient cause is
1 placed in juxtaposition with a consistent result and a legitimate inference may be drawn that the cause produced the result. Libby v. Banks, 209 Ill. 109; 29 Cyc. 590.

Another contention is made in support of this proposition which is to the effect that the evidence for the appellee is so overwhelmed by the evidence for the appellant that it is not sufficient to support the verdict. We do not deem it necessary to set out a resume of the proofs in this opinion. We have carefully examined the record, and, while it may be that a conclusion might be reached from the
2 evidence differing from that reached by the jury, if it were within our province to draw such inference, still it cannot be said that there is no substantial evidence to support the verdict, and, therefore, it cannot be disturbed here. Candelaria v. Miera, 13 N. M. 360, 84 Pac. 1021; Clark v. Mining Co., 13 N. M. 416, 85 Pac. 968; Stringfellow & Tannehill v. Petty, 89 Pac. 258.

2. The next proposition advanced is that certain evidence was improperly admitted over appellant's objection. A witness was permitted to testify to the condition of the step of car No. 3 in October, 1904, seven months prior to the accident and to the condition of the grating

above and back of the step corresponding to what is known by mechanics as a "riser" at the same date. Objection was made to the testimony in regard to the grate or riser on the ground that negligence in using a defective grate was not within the pleadings. An examination of the complaint, however, clearly discloses the charge that the injury resulted from two causes, viz: The starting of the car and the defective grate. This objection, therefore, was not well founded. It was further objected that the testimony was directed to a condition too remote from the accident, the question being as to what the condition was at the very time of the accident. This, of course, is
3 the question, but, the evidence of such condition is not necessarily confined to such exact time. When a condition or quality is once shown to exist, the same will be presumed to continue until the contrary appears. 1 Wig. Evidence 437. This principle is often applied in a variety of circumstances. Lazarus v. Phelps, 156 U. S. 205; Leport v. Todd, 32 N. J. L. 138; Kidder v. Stevens, 60 Cal. 419; Lind v. Lind, 53 Minn. 51; Anderson v. Watt, 138 U. S. 706.

And a condition soon after an accident may sometimes be shown, as was also done in this case, where the circumstances are such as to justify the inference that the con-
4 dition was the same at the time of the injury. Slack v. Harris, 101 Ill. Ap. 537; Kingman v. R. R. Co., 181 Mass. 387.

3. The next proposition is that the verdict was so excessive as to show that it was the result of passion and prejudice, and, consequently, the whole verdict must be
5 set aside. Of course, the doctrine is well recognized, but its applicability to this case is doubted. The trial court expressly declined to so find, but simply found the verdict to be excessive. We have examined the record as to the character of the injuries received and their extent and duration as shown by the testimony, and, are unable to say that they were so trivial as to show that the jury gave then no candid consideration but were simply led to their verdict by passion and prejudice. The plain-

tiff suffered an injury and the jury simply overestimated that injury as the trial court found.

4. The next proposition is as to certain improper remarks by counsel for appellee to the jury in disparagement of the witnesses for appellant. We do not understand from the record whether the trial court found that the remarks were in fact made, and his refusal of instructions on the subject do not disclose such finding; but, aside from the question of fact involved, the record fails to disclose
6 any objection at the time of the alleged improper remarks. This is fatal to appellant's objection. Crumpton v. U. S., 138 U. S. 361; Thomp. Trials, sec. 962; Learned v. Hall, 136 Mass. 417; Powers v. Mitchell, 77 Me. 361; Dowell v. Wilcox, 64 Ia., 721, 724; State v. Degonia, 69 Mo. 486; Barbour v. McKee, 7 Mo. Ap. 587.

5. Objections are made to giving and refusing of instructions which will be considered together. It is first objected that the instruction of the court is based upon evidence as to the condition of the car which it is alleged was incompetent. This objection cannot be sustained as we have already seen the evidence was competent and the instruction based upon it was, therefore, proper.

It is further objected that the court refused instructions requested by appellant warning the jury to disregard any remarks of counsel not authorized by the evidence. The instructions asked were entirely proper in form but the court had already directed the jury in this regard, and, as we think, with sufficient clearness.

The principal objection to the instructions arises out of the giving by the court of its own motion the following instruction:

"If you believe from a preponderance of the evidence that the plaintiff got upon a car of the defendant company which it was running in the course of its business as a common carrier of such persons as might choose to become passengers on it, and while upon said car was injured through the negligence of the defendant, its agents or servants, either in their putting the car in motion as the

plaintiff was in the act of getting upon it, or in providing and using a car in its said business which was in the defective condition alleged by the plaintiff in her complaint, provided that such defective condition was the cause of the injury to the plaintiff, and that she did not contribute to said injury through her own negligence, you should find the issues for the plaintiff.

This instruction is both without the pleadings and the proofs. The charge in the complaint is that by reason of both the starting of the car and the defective step and riser the appellee was thrown to the platform and her foot inserted in an opening in the defective riser thereby receiving the injury, and the proofs were submitted in support of this theory and of no other. The instruction, however, authorizes a verdict for appellee in case of injury caused either by the starting of the car or by the defective step and riser. In this it was clearly erroneous but the question remains whether it was a harmless error. The jury in addition to the general verdict made a special finding of fact that the car which appellee attempted to board moved while she was in the act of boarding it and before she fell upon the platform. They thus clearly showed that they found their verdict upon the issues presented by the pleadings and supported by the proofs and were in no way mislead by the erroneous instruction. Counsel for appellee seek to justify the instruction in the form given by reason of some general allegations in the
7 complaint, but it is not necessary to determine whether the same can be properly done. The error, if it was an error, was a harmless one and appellant cannot complain.

This disposes of all of the assignments of error, and, for the reasons stated, the judgment of the court below will be affirmed and, it is so ordered.

[No. 1221, January 12, 1909.]

MICHAEL A. ROSS, Appellee, v. CLARK M. CARR, EUGENE A. CARR, and THE ZUNI LUMBER AND TRADING COMPANY, Appellants.

SYLLABUS (BY THE COURT).

1. As the sixth paragraph of the amended complaint sets up the making of a written contract; that such contract was extended and that the defendants authorized the plaintiff to continue his efforts and negotiations for a sale of the land, and that he did so continue them with the result that a sale was made, it sets up a cause of action, and the court properly overruled the demurrer to this paragraph of the amended complaint.

2. The court properly denied the motion made by the defendants that the plaintiff elect on which count of the amended complaint he would go to trial, for both counts set up but one cause of action, varying only the form of the statement of the action, so as to have them meet any state of proofs; and, when a plaintiff is in real doubt as to his relief, he has the right to set forth his cause of action in several counts.

3. There was no error in the refusal of the court to grant a continuance of the case when the plaintiff amended his complaint by increasing the ab damnum clause. The granting or a continuance rests in the sound discretion of the court, and in the case at bar that discretion was not abused, and in any event the defendants were not damaged, as the jury only returned a verdict for the amount of damages asked by plaintiff, before the ab damnum clause was increased.

4. The contract with Ross for the sale of the lands being a joint contract, a joint judgment against all of the defendants was proper.

5. There was no error in the admission by the court of evidence as to the transactions with Clark M. Carr, prior to December 8th, 1905, for the amended complaint sets out that in June, 1904, plaintiff was employed by defendants to procure purchasers for the lands, and that such work was continued until April, 1906, when the lands were sold, for the evi-

dence objected to goes to prove the transactions between June, 1904, and December 8th, 1905.

6. No error was committed by the court in excluding the admissions of Wirtz and the deposition of Gordon, as to Ross being entitled to a share of his (Wirtz) commission, for as Ross was a middle-man and did not act as a broker, he was entitled to receive compensation from both the buyer and the seller.

7. The court properly excluded evidence that plaintiff had entered into an agreement with outside parties who had supplied him with money, to give them a part of the commission which he might receive for services performed in the sale of the lands.

8. There was no error committed by the court in excluding that part of the evidence of E. L. Medler, as to conversations he had had with Ross, concerning the timber contract of the Zuñi Mountain Lumber Company, as the substance of the excluded testimony, was that Ross had never spoken to him (Medler) of the sale or assignment of the timber contract to Wirtz or others.

Appeal from the District Court for Bernalillo County before IRA A. ABBOTT, Associate Justice. Affirmed.

E. L. MEDLER, for Appellants.

"An offer to sell lands is personal to the proposed purchaser. No estate is vested in him by the offer, and therefore, his heirs have no right to accept the offer after his death." 29 A. & E. Enc. Law, 2 ed. 595; Sutherland v. Parkins, 75 Ill. 342; Man v. Show, 51 Fed. 862; Neither is the right assignable. 29 Enc. Law, 2 ed. 595; 1 Warville on Vendors 187; Duncan v. Beard, 2 Nott & McC. 400, 404, cited in 1 Words & Phrases 584; Lechmere Bank v. Boynton, et als, 11 Cush. 379, 380.

"The practice of pleading a double statement of the case, so as to meet the exigencies of the proof is not permitted under the code, as a general rule." Bliss on Code Plead., sec. 118; Pom. Rem. & Rem. Rights, sec. 576; Spalding v. Saltiel, 18 Colo. 86, 31 Pac. 586; Cramer

v. Oppenstein, 16 Colo. 504, 27 Pac. 716; Sturges et al v. Burton et al, 8 Ohio St. 218; Fergusson v. Gilbert, 16 Ohio State 88; Stockridge Iron Co. v. Mellen, 5 How. Pr. 439; Churchill v. Churchill, 9 How. Pr. 553; Dickens v. N. Y. Cent. R. R., 13 How. Pr. 228; Lackey v. Vanderbilt, 10 How. Pr. 161; Dunning v. Thomas, 11 How. Pr. 281; Fern v. Vanderbilt, 13 Abb. Pr. 72; Secor v. Sturges, 16 N. Y. 558.

"The broker, in order to be entitled to his commissions, must have been the procuring cause of the transaction." 4 Enc. Law, 2 ed. 977; Loud v. Hale, 106 Mass. 404; Zeimer v. Antisell, 75 Cal. 509; Doonon v. Ives, 73 Ga. 295; Neufeld v. Oren, 60 Ill. Ap. 350; Sievers v. Griffin, 14 Id. 63; Platt v. John, 9 Indiana App. 58; Latshaw v. Moore, 50 Kan. 234; Tombs v. Alexander, 101 Mass. 255, 3 Am. Rep. 349; Chilton v. Butler, 1 ed. Smith, N. Y. 150; Moses v. Bierling, 31 N. Y. 462; Smith v. Seattle, etc. R. Co., 72 Hun. N. Y. 202; Sussdorf v. Schmidt, 55 N. Y. 319; Wylie v. Marine Bank, 61 N. Y. 415; Earp. v. Cummins, 54 Pa. St. 394, 93 Am. Dec. 718; Keys v. Johnson, 68 Pa. St. 42; Pratt v. Bank, 12 Phila., Pa. 378; Brown v. Shelton, 23 S. W. Rep. Tex. 483; McKnight v. Thayer, 48 N. Y. 620; Lloyd v. Matthews, 51 N. Y. 132; Markus v. Kennedy, 19 Misc. 517; Wylie v. Marine Bank, 61 N. Y. 416; Armstrong v. Wann, 29 Minn. 126; Hartley v. Anderson, 150 Pa. 391; Keys v. Johnson, 68 Pa. 42; Carson v. Baker, 2 Colo. Ap. 248; 2 Parsons on Contracts, sec. 495.

Where it is in issue as to what an agreement actually is, a witness present at the negotiations may state what he understood the parties agreed to. 3 Enc. of Ev. 520; Hale v. Taylor, 56 N. H. 405; Norris v. Merrill, 40 N. H. 395; Fisk v. Chester, 8 Gray 506; Thatcher v. Phinnery, 7 Allen 146; Lombard v. Oliver, 7 Allen 155; Delano v. Goodwin, 38 N. H. 203; Moody v. Davis, 10 Ga. 403; Printup v. Mitchell, 63 Am. Dec. 258; Foley v. Abbott, 66 Ga. 247; Linsley v. Lovely, 26 Vt. 123; State v. Lockwood, 58 Vt. 378; Wheeler v. Campbell, 34 At., Vt. 35; 28 Am. & Eng. Enc. of Law, 2 ed. 541;

Moses v. Salisbury, 48 N. Y. 638; Legh v. Heald, 1 Bam. & Adol. 624, in 20 Eng. Com. L. Rep.; Covington R. R. Co. v. Ingels, 15 B. Mon., Ky. 637.

"If the broker procures a purchaser for whom he is also acting as agent without disclosing the fact to the principal, it constitutes such a fraud as precludes him from recovering any commissions." Cannan v. Beach, 63 N. Y. 67; Farnsworth v. Hemmer, 1 Allen 494, 79 Am. Dec. 756; Claplin v. Farmers etc. Bank, 25 N. Y. 293; Gardner v. Ogden, 22 N. Y. 347, 78 Am. Dec. 192; Bell. v. McConnell, 37 Ohio St. 396, 41 Am. Rep. 528; Leathers v. Canfield, 45 L. R. A. 44; 4 A. & E. Enc. Law, 2 ed. 969, and cases cited in notes; Siegel v. Gould, 7 Lans. 177; Fritz v. Finnerty, Colo. 10 Curt L. J. 487; Duryea v. Lester, 75 N. Y. 452, cited in note to 45 L. R. A. 51; Story on Agency, sec. 31; Copeland v. Mercantile Ins. Co., 6 Pick. 198, 204; Pugsley v. Murray, 4 E. D. Smith 245; Rupp v. Sampson, 16 Gray 398, 77 Am. Dec. 416; Rice v. Wood, 113 Mass. 134; Walker v. Osgood, 98 Mass. 350; Bell v. McConnell, 38 O. St. 400; Myer v. Hanchett, 39 Wis. 423; Luke 16, 13; Walker v. Osgood, 98 Mass. 348; Smith v. Townsend, 109 Id. 500; Rice v. Wood, 113 Id. 133 s. c. 18 Am. Rep. 459; Bollman v. Loomis, 41 Conn. 581; Everhart v. Searle, 71 Pa. St. 256; Morrison v. Thompson, L. R. 9 Q. B. 480; Lynch v. Fallon, 11 R. I. 311, s.c. 23 Am. Rep. 458; Meyer v. Hanchett, 43 Wis. 246; Bell v. McConnell, 37 O. St. 396, 41 Am. Rep. 528; Strawbridge v. Swan, 43 Neb. 781; Campbell v. Baxter, 41 Neb. 729; Ormes v. Bauchy, 13 Jones 85; Rowe v. Stephens, 53 N. Y. 621; Raisin v. Clark, 41 Md. 158; McDonald v. Malz, 94 Mich. 172; Scribner v. Collar, 40 Mich. 375; Lloyd v. Colston, 5 Bush, Ky. 587; Hobart v. Sherburne, 66 Minn. 171.

"The obvious rule is 'that where two or more are jointly entitled, or have a joint legal interest in the property affected, they must in general, join in the action.' " Bliss on Code Plead., secs. 24, 45; Comp. Laws 1897, sec. 2685, sub-secs, 2, 4; Eaton v. Alger, 57 Barb. 179, 189; Hereth v. Smith, 33 Ind. 514; Cottle v. Cole, 20 Iowa

481; Minnesota Thresher Man. Co. v. Heipler, 49 Minn. 395, 52 N. W. 33; Young v. Hudson, 99 Mo. 102, 12 S. W. 532; McPherson v. Weston, 64 Cal. 275, 30 Pac. 842; Swift v. Ellsworth, 10 Ind. 205; Bartholomew Co. Com'rs. v. Jameson, 86 Ind. 154; White v. Miners' National Bank, 102 U. S. 658; Hardin v. Helton, 50 Ind. 319; Emmitt v. Brophy, 42 O. St. 82; Rice v. Savery, 22 Iowa 470; Blanchard v. Page, 8 Gray 281; Murray v. Warner, 55 N. H. 548; Adams v. O'Connor, 100 Mass. 515; Stafford v. Walter, 67 Hill, 84; Phoenix Ins. Co. v. Mitchell, 67 Hill. 43; Mizner v. Frazier, 40 Mich. 592.

"Where a party's right to compensation under the contract, is doubtful, and is contested on reasonable grounds, and suit is required in order to determine the amount due him, interest will not be allowed for the time preceding such determination." Shipman v. State, 44 Wis. 458; 16 Enc. Law, 2 ed. 1015.

"The defendants must each be shown to be liable to the extent of the verdict in order that a joint judgment should be rendered against them." Chambers v. Upton, 34 Fed. 473; 1 Black on Judgments, sec. 210.

"An agent who contracts in the name of his principal, is not liable to a suit on such contract." Parks v. Ross, 11 How. 374; 1 Enc. Law, 2 ed. 1119; Stanton v. Camp., 4 Barb. 274; Whitney v. Wyman, 101 U. S. 392, 25 L. ed. 1052.

O. N. MARRON and W. B. CHILDERS for Appellee.

"One may ratify the previous unauthorized doing by another in his behalf, of any act which he might then and could still lawfully do himself, and which he might then and could still lawfully delegate to such other to be done." Mechem on Agency; Weakens v. Watson, 27 Mo. 163; Beall v. January, 62 Mo. 434; Courcier v. Ritter, No. 3282 Fed. Cases; Montgomery v. Pac. Coast L. Bureau, 29 Pac. 640; Spearing v. Butler, 69 Ill. 575; Juda v. Trus. of the Vin. Uni. 16 Ind. 56; Shepherd v. Gibbs, 48 N. W. 179; 1 Clark & Skyles on Agency, secs. 106, 109; Gaines v. Miller, 111 U. S. 395, L. ed. Bk. 28, pp. 466, 467; Bronson's Execu-

tor v. Chappell, 12 Wall. 681 (683); Drakely v. Gregg, 8 Wall., U. S. 267; Wilson v. Sturgis, 71 Cal. 226, 229; Plant v. Thompson, 42 Kan. 664; Duclos v. Cunningham, 102 N. Y. 678, Book 21, N. Y. Ct. of App., Rev. ed with notes 494; Dupre v. Splane, 16 La. 51; Breedlove v. Wamack, 2 Mart., N. S. 181; Mechem on Agency, sec. 135, p. 91; Cook v. Fiske, 12 Gray 491; Pickett v. Badger, 1 C. B., N. S. 296; Tombs v. Alexander, 101 Mass. 255; McGavock v. Woodlief, 20 How. 221; Wylie v. Bank, 61 N. Y. 415; Sibbald v. Iron Co., 83 N. Y. 382; Zeimer v. Antsell et al., 17 Pac. 642 (643); Eart v. Cummings, 7 Am. Dec. 718 (719); Goss v. Stevens, 32 Minn. 472 (474); Stewart v. Mather, 32 Wis. 344; Gillette v. Ridge, 117 Mo. 553; Nesbitt v. Halser, 49 Mo. 383; Villey v. Pettit, 96 Ky. 576; Hoadley v. Savings Bank, 44 L. R. A. 321 (335); Coleman v. Meade, 13 Bush, 363; Lemon v. Lloyd, 46 Mo. App. 452 (456); Ward v. Cobb, 148 Mass. 518; Lunny v. Healey, 44 L. R. A. 393 (397).

"A cause of action arising on contract may be set forth in different counts, with allegations which are obviously designed to prevent variance between pleading and proof." 5 Enc. Pl. & Pr. 325, 324 and authorities cited in note 1; Wilson v. Smith, 61 Cal. 209; Walch v. Kettenborg, 8 Minn. 127; Jones v. Palmer, 1 Abb. Pr. 442; Blank v. Hartshorn, 37 Hun., N. Y. 101; Brinkman v. Hunter, 73 Mo. 172 (178); Compiled Laws 1897, sec. 2685, sub-secs. 32, 68, 85; Bliss on Code Pleading, 3 ed., secs. 119, 120; Schneider v. Schneider, 25 Ind. 399; Brinkman v. Hunter, 73 Mo. 172, 178, 179; Brownell v. P. R. R. Co., 47 Mo. 243; Brady v. Connelly, 52 Mo. 19; City of St. Louis v. Allen, 53 Mo. 49; Owens v. Hannibal & St. Joseph R. R. Co., 58 Mo. 386, 394; Byrdseye v. Smith, 32 Barb. 217; Jones v. Palmer, 1 Abb. Prac. Rep. 442; Welch v. Platt, 32 Hun., N. Y. 195; Hoadley v. Savings Bank, 44 L. R. A. 327, note B; Wagner v. Nogel, 33 Minn. 348; Sterns v. Dubois, 55 Ind. 258.

If the contract be even modified resulting in a valid contract of sale between the owner and purchaser, the com-

missions of the agent are earned. Coleman v. Meade, 13 Bush. 363; Legman v. Lloyd, 46 Mo. App. 452; Zeidler v Walker, 41 Mo. App. 118; Hayden v. Grillo, 26 Mo. App. 289; Love v. Owens, 31 Mo. App. 501; Millan & Abbott v. Porter, 31 Mo. App. 563; McLure v. Luke, 154 Fed. 647; Woods v. Stevens, 46 Mo. 555, 556, 557; Ward v. Cobb, 148 Mass. 518; Brown v. Campbell, 12 Wall. 681.

"If the duty of the broker was simply to bring together two men who desired to exchange their lands, and the broker's entire duty was performed when he had brought the two men together, then we can see nothing against good morals and a sound public policy in allowing compensation to the broker from each of the parties. In such a case the broker is in no sense representing conflicting interests." Clark v. Allen 57 Pac. Rep. 985; Farnsworth v. Hemmer, 1 Allen, Mass., 494, 79 Am. Dec. 756; Rupp v. Sampson, 16 Gray, Mass. 401, 77 Am. Dec. 416; Knauss v. Brewing Co., 142 N. Y. 70, 36 N. E. 867; Empire State Ins. Co. v. American Cen. Ins. Co., 34 N. E. 201, 138 N. Y. 446; McLure v. Luke, 154 Fed. 647, 650, 651; Knauss v. Gottfried Krueger Brewing Co., 36 N. E. 867, 868; Young v. Trainor, 158 Ill. 428; O'Neill v. Sinclair, 153 Ill. 524.

"A stranger to a contract cannot join with the party thereof, in an action thereon, even though he may have an interest therein, as a sub-contractor or partial assignee under one party." 15 Enc. Pl. & Pr. 527; McKnight v. Watkins, 6 Mo. App. 118; Curtis v. Sprague, et al, 51 Cal. 239.

STATEMENT OF FACTS.

On September 7th, 1906, Michael A. Ross, filed a suit in the District Court of Bernalillo County, to recover from the defendants the sum of $6,750.00, as compensation or commission for the sale of certain timber lands situated in the second Judicial District of this Territory. Eugene A. Carr, one of the defendants being a non-resident, an attachment was sued out against him and service was had by publication.

On February 19th, 1907, an amended complaint was filed by the plaintiff, which contained two alleged causes of action. The first count of this amended complaint was a repetition of the cause of action set up in the original complaint, and the second cause of action is upon a special contract in writing.

Clark M. Carr, and the Zuni Mountain Lumber and Trading Co., filed a joint answer which set up a general denial. Eugene A. Carr answered specially and his answer sets up three separate defenses, besides a general denial, to-wit:—that the options had expired by Dec. 8, 1905, when the option to J. J. Wirtz was executed, and that neither Wirtz or his associates availed themselves of the option. That the option of Dec. 8, 1905, was given upon the express understanding that the plaintiff was to sell the land to J. J. Wirtz and his associates and no others. That after the expiration of the Wirtz option defendant was negotiating with other purchasers, of which plaintiff had notice. The answer further alleges that after the option of December 8th, 1905, had expired and Wirtz and his associates had failed to avail themselves of its terms, and had abandoned the purchase, that Wirtz, acting as a broker. procured three persons to purchase the lands, and that Wirtz was paid a commission of $1,000.00 for his services, and that plaintiff was acting as agent and representative of Wirtz or as a co-partner, and that he was to obtain a commission or profit from Wirtz.

The second defense is that the plaintiff was the agent or broker of the purchasers to whom the defendants sold the land, and was acting for them in and about the sale of the land.

The third defense alleges, upon information and belief, that the plaintiff made a contract with J. E. Saint and C. M. Foraker, by which they were entitled to a one-third interest in any commissions upon a sale of timber lands in the Territory of New Mexico.

The reply denied all the new matter set up in the answer of Eugene A. Carr, and alleged that if any agreement was made with Foraker and Saint it was only an

agreement to pay certain porportional parts of the commissions to them after the same were collected and received by the plaintiff. A demurrer to the amended complaint was interposed and overruled.

Trial was had before a jury which returned a verdict in favor of plaintiff for the sum of $6,750.00, and the attachment proceedings against Eugene A. Carr, were also sustained.

Motion for a new trial was argued and overruled and from the joint judgment against all of the defendants this appeal has been taken.

OPINION OF THE COURT.

MILLS, C. J.—1. The first error assigned is that the trial court committed error in overruling the demurrer interposed by the defendants to the sixth paragraph of the amended complaint.

This paragraph of the amended complaint is the one that sets up the second cause of action. Briefly, we may say that this paragraph sets out appellee's original employment and by whom employed; the subject matter of the employment and the price for which the property was to be sold, with the further allegation that although the time limited for the consumation of the sale had expired, that the contract was extended, and the defendants "authorized the said plaintiff to continue his negotiations and efforts which he was so making as aforesaid;" with a further allegation that the time was continued; and the allegation that thereafter, one J. J. Wirtz obtained an option to purchase the same land and further alleging that appellee continued his negotiations, "through the said Wirtz and under the said option and brought to the said defendants his proposed purchasers for said lands, Gordon, McFarlane and Garvin, who were associates of Wirtz," and further alleging that these negotiations were continued up to the month of April, 1906, when the lands were sold to these parties, through the efforts and negotiations of appellee. The price for which they were sold is also set out. It also sets out that all of these things were done with the full knowledge

of the defendants that the plaintiff was still endeavoring to procure purchasers for said lands, which finally resulted in the sale being made, and that the services of the appellee were reasonably worth five per cent of the purchase money received by the defendants for the sale of said lands.

Paragraph six of the amended complaint is of course set out at much greater length than we have set it out above. It does allege the making of a written contract, that the contract was extended and that the defendants authorized the plaintiff to continue his efforts and negotiations for a sale and that he did so continue them, with the result that finally the lands were sold.

We are of the opinion that paragraph six of the amended complaint sets out a cause of action, and that the court below would have committed error if it had sustained
1 the demurrer, without giving Ross the opportunity to substantiate by proofs the allegations contained in it. The court below committed no error in overruling the demurrer interposed by the defendants to the sixth paragraph of the amended complaint.

2. An examination of the record discloses that immediately after the jury was selected and sworn and before any evidence had been introduced the attorney for the defendants moved that the plaintiff elect on which of the two causes of action set out in the amended complaint he would proceed, and upon the court's overruling this motion and allowing the plaintiff to proceed on both causes of action, the second assignment of error is predicated.

The amended complaint does contain but one cause of action, but it is set out in two different ways. The first five paragraphs after setting out the names of the parties contain the allegation that during the month of June, 1904, the plaintiff was employed by the defendants to procure for them a purchaser for the timber lands and that if the plaintiff could sell the lands the defendants agreed to pay plaintiff for his services, work and labor the sum of five per cent upon the price that should be obtained for said lands. That from the month of June, 1904, to April, 1906, plaintiff worked and labored and rendered services in pro-

curing a purchaser for said lands and that in said last mentioned month plaintiff procured a purchaser to whom the lands were sold by the defendants at the price of $135,000. That the plaintiff was entitled to receive the sum of $6,750.00 for his compensation in procuring purchasers for said property, but that the defendants have refused to pay the same.

The second count set out in paragraph six, of the amended complaint, we have already set out briefly above. It goes more into detail of the transaction than the first count, and sets up the written contracts and options. It is obvious to even a casual reader, that but one transaction is set out in the amended complaint. Our code requires that a complaint must contain a statement of the facts on which the cause of action is based set out in ordinary and concise language. "A cause of action arising on contract may be set forth in different counts. 2 with allegations which are obviously designed to prevent a variance between pleading and proof." 5 Enc. P. & P. p. 325; and the same rule is laid down in California from which much of our code is taken. The Supreme Court of that state says: "Under our code, which provides that the complaint must contain a statement of the facts constituting the cause of action in ordinary and concise language that plaintiff may set them out in two separate forms when there is a fair and reasonable doubt of his ability to safely plead in one mode only." Wilson v. Smith, 61 Cal. 209; and the Supreme Court of Missouri says—"The Circuit Court committed no error in refusing to compel the plaintiffs to elect upon which count of the petition they would proceed. It is well settled in this state that the provisions of the code requiring the plaintiff to set forth in his petition a plain and concise statement of the facts constituting a cause of action, without unnecessary repetition," does not prohibit the statement of a single cause of action in different counts, for the purpose of so varying the form of the statement as to meet any possible state of the proof. Brownell v. P. R. R. Co., 47 Mo. 243; Brady v. Connelly, 52 Mo. 19; City of St. Louis v. Allen, 53 Mo.

49; Owens v. Hannibal & St. Joseph R. R. Co., 58 Mo. 386, 394. So when two distinct and different claims are based upon the same instrument, although the plaintiff may be entitled only to a single satisfaction, both may be stated in the same petition, and should, of course, be stated in different counts. Birdseye v. Smith, 32 Barb. 217; Bliss on Code Pleading, sec. 120. "In neither case can the court compel the plaintiff to elect upon which count he will proceed." Bri[illegible] v. Hunter, 73 Mo. 172, and the same [illegible] doctrine is laid down in Jones v. Palmer, 1 Abb. Prac. Rep. p. 442, and in numerous other cases.

We do not think that in the case at bar the trial court committed any error in overruling the defendants' motion to have the plaintiff elect on which count of the amended complaint he would proceed. The sustaining or overruling of a motion like this is always largely in the discretion of the trial court. Mr. Bliss in his work on Code Pleadings (3rd ed.) sec. 120, says—"There may be actually two grounds for the action, or being only one, certain supposed grounds may be so connected, that the plaintiff may not be able to tell in advance which he will establish upon the trial. The code will have failed in its chief object if he is forbidden to develop any ground upon which he bases his right of recovery." We think that in a case like this, when a plaintiff is in real doubt as to his relief, that he has the right to set forth his cause of action in several counts, so as to meet the facts which are established on the trial.

3. The next alleged error is that the court refused to instruct the jury to return a verdict in favor of the defendants, The Zuni Mountain Lumber and Trading Company, and failed to give instructions 11 and 12, asked for by defendants.

These two requested instructions, which were refused, ask the court to instruct the jury to return a verdict in favor of The Zuni Mountain Lumber Company.

It will be noticed that in the several contracts that are in evidence the lands to be sold are always mentioned at between 40,000 and 43,000 acres, and it also appears in evidence that between 18,000 and 19,000 acres of the

land was the property of Eugene A. Carr, and that in this land Clark M. Carr was interested, and of the other lands sold 160 acres belonged to The Zuni Mountain Lumber and Trading Company, which company also claimed to own the timber on upwards of 11,000 acres of lands, purchased from the Territory. This is testified to by the defendant Clark M. Carr, and the same witness also testified that the lands and timber sold Gordon, McFarlane and Garvin, were the same or rather a portion of the lands mentioned in the options to Ross and Wirtz. In view of this evidence, we do not think that the court committed any error in refusing the request of the defendants that the jury be instructed to return a verdict in favor of The Zuni Mountain Lumber and Trading Company. The Carrs were The Zuni Mountain Lumber and Trading Company, and the purchasers of the property were brought to Clark through the efforts of Ross, and as the timber contract from the Territory was at the rate of $2.50 per acre, and as this same land was sold to Gordon, McFarlane and Garvin for $5.00 per acre, or at a profit of one hundred per cent, it seems only fair that the party through whose efforts the parties to the sale were brought together should have some compensation for his work and labor.

4. We cannot find any error in the refusal of the court to instruct the jury to find a verdict for the defendants upon the ground that Gordon, McFarlane and Garvin were not shown to be the associates of Wirtz as purchasers within the terms of the option of December 8th, 1905.

The evidence is quite clear that Wirtz was a real estate broker in Milwaukee, Wisconsin, and that Ross had induced him to try and find purchasers for the lands of the defendants. That at the solicitation of Ross the option was made out in the name of Wirtz and that at the same time in order to secure himself and make his commission certain in the event that a sale was made through Wirtz, C. M. Carr gave him a letter agreeing to pay him a commission of five per cent on the proceeds of any sale made with J. J. Wirtz and his associates.

From an examination of the entire record, it is appar-

ent that the defendants did not expect Wirtz to join in the purchase of the timber lands and timber contract. He was only a real estate broker, and his business was to try and find purchasers for the property which it was desired to sell. None of the parties expected him to personally join in the purchase, nor does he claim to have done so. For the court to have held that Ross could get no pay for the time he had put in and the labor he had done in trying to make a sale of this property, unless Wirtz was one of the purchasers, would in our opinion have been incorrect. The option to Wirtz does not provide that the sale must be made to him, but says that either he or his representatives must be on the lands making an examination within a limited time. The letter of the same date given to Ross, in which his commission was agreed to, refers to this option, and they both must be read together, and reading them as one, it is clear that Ross was to have a commission if the sale was made to Wirtz or his representatives, that is, to Gordon, McFarlane and Garvin, or either of them.

5. The fifth alleged error is that the court erred in allowing plaintiff to amend the *ab damnum* clause of the complaint, without granting the defendants the continuance which they asked for.

The second count of the amended complaint sets out on information and belief, that the purchase money paid for said lands was about the sum of $135,000.00 and that a reasonable compensation for the plaintiff for his work, labor and services was 5% upon the amount. During the trial the contract entered into between the defendants. and the purchasers of the property was introduced in evidence, by which it appeared that the contract price for the lands and timber contract was $200,000.00 and upon receiving this information plaintiff at once asked leave to amend the complaint by changing the *ab damnum* 3 clause to $10,000.00 being 5% upon $200,000.00. The court very properly granted this motion, under the provision of our code, which allows a complaint to be amended to conform to the proofs. Nor were the defendants

injured by this change, for the jury returned a verdict in favor of the plaintiff for the sum of $6,750.00, being the damages claimed by the plaintiff before the complaint was amended. The granting or refusing of a continuance as we have held, rests in the sound discretion of the court, and in the case at bar we can see no abuse of such discretion.

6. Other errors alleged are that the amount of the judgment against the defendants is excessive; and that the judgment is joint, when it should have been several.

Upon the first of these points the record discloses that the amount of the damages claimed in the amended complaint when it was first filed was $6,750.00, being 5% commission on the amount which before the trial the plaintiff thought the defendants had received for the land. On the trial the contract for the sale, was introduced in evidence, and the plaintiff then learned that the contract price as shown by the contract was $200,000.00 and the *ad damnum* clause was then amended to $10,000.00, being 5% on that sum.

Mr. Medler stated on cross examination that the only fictitious item in the $200,000.00 contract, was the sum of $51,826.00 which amount was added at the request of the purchasers. If Mr. Medler is correct in his statement, and he appears to be so, as to that being the only fictitious item set out in the contract, then the jury would have been justified in returning a verdict of something over $7,400.00. Mr. Medler arrives at his figures as is shown on page 288 of the printed transcript, by adding the sums to be paid on the General Carr land $92,885.80, the sum to be paid for the transfer of the Territorial timber contract $27,644.00—and the sum of $27,644.00—to be paid to the territory for the contract and which payment was assumed by Gordon, McFarlane and Garvin. These several amounts added together amount to the sum of $148,173.80. We think that the jury might have returned a verdict of 5% on that sum, without having committed any error, but the verdict is evidently the result of a compromise, and being less than the amount

claimed as damages, and within the sum of 5% on the amount of $148,173.80, the defendants cannot complain of it. Complainants might, if they had cared to do so, have objected to the verdict on the ground that it was not large enough.

As to the joint judgment, we need only say that the amended complaint sets out a joint liability. This question of joint liability was submitted to the jury and
4 there was evidence before it, that the lands of The Zuni Mountain Lumber and Trading Company were included in the contract of the lands which were to be sold. Clark M. Carr was president of The Zuni Mountain Lumber and Trading Company, and the contract with the Territory for the purchase of the timber on the 11,000 acres of land stood in his name. The evidence is undisputed that Clark M. Carr, was interested with Eugene A. Carr, in the lands which stood in the latter's name, but what interest he had in it does not appear in the record.

The pleadings and the evidence we think shows that the defendants were united in interest and that each and all of them employed Ross to procure purchasers for the lands in dispute We think that the contract for the commission to be paid to Ross was a joint contract in the event of a sale being made, and being a joint contract we can see no reason why there could not be a joint judgment.

7. We have carefully examined the other alleged errors, set out by the attorney for the defendants, and can pass upon them in but a few words.

1. Exception No. 6, that the court erroneously admitted evidence as to the transactions of plaintiff with Clark M. Carr prior to Dec. 8th, 1905.

The answer to this is, that the first cause of action set out in the amended complaint, is that in the month of June 1904, plaintiff was employed by defendants to procure purchasers for the lands, and that he continued such work to April 1906, when the lands were sold. The evidence objected to goes to sustain this cause of action, which

could not have been proved without going into the transactions which occurred prior to December 8th, 1905,
5 and as the evidence discloses that Clark M. Carr, was the agent of the other defendants, we can see no error in the court's having allowed it to go to the jury.

2. Exception No. 7, that the court erred in excluding admissions of Wirtz as to plaintiff being entitled to a share of his, Wirtz's, commission, and in excluding from evidence certain exhibits attached to the deposition of Gordon, tending to show the share Ross was to have in such commissions.

A full examination of the record shows that in effecting the sale Ross did not act as a broker, but only as a middleman. He was instrumental in bringing the buyers and the sellers together, but was not expected to and did not take any part in the negotiations between them, and the final bargain was made without his aid or intervention. Indeed, it is in evidence that Ross did not know the price at which the land was sold until the written contract was offered in evidence. Ross, being only a middle-man, could therefore legally have taken a commission from both buyers and the sellers. McLure v. Luke, 154 Fed. 647; Knauss v. Godfried Krueger Brewing Co., 36 N. E. 867.

Holding that Ross was a middle-man and not a broker, and as his duties were performed when he brought the buyers and sellers together, the court very properly ex-
6 cluded any evidence as to what Wirtz may have told Gordon as to Ross being entitled to a share of the commission he was to receive. It may also be said in passing that Ross denied that he was to have or had received any part of the commission paid or to be paid to Wirtz.

3. Exception No. 8, that the court erred in excluding the evidence of E. W. Dobson, and the contract between the plaintiff, Foraker and Saint.

The appellants herein sought to prove that plaintiff, Foraker and Saint, had entered into a contract by which they were all to endeavor to make a sale of the timber lands,

and that they had agreed to divide the commission, in the event that a sale was made. It appears to us that this
7 evidence was very properly excluded, as it had nothing to do with the case on trial. It cannot be contended that either Foraker or Saint could have maintained any action against appellants for a commission for the sale of the lands, for appellants were not parties to any agreement with them looking to such sale. If Foraker and Saint have any claim on account of the agreement which they made with Ross, for a division of the commission, they must institute proper proceedings against him for its collection. If they have a claim against Ross it certainly is not and was not a defense to this suit.

4. Exception No. 9, that the court erred in excluding the evidence of Mr. E. L. Medler as to conversations with plaintiff Ross concerning the timber contract of The Zuni Mountain Lumber and Trading Company.

The examination of Mr. Medler, begins on page 381, of the printed transcript, and from a careful reading of it, we cannot find that the court excluded evidence of
8 Mr. Medler as to conversations he had with plaintiff Ross concerning the timber contract of The Zuni Mountain Lumber and Trading Company. All that Mr. Medler did say on this subject is in substance that the defendants, or Ross, had never spoken to him of the sale or assignment of the timber contract to Wirtz or to Gordon, McFarlane and Garvin. We think that the court very properly sustained the motion to strike out this evidence; nor do we think that exception No. 10, is well taken, for the court did not in our opinion, exclude the evidence of the witness Clark M. Carr, as to the employment of Ross, as his agent, or as to whether or not the timber contract of The Zuni Mountain Lumber and Trading Company was included in the option of December 8th.

5. Exceptions Nos. 11, 13 and 15 are too general in their nature; they are not specific, and will not be considered by us.

6. Exception No. 12, is as to the refusal of the court to give certain instructions, numbered 1, 13 and 14,

asked by the defendants, and to the giving by the court of its own motion of the instructions given by it, numbered 1 to 14, inclusive. We have examined all of the instructions, both those given and refused by the court, and have come to the conclusion that the instructions given by the court very fairly cover the law of this case, and that there is no reversible error in them.

We have given this case careful consideration, and have scrutinized the entire transcript of record with great care, and, finding no reversible error in it, the judgment of the court below is therefore affirmed; and, it is so ordered.

[No. 1223, January 12, 1909.]

TERRITORY OF NEW MEXICO, Appellee, v. JAP L. CLARK, Appellant.

SYLLABUS (BY THE COURT).

1. A judgment of a district court will not be set aside by this court merely on the ground that the term of court at which it was rendered was not held at the de jure county seat of the county for which the term was held, as provided by law, if the term was held and the judgment rendered at the de facto county seat, as established by the Act of the Legislative Assembly of the Territory.

2. A witness for the defendant was asked on cross-examination if he made certain statements when he testified at the preliminary hearing which he had made in his testimony at the trial, to which he replied as to one of them that he did. His entire testimony at the preliminary hearing was properly admitted to show whether it contained that statement.

3. Conduct on the part of one or more of the jurors during the trial of a criminal case, although censurable, is not a sufficient ground for a new trial, unless it appears, or is at least presumable, that the defendant was prejudiced thereby.

4. Evidence of what the defendants, jointly indicted for murder had said and done not long before the homicide in relation to the man with whose murder they were charged and another man associated with him in what they regarded as hostile acts toward themselves, was properly admitted as proof of their animus toward the man who was killed.

5. In a trial for murder under sections 1060, et seq. C. L. 1897, charged in the indictment as murder in the first degree, it is not the duty of the court to give instructions covering murder in the third degree in the absence of evidence in the case that the homicide by the defendant was without intent on his part.

6. Under the circumstances shown in the record, a severance was properly denied.

7. The instruction as to self-defense was, sufficiently favorable to the defendant.

Appeal from the District Court for Torrance County, before EDWARD A. MANN, Associate Justice. Affirmed.

A. B. RENEHAN and GEORGE W. PRICHARD, for Appellant.

Evidence not *res gestae* should have been excluded. 11 Enc. Ev. 328, 405; Bird v. U. S., 180 U. S. 360; People v. La Rubria, 140 N. Y. 92; Hirschman v. The People, 101 Ill. 574; Territory v. Armijo, 7 N. M. 437; Guild v. Pringle, 130 Fed. 423; Insurance Company v. Mosely, 8 Wall 408.

The nature of the act, the circumstances under which it was done and the consequences resulting therefrom are competent evidence for or against the defendant, such as the cause of the difficulty which immediately resulted in the homicide. 6 Enc. Ev., 625, 626 and 627; 11 Enc. Ev., 403, 404 and 405.

The defendant has a right to produce self-impeachment of witness on cross-examination by questions concerning conviction of a felony, murder, and it is not necessary in questioning witness as to his conviction of crime to specify the nature, time or place, or the court in which

the conviction was had. 7 Enc. Ev. 218-220; C. L. 1897, sec. 3025.

A writing not executed by a witness is not the best evidence of his statements contained therein. Only where a statement is contained in a writing made by or admitted to be correct by a witness, it is proper to admit the writing in evidence to prove the statement. 2 Wigmore on Ev., secs. 1025 et seq.; 7 Enc. Ev: 128, 132 et seq. As to juror's bias, prejudice and concealment of feelings. Jewel v. Jewel, 18 L. R. A. 476, p. 6 a. b. d.; Mattox v. United States, 146 U. S. 140.

A special law locating or changing a county seat is forbidden by the Springer Act. C. L. 1897, p. 45; Laws of 1903, p. 132; Laws 1905, ch. 2, p. 3; Laws 1905, ch. 119. The law requires District Courts to be had at the county seats of the different counties. C. L. 1897, sec. 903; Burrill's, Rapalje's and Bouvier's Law Dictionaries; Lewis v. Hoboken, 13 Vroom 378; Hobart v. Hobart, 45 Ia. 503; In re Terrill, 34 Pac. 457, 39 Am. St. 327; Levoy v. Bigelow, 34 N. E. 128; In re McCloskey, 37 Pac. 856; Coulter v. Routt County, 9 Colo. 265 and 267; State v. Harper County, 34 Kans. 302; State v. Mills, 39 Kans. 76.

The court should have instructed the jury as to murder in the third degree as requested by the defendants. Thompson v. United States, 155 U. S. 271; Rowe v. United States, 164 U. S. 354.

Not all affrays and not all deliberate or malicious acts of a man deprive him of self defense. Rowe v. United States, 164 U. S. 554.

It was an abuse of sound discretion to refuse a severance. United States v. Ball, 163 U. S. 672 and cases cited.

JAMES M. HERVEY, Attorney General, for Appellee.

"Every circumstance no matter how trivial, which bears upon the question of malice must be considered by the jury. U. S. v. Meagher, 37 Fed. Rep. 880; 1 Bish. Cr. Proc. 1125, 1126; State v. Patza, 3 La. Ann. 512; State v. Thomas, 30 La. Ann. 600; State v. Vines, 34 La.

Ann. 1081; Bird v. U. S., 180 U. S. 360; Thiede v. Utah Territory, 159 U. S. 518.

No foundation had been laid for direct question which trial court refused to permit witness to answer. Territory v. Claypool, 71 Pac. 463.

A witness may be asked on cross-examination as to whether or not he was ever convicted of an infamous crime where the question put to such witness specifies the nature of the crime, time or place, and the court in which the conviction was had, but this the counsel for appellant did not attempt to do. 2 Elliott on Evidence 982; 7 Enc. of Ev. 218-220; C. L. 1897, sec. 3025.

The courts take judicial notice of their own records, prior orders and proceedings in the same cause. I Elliott on Evidence, 29, 56, 57; C. L. 1897, sec. 3379; Pittsburg, etc. R. Co. v. Ackworth, 3 Ohio Dec. 456; in re Meyer 74 Feb. Rep. 881; Wood v. Ward, 19 South Rep. 354, Ala.; Town v. Bossier, 19 La. Ann. 162; Morris v. Ogle, 56 Ga. 592; 1 Greenleaf on Evidence 501; Sigafus v. Porter, 84 Fed. 430, 28 C. C. A. 443; in re Wong Sing, 83 Fed. 147; Pittsburg & W. R. Co. v. Thompson, 82 Fed. 720, 27 C. C. A. 333; Crocker v. Carpenter, 98 Cal. 418, 33 Pac. 271; Wise v. Wakefield, 18 Cal. 107, 50 Pac. 310; Taylor v. Adams, 115 Ill. 574; Hyde v. Heath, 75 Ill. 318; Mathis v. State, 33 Ga. 24; Randolph v. Woodstock, 35 Va. 292; Territory v. Claypool, 71 Pac. 463.

The allowance or refusal of a new trial rests in the sound discretion of the court to which the application is addressed. Mattox v. U. S., 146 U. S. 140.

In re-establishing a county, the re-establishment of a county seat is as fully within the powers of the legislature as is the re-establishment of the boundaries. Laws of 1903, chapter 70; Laws of 1905, chapter 2.

When the evidence shows that the defendant intended to kill, the question for the jury is whether the killing was justifiable, and it is error to charge that they might find the defendant guilty of a degree of murder in which the intent to kill is entirely wanting. Territory v. Jewel, 4 N. M. 318; Territory v. Hendricks, 13 N. M. 300.

To instruct the jury in a criminal case that the de-

fendant cannot properly be convicted of a crime less than that charged, or to refuse to instruct them in respect to the lesser offences that might, under some circumstances, be included in the one so charged—there being no evidence whatever upon which any verdict could be properly returned except one of guilty or of not guilty of the particular offence charged—is not error. Rowe v. U. S., 164 U. S. 554; Sparf & Hansen v. U. S., 156 U. S. 103; Territory v. Gonzales, 1 N. M. 447.

Where two or more persons are jointly charged in the same indictment with a capital offense, they have not a right, by law, to be tried separately without the consent of the prosecutor. U. S. v. Merchant and Colson, 12 Wheat. 480; U. S. v. Ball, 163 U. S. 672.

OPINION OF THE COURT.

ABBOTT, J.—(The essential facts appear in the opinion.)—Of the errors assigned by the defendant, one is of special importance, since it raises the question whether a term of the Sixth Judicial District Court for Torrance County can be legally held at Estancia, where the defendant was convicted of murder in the second degree at what purported to be a term of said court held in June, 1907.

Torrance County was created by the Legislative Assembly of the Territory of New Mexico, by Chapter 70, of the Laws of 1903, and Progreso was made the county seat; by chapter 2 of the Acts of 1905, the assembly attempted to make Estancia the county seat. This, the appellant claims, is in violation of the "Springer Act," so called. C. L. 1897, p. 45. Its language on the point is as follows: "The legislatures of the Territories of the United States shall not pass local or special laws in any of the following enumerated cases; that is to say: * * * Locating or changing county seats." By act of Congress approved July 19, 1888, (C. L. 1897, p. 60), it was declared that the Springer Act should not be construed to prohibit the creation by Territorial Legislatures of new counties and the location of the county seats thereof. That the statute, chapter 2, 1905, is a local or special law, cannot be doubted, and, indeed, the contrary is not claimed in the brief

for the Territory. See Note to State v. Sayre, Vol. 4 Am. & Eng. An. Cases, p. 659; Codlin v. County Commissioners, 9 N. M. 565. It is however suggested in the brief of the attorney general that the act in question was really the "re-establishment" of Torrance County. But the assembly clearly excluded that idea by providing in section one of the statute in question, that the act—chapter 70, laws of 1903, "is hereby amended as follows:" not that it or any part of it is repealed. In section 6 of the later statute it is explicitly declared that no section of the original act "not herein expressly referred to shall be affected", and that "all the officers of said county of Torrance chosen at the last general election shall hold their offices as if this act had not been passed." Certainly a county which has once been established or created cannot be again created until it has first ceased to exist. It is significant in this connection, that the same assembly, by chapter 10, acts of 1905, "abolished" the County of Sandoval, and then proceeded to "create" a county of the same name, with the county seat at Bernalillo instead of at Sandoval where it had before that been. Further, it is not without a bearing on the intention of the assembly in enacting the law in question that there was then in effect a general law of the Territory (section 630, C. L. 1897) providing for the changing of county seats, and that it was amended by the same assembly. (Chapter 119, Acts of 1905).

But if it be conceded that Estancia is not the *de jure* county seat of Torrance County, does it follow that the trial of the appellant was invalid because it was had there, contrary to section 903, C. L. 1897, which provides that "the District Courts shall be held at the county seats of the different counties"? It is not suggested that the appellant was in any way actually harmed or put at any disadvantage through the fact that he was tried at Estancia rather than at Progreso, which is indeed merely a name, there being no settlement at that point. It was, however, unquestionably the earlier doctrine that a court could be held only at the place fixed by law for its sessions,

and that any trial attempted to be held elsewhere was a nullity. It may well be questioned whether that view is sustained by sound reason, when, as in this case, the place at which the court was held was *de facto* the county seat by legislative enactment. The validity of such a statute should, in the public interest, be attacked in a direct proceeding, rather than in an ordinary case coming before the court. Robinson v. Moore, 25 Ill. 118. That a valid session of court may be held at a *de facto* county seat is held and the view ably sustained in re
1 Chas. Atchison, 13 Colo. 525, 10 L. R. A. 790; Robinson v. Moore, *supra*. That conclusion, it seems to us, better serves the ends of justice, than the opposite one. Indeed, the language of the court in Robinson v. Moore, *supra*, is not inappropriate to this case. "This may be a question of great doubt, x x x and it would be monstrous indeed to hold that if the Circuit Judge was mistaken in his conclusions as to which place was the county seat all his proceedings were void and all his judgments mere nullities."

Another claim of serious error is based on the fact that the testimony of James T. Smart, at the preliminary hearing at which the appellant was held for the grand jury, was admitted in evidence at the trial without proof that it was his testimony. As we understand the record that objection was not distinctly made at the time the evidence was offered. The proffer was, "I will offer in evidence so much of the transcript of the evidence taken on the preliminary examination of these defendants as includes the evidence of James T. Smart, who has testified here," to which the attorneys for the defendants said: "We will object to it as immaterial, irrelevant and incompetent. No foundation has been laid for the introduction *en masse* of that testimony, the witness Smart not having TESTIFIED GENERALLY as to that testimony, except as to particular portions of the testimony." By one, at least, of the questions put to him, he was asked if he made a certain statement when he testified at the preliminary hearing, to which he replied that he did. It could

not be determined whether that statement was correct without reading all that testimony. It appeared that the transcript which was offered had been produced and filed in court by the defendants on an application for a writ of *habeas corpus,* and was among the papers in the cause on the trial. Whether, under those circumstances, these defendants could be heard to question its correctness,
2 *quare?* But, even if there was legal error in admitting it, it does not appear that it differed materially from Smart's testimony at the trial, or that the defendant was probably injured by its admission; and the error, if any, was harmless. U. S. v. Claypool, et al, 11 N. M. 580; Cunningham v. Springer, 13 N. M. 259; Cunningham v. Springer, 204 U. S. 647, 652.

Another error assigned is based on the admission of evidence as to an attack by the defendants, Clark and his co-defendant, McKean on J. C. Gilbert, a short time before the encounter with Chase, in which the latter was killed, and of evidence that he and McKean were in Torrance armed as they were on the day of the homicide in question, a few days before it occurred. There was undisputed testimony that Chase and Gilbert had been associated in one or more prosecutions of Clark, that Chase had threatened to kill Clark the first time he had the chance, or the first time he came to Torrance, and that the threats had been communicated to Clark some months before the homicide. It also appeared that Chase and Gilbert had incurred the hostility of McKean by what they had done in a criminal proceeding against him. Clark and McKean were on trial for the murder of Chase.

It was relevant and material, as we think, under such
4 circumstances, to show that they went to Torrance together armed a few days before the killing of Chase; that they went there together armed on the day of the killing, met Gilbert in a saloon, and as he testified, joined in beating him, Clark declaring it was because he, Gilbert, had lied about him in court, that a little later Chase passed when McKean said to Clark: "You have licked one, I will lick the other," and followed Chase to the railroad station

where he challenged him to fight, and on his refusal went back and reported to Clark, who then went where Chase was, and the quarrel which resulted in his killing Chase began. The evidence in relation to the assault on Gilbert was afterwards withdrawn from the consideration of the jury by the court; but, as it appears to us, that need not have been done. The matters testified of all bore so close relation to the homicide itself that they were admissible to characterize and explain it. Thiede v. Utah, 159 U. S. 518; United States v. Meagher, 37 Fed. 880.

The statement by a juror, after verdict, to Mr. Renehan, one of the counsel for the defendant, which it is claimed shows that his statement on his *voir dire* were not true, does not, we think, necessarily have that effect. The evidence he heard during the trial may very well have brought to his recollection matters which he had before known or heard of but did not have in mind when he was examined for the jury. There was testimony in the case well calculated to have that effect, and to connect any general talk he may have heard about the work of Chase against law-breakers with the case on trial. That one of the jurors commented on the evidence as it was progressing to one of his fellow members; that while the case was in progress but before it had been submitted to the jury, the jurors, on their way to breakfast, went into a saloon, the bailiffs in charge and one juror protesting, but keeping with the others, and these eleven jurors ordered and were served with liquor; that some of them talked from the windows of the room where they were when the trial was not in progress, to persons outside, was censurable, and doubtless would have been censured by the court if those incidents had been brought to its attention; although it did not appear that intoxication resulted from the drinking or that the talk was about the case, but they do not require or warrant a reversal of the judgment, "as no harm to the appellant was either
3 shown or presumable." Bishop's New Crim. Proc., Vol-
1, Sec. 999, and cases cited; Vol. 17 Am. & Eng. Enc. of Law, pp. 1204, 1206.

The evidence in the case did not call for an instruction as to murder in the third degree. Territory v. Jewell,
5 4 N. M. 318; Territory v. Hendricks, 13 N. M. 300; 84 Pac. 523.

On the question of self defense the court against the objection of the defendants gave this instruction: "The defendants cannot avail themselves of the doctrine of necessary self-defense if the necessity of that defense
7 was brought on by themselves, or provoked by their own deliberate or malicious acts, or by beginning the fight with the deceased for the purpose of taking his life or committing a bodily harm upon him, in which he killed deceased by the use of a deadly weapon, unless the defendant in reality and in good faith endeavored to decline any further struggle before the fatal shot was fired." We think the instruction was sufficiently favorable to the defendant. Rowe v. United States, 164 U. S. 554; Sparf & Hanson v. U. S. 156 U. S. 103; Territory v. Gonzales, 11 N. M. 301, 68 Pac. 925.

It was a proper exercise of the discretion of the court to refuse to grant a severance under the circumstances.

There was evidence strongly tending to show that the
6 appellant and McKean acted in collusion to attack Chase, on account of a common hostility to him growing out of their alleged grievances against him. That such evidence was to be offered was doubtless made known to the court in the argument of the motion for a severance. United States v. Merchant and Colson, 12 Wheaton, 480.

The other assignments of error do not call for consideration separately.

The judgment of the District Court is affirmed.

[No. 1228, January 12, 1909.]

THE PECOS VALLEY IMMIGRATION COMPANY, Appellant, v. JOHN B. CECIL, Appellee.

SYLLABUS.

1. Where there is substantial evidence to support them, findings of fact by the trial court will not be disturbed on appeal.

2. In action for commissions by real estate broker, evidence held that "the listing of defendant's property with plaintiff expired" before time of sale and that plaintiff did not have defendant's property for sale at the time of its sale.

3. The facts of the case do not bring it within the decisions which hold that a sale by a party direct leaves the factor's right to the commission intact, where the latter has furnished the customer and has thus been the producing cause of the sale. Such cases presuppose and assume relationship of principal and agent which the court in this case finds did not exist."

Appeal from the District Court for Eddy County before W. H. POPE, Associate Justice. Affirmed.

BUJAC & BRICE, for Appellant.

The findings of the court below will be set aside when there is no evidence to sustain them; or when they are manifestly against the weight of the evidence. Brown v. Lockhart, 12 N. M. 10; Romero v. Coleman, 11 N. M. 533; Rush v. Fletcher, 11 N. M. 555.

The law favors that construction of contracts of this nature and that interpretation of the facts and acts of the parties which will secure to the broker payment of his commission. Duncan v. Borden, 59 Pac. 60; Stewart v. Mather, 36 Wis. 344; Orton v. Scofield, 61 Wis. 382; McKenzie v. Lego, 74 N. W. 249.

An owner of property cannot voluntarily reduce the price of same below that made to his broker and sell the same to his broker's customer at less than the price agreed upon, and deprive the broker of his commission. Welch

v. Young, 79 N. W. 59; Reid v. McNerney, 103 N. W. 1001; Hafner v. Herron, 46 N. W. 211; Henry v. Stewart, 57 N. W. 190; Lloyd v. Matthews, 51 N. Y. 124; Potvin v. Curren et al., 14 N. W. 400; Hubacheck v. Hazzard, et al., 86 N. W. 426; Plant v. Thompson, 22 Pac. 726; Byrd v. Frost, 29 S. W. 46; Ratts v. Shepard, 14 Pac. 496.

A real estate broker is entitled to his commission when he has produced a customer with whom the owner of the property makes a trade upon terms satisfactory to himself, although the deferred payments were not made by the purchaser, and the terms of the contract never fully carried out. Stewart v. Fowler, 36 Pac. 1002.

When a broker's time is limited, and negotiations are commenced while the property is listed with him, and the time in which he had a right to sell expires, and the trade is subsequently closed by the owner, the broker is entitled to his commission. Jaeger v. Glover, 95 N. W. 311; Humphrey v. Eddy Transp. Co., 73 N. W. 422.

If a real estate broker brings to an owner of property a prospective purchaser, who afterwards buys the property, being the object for which they were introduced, the broker is entitled to his commission although he had nothing further to do with the transaction. Hambleton v. Fort, 78 N. W. 498; Butler v. Kennard, 36 N. W. 579; Rounds v. Alee, 89 N. W. 1098; Scott v. Clark, 54 N. W. 538; Howe v. Werner, 44 Pac. 511; Marlett v. Elliott, 77 Pac. 104.

When property is listed with a real estate broker for sale and no limitation is placed as to the time when such sale should be effected, the contract will continue until terminated by one of the parties giving notice. Lloyd v. Mathews, 51 N. Y. 124; 19 Cyc. 222, 223; Knox v. Parker, 25 Pac. 909; Heaton v. Edwards, 51 N. W. 544.

Where a broker furnishes a customer for the purchase of land, even though the land was not previously listed with such broker, under an agreement that the owner should show, price and sell the land, the broker is entitled to his commission if the owner does show, price

and sell the land to such customer prior to the lands being withdrawn from their hands, or if such sale results subsequently to its being withdrawn provided negotiations were begun while the land was in the hands of the broker and continued uninterrupted until such sale was made, or in case such sale was made, or terms agreed upon, prior to the brokers receiving notice from the owner that the contract was terminated. Reid v. McNeevey, 103 N. W. 1001; Humphrey v. Transp. Co., 73 N. W. 422; Howe v. Werner, 44 Pac. 511; Gresham v. Connelley, 41 S. E. 42; Sylvester v. Johnson, 75 S. W. 923; Butler v. Kennard, 36 N. W. 579; Potvin v. Curron, 14 N. W. 400; Scott v. Clark, 54 N. W. 538; Lloyd v. Matthews, 51 N. Y. 124; Marlatt v. Elliott, 77 Pac. 104; Plant v. Thompson, 22 Pac. 726; Cunliff v. Housman, 71 S. W. 368; Heaton v. Edwards, 51 N. W. 544; Veatch v. Norman, 69 S. W. 472; Knox v. Parker, 25 Pac. 909.

It is not permissible to single out certain facts upon which to predicate a finding thereby excluding all other facts and circumstances in proof. McCormick v. Henderson, 75 S. W. 171, and cases cited.

REID & HERVEY, for Appellee.

Findings of fact by a trial court, like the verdict of a jury, will not be disturbed where there is any substantial evidence to support them. Zanz v. Stover, 2 N. M. 29; Romero v. Desmarais, 5 N. M. 142; Newcomb v. White, 5 N. M. 435; Torlina v. Trorlicht, 6 N. M. 54; Perea v. Barela, 6 N. M. 239; Lynch v. Grayson, 7 N. M. 26; Gale v. Salas, 11 N. M. 210; Romero v. Coleman, 11 N. M. 533; Rush v. Fletcher, 11 N. M. 555; Brown v. Lockhart, 12 N. M. 10.

Where an agent, without the consent of his principal, makes use of his agency to acquire or promote interests, which are directly inimical to those of his principal, he will not be allowed to recover compensation for his services. Salomons v. Pender, 3 H. & C. 639; McGar v. Adams, 65 Ala. 106; Lary v. Baker, 86 Ga. 468; Hobsen v. Peake, 44 La. Ann. 383; Janson v. Williams, 36 Neb. 869; Murray v. Beard, 102 N. Y. 505; Diringer

v. Meyer, 42 Wis. 311, 24 Am. Rep. 415; Singer v. McCormick, 4 W. & S., Pa. 265; Jaffray v. King, 34 Md. 217; Adams Exp. Co. v. Trego, 35 Md. 47; Orr v. Ward, 73 Ill. 318; Gardner v. McCutcheon, 4 Beav. 534; Spottswood v. Barrow, 5 W. H. & G. 110; Ridgway v. Market Co., 3 Ad. & E. 171; Armor v. Fearon, 9 Ad. & E. 548; Horton v. McMurtry, 5 Hurl. & N. 667; Callo v. Brouncker, 4 C. & P. 518; Atkin v. Acton, 4 C. & P. 208; Lacy v. Osbaldiston, 8 C. & P. 80; Read v. Dunsmore, 9 C. & P. 588; Nichol v. Martyn, 2 Esp. 732; Henderson v. Hydraulic Works, 9 Phila., Pa. 100; Bixby v. Parsons, 49 Conn. 483, 44 Am. Rep. 246; Chicago, etc., Ry. Co. v. Bayfield, 37 Mich. 205; Hofflin v. Moss, 67 Fed. 440, 14 C. C. A. 459, 32 U. S. App. 200.

OPINION OF THE COURT.

MILLS, C. J.—This case was tried by the court below sitting without a jury. The court made findings of facts, which were before us on this appeal, and according to the rule frequently enunciated by this court such findings of facts, and the judgment entered thereon, like the ver-
1 dict of a jury, will not be disturbed where there is substantial evidence to support them. Zanz v. Stover, 2 N. M. 29; Romero v. Desmarais, 5 N. M. 142; Torlina v. Torlicht, 5 N. M. 148; Newcomb v. White, 5 N. M. 435; Torlina v. Torlicht, 6 N. M. 54; Perea v. Barela, 6 N. M. 239; Lynch v. Grayson, 7 N. M. 26; Gale v. Salas, 11 N. M. 210; Romero v. Coleman, 11 N. M. 533; Rush v. Fletcher, 11 N. M. 555; Brown v. Lockhart, 12 N. M. 16.

This suit was brought to collect a brokerage or commission of five dollars per acre on the sale of two hundred and forty acres of land.

The appellee herein admits that for himself and as agent for one L. R. Sperry, he listed the land for the sale of which the brokerage or commission is claimed, for sale, early in September, A. D. 1905, for the period of thirty days, with one Harry Hamilton, who in turn re-listed it for sale with The Pecos Valley Immigration Co., appellant

herein and that in October of the same year he renewed such listing for thirty days, which second listing expired on November 9th, A. D. 1905. Appellee also testified that after November 9th A. D. 1905, he refused to list the land with any one, although requested so to do, without reserving the right to sell it himself. He also testified that when solicited to relist the property for sale and when he refused to do so, he gave appellant's representative the description of the land, and said that if they produced the purchase price before he sold it, that appellant would be entitled to whatever commission he made over and above the net price he had set on the property. It also appears that in January, A. D. 1906, appellee sold the land to one Kaufman, who first came to New Mexico in the winter of 1905 on an excursion run under the auspices of the appellant.

The evidence in this, as in nearly all contested cases, is conflicting to some extent, but there is ample testimony to sustain the finding of the learned judge who tried the case, that, "The listing of defendant's property with plaintiff expired in November, 1905, and said company did not have it for sale when Kaufman came to Artesia in December, 1905." We think that not only this, but that all of the facts found by the court are eminently proper, and that the weight of the evidence as disclosed by the printed transcript which is before us, sustains them.

2

We are particularly struck by the clear and positive evidence of the defendant Cecil, appellee herein. He does not appear to have sought to conceal anything, but evidently has tried to detail all of the facts relevant to the issues in the case just as he remembered them.

The court also found as a conclusion of law, that: "The facts of the case do not bring it within the decisions which hold that a sale by a party direct leaves the factor's right to the commission intact, where the latter has furnished the customer and has thus been the procuring cause of the sale. Such cases presuppose and assume relationship of principal and agent which the court in this case finds did not exist."

3

As the court below found that the contract allowing appellant to sell the land expired in November, 1905, and as at the time the same was made to Kaufman, in January, 1906, by the appellee, the appellant had nothing to do with the disposition of the land, this finding of the court is correct, and appellant is clearly not entitled to any commission on the sale.

We have not considered it necessary to take up in detail the many exceptions urged by counsel for appellant, as we think that this opinion fairly covers the merits of the case, and as there is no error apparent in the record or in the judgment entered by the court below, the same is therefore affirmed, and, It is so ordered.

[No. 1241, January 12, 1909.)

TERRITORY OF NEW MEXICO, Appellant, v. PEDRO GONZALES, Appellee.

Appeal from the District Court for Dona Ana County before FRANK W. PARKER, Associate Justice. Reversed and remanded.

J. M. HERVEY, Attorney General, and MARK B. THOMPSON, District Attorney, for Appellant.

Gambling legislation in New Mexico. Compiled Laws 1884, secs. 880-883, 891, 892, 2290; Crow v. The State, 6 Texas 335; Job 5; Psalms 21; C. L. 1897, secs. 1305, 1314, 3199; Laws of 1887; Laws of 1893; Laws of 1897, chapters 31, 32; Joseph v. Miller, 1 N. M. 621; Laws of 1907, chapter 64.

"Statutes for the suppression of fraud should be liberally construed." Bacon's Abr., vol. 9, p. 251; Sutherland Statutory Construction 427; Randolph v. The State, 9 Texas 521 (1853); Portis v. The State, 7 Ark. 360; Territory v. Gutierrez, 78 Pac. 143; ejusdem generis, vol. 3, Words and Phrases; ex-parte Leland, S. C., 1 Nott & McC. 460; Moore v. The State, 146 Ill. 600; People v. New York and M. B. Ry. Co., 84 N. Y. 565; Phillips

v. Christian Co., 87 Ill. App. 481 (484); Remick v. Boyd, 99 Pa. St. 555; Union Co. v. Ussery, 147 Ill. 208; Misch v. Russell, 136 Ill. 22; Reg. v. Dickenson, 7 El. Bl. 831; Wanstead Local Board v. Hill, 13 C. B. N. S. 479; re Barre Water Co., 62 Vt. 27.

Construing of statutes directed against gambling. People v. Carroll, 80 Cal. 157; Stearns v. The State, 21 Texas, 693; Webb v. State, 17 Texas 206; Crow v. State, 6 Texas, 335; Randolph v. State, 9 Texas, 521; Bell v. State, 32 Texas, Cr. R. 187; Faucett v. State, 46 Texas, Cr. R. 114; Mims v. State, 88 Ga. 458; Brown v. State, 40 Ga. 692; Commonwealth v. Wyatt, 6 Randolph, Va. 694; Christopher v. State, 41 Tex. Cr. R. 239; State v. Gaughan, 55 W. Va. 692; Portis v. State, 27 Ark. 360; Trimble v. State, 27 Ark. 355; Euper v. State, 35 Ark. 629; State v. Rosenblatt, 185 Mo. 114; Eubanks v. State, 5 Mo. 451; State v. Gittlee, 6 Ore. 426; In re Lee Tong, 18 Fed. 253; Meeks v. State, Texas 1903, 74 S. W. 910; Oblennis v. State, 12 Mo. 311; Vicaro v. The Commonwealth, Dana, Ky. 1846, 506.

Qualifying words are usually limited to their immediate precedents. Lewis Sutherland on Statutory Construction, sec. 420.

HOLT & SUTHERLAND for Appellee.

No Brief.

STATEMENT OF FACTS

This is a case wherein appellee was indicted by the grand jury of Dona Ana County for the offense of running and operating a certain banking game of chance, to-wit: A nickel-in-the-slot machine, contrary to the statute of New Mexico.

A warrant was issued upon said indictment and the defendant was taken into custody, filed his appearance bond in the sum of $500 which said bond was approved according to law.

Thereafter, the defendant withdrew his plea of not guilty, theretofore entered, and filed a motion to quash the indictment found against him upon the ground that

it did not charge any offense under or known to the law of the Territory of New Mexico.

An agreed statement of facts was filed, describing the said nickel-in-the-slot machine as follows:

"A case, box or frame about five feet high and about four feet wide; that on the inside thereof is certain machinery so constructed as to make it work automatically when in running order; that there is a number of slots of different colors on the top of the machine and if the player puts a nickel into the slot of any color and pushes down a crank, it starts a circular disc to revolving, containing colors corresponding to the colors on the slots and if the color shown by the indicator over the disc at which the disc stops revolving is the same color as the slot in which the coin was deposited, a certain valve will open and pay out to the player from one to forty times the amount played by the player according to the color played by him. If the indicator does not stop at the color played the player loses the amount played. That there is a common fund placed in the machine by the owner and constantly kept there against which the players can play, to which the player's losings are added and from which his winnings are taken. In other words; if the nickel is placed in the green slot and the disc stops at the point so the indicator points to the green color on the disc, it pays five times the original nickel played, and the yellow pays ten, the white twenty and the blue forty when similarly played. If, on the other hand, the indicator shows on some color which the player has not played, his money so played by him goes into the common fund and becomes the property of the relator and is lost to the player. Whether the player wins or loses is wholly a matter of chance.

"The machine above described is a game of hazard or chance in which small sums are volunteered or ventured for the chance of obtaining a larger sum of money. The machine above described is what is known as a 'percentage game,' that is, the chances are unequal in favor of the owner."

And on the same day, the court, after hearing defend-

ant's motion to quash, and arguments of counsel, sustained said motion and discharged the defendant.

OPINION OF THE COURT.

Per curiam. This case is on all fours with that of the Territory of New Mexico v. Charles R. Jones, recently decided by this court, except that this is an appeal from a quashed indictment, and not from a quashed information, and on the authority of that case, the judgment in this cause is reversed and the case is remanded to the District Court of Dona Ana County for further proceedings: and It is so ordered.

[No. 1165, January 19, 1909.]

EDUARDO CHAVEZ, Appellee, v. JOHN D. TORLINA, Appellant.

SYLLABUS.

1. The owner of an encroaching building is a licensee where the owner of the land agrees that the former may continue to encroach until the owner demanded possession of the land encroached upon.

2. The license ceased with death and was not transferable being a personal privilege of the licensee.

3. The court permitted plaintiff an amendment of the replication after trial, but before judgment and afterwards found in defendant's favor on the issue involved. On defendant's appeal plaintiff filed no cross-appeal, so that the finding could not be reviewed. Held, that the ruling as to the amendment was harmless as far as the defendant was concerned.

4. Appellee sought to establish his ownership by hostile possession. He thereby disclaims possession as a tenant or licensee, the two positions being inconsistent with each other, and cannot be maintained at the same time.

5. Appellant telling appellee, who is rebuilding wall encroaching on appellant's land but held adversely by appellee: "Your wall is on my ground. You cannot throw rubbish in this yard—you throw your rubbish on your own

side," is of too casual a nature to be regarded as sufficient to suspend the operation of the law of adverse possession.

6. Where appellee relies upon an ownership and possession hostile to the true owner, there is no ground of liability of the true owner. If appellant was a stranger to the title it would be different.

7. An entry on lands of another without right and not in subordination to the title of the owner is a mere trespass, and no tenancy is created thereby.

8. If the relation of landlord and tenant did not exist between owner of building encroaching and the owner of the land, it was not necessary for owner of land to give owner of building notice to quit and remove the encroaching wall from the land.

9. Nor was notice necessary to revoke the license if owner of building were held to be a licensee.

10. The owner is not liable to a trespasser, or one who is on his property by mere permission or sufferance, for negligence of himself or agents.

11. Where appellant notified the appellee that appellee's wall was upon appellant's ground at the time appellee was preparing to rebuild the fallen wall, the appellee being a trespasser upon appellant's ground, no damages could be recovered for the rebuilding of the wall.

Appeal from the District Court for Bernalillo County, before IRA A. ABBOTT, Associate Justice. Reversed and remanded.

W. C. HEACOCK and LOWELL LOUGHARY, for Appellant.

Allegations of title are material in actions respecting personalty as well as in those concerning realty, and when made must be strictly proven, any material variance between the allegations and the proof thereof being fatal. Enc. P. & P., vol. 21, pp. 712, 740; Great Falls Co. v. Worster, 15 N. H. 460; St. Joseph Ice Co. v. Bertch, 71 N. E. 56 (58); Davis v. Jewett, 13 N. H. 90 (91); C. L. 1897, sec. 2685, sub-secs. 32, 49; Ogden v. Moore, 95 Mich. 290 (294); Bangor O. and M. R. R. Co. v. Thomas, 49 Me. 9; White v. Brash, 73 Pac. 445; Cunzie

v. Wixom, 39 Mich, 384; Hudson v. Swan, 83 N. Y. 552.

"A license is generally so much a matter of personal trust and confidence that it does not extend to any one but the licensee. The death of either party will, of itself, revoke it. So would a transfer or alienation of the interest of the licenser or licensee in the subject matter of the license." 1 Wash. Real Prop. (4 ed.) 632; DeHorn v. U. S., 5 Wall. 72 U. S. 599; Cook v. Sterans, 11 Mass. 533; Bleadsdell v. R. R. Co., 51 N. H. 483; Smith v. Stewart, 6 Johns, N. Y. 45; Jackson v. Taylor, 2 Johns. 444; Cooper v. Adams, 6 Cush. 89; McLeran v. Benton 73 Cal. 340; Ruggles v. Leasure, 24 Pick., Mass. 187.

"An encroachment is deemed a private nuisance which the adjoining owner, who is thereby deprived of the complete enjoyment of his land, may abate." Cyc. L. & P., vol. 1, pp. 772, 773; Myers v. Metzlar, 51 Cal. 142; Beekman v. Jones, 42 Hun., N. Y. Sup. Ct. 328; Harrington v. McCarthy, 169 Mass. 492; Little v. Hockett, 116 U. S. 366; 21 Enc. of Law 584, and authorities cited. Candelaria v. A., T. & S. F. Ry. Co., 6 N. M. 266 (270).

A license to build or occupy does not carry with it the right to rebuild. Carleton v. Redington, 21 N. H. 291 (307); Cook v. Stearns, 11 Mass. 533; Price v. Case, 10 Conn. 375 (383).

Trespassers and mere licensees take the premises as they find them with their surrounding perils; the only duty owed them by the owner is to avoid wanton or malicious injury. Current Law, vol. 4, p. 769; Cooley on Torts, ed. 372, 384, 792, 794; Pittsburg Ry. Co. v. Bingham, 29 Ohio St. 372; Minor v. Sharon, 112 Mass. 487; Victory v. Baker, 67 N. Y. 368; Gellispie v. McGowan, 100 Pa. St. 144; Gills v. Penn. Ry. Co., P. F. Smith, Pa. 141; Vanderbeck v. Hendry, 34 N. J. L. 472; Fairplay Hyd. Mining Co. v. Weston, 67 Pac. 160; Hadley v. Hagerty, 59 Am. Dec. 736; Mason v. Mo. Pac. Ry. Co. 41 Am. Rep. 405; Clark v. Mich. Ry. Co. 67 Am. St. 444; Reckhow v. Shank, 43 N. Y. 541; Akers v. Chicago, St. P. & Ry. Co., 60 N. W. 669; Marti v. Knapp, 57 Iowa 342; White v. Brash, 73 Pac. 446; Albert v. New York, 75 App. Div. 556; St. Joseph Ice Co. v. Bertch, 71 N. E. 56; Ill. Cent.

Ry. Co. v. Godfrey, 22 Am. Rep. 112; Letts v. Kessler, 42 N. E. 765 (767).

"A tenancy at will cannot arise without an actual grant or contract." 1 Wash. Real Prop., 4 ed. 581, 616; 12 Enc. Law 661, 662; Keys v. Davis, 101 Ind. 75; Jackson v. Tyler, 2 Johns, 444; McLeran v. Benson, 73 Cal. 340; Sedg. & Waite on Trial to Title, secs. 375, 387; Kunzie v. Wixom, 39 Mich. 384 (388); Simms v. Cooper, 5 N. E. 726.

In actions for damages growing out of negligence, the particular acts or omissions which constitute negligence must be set forth; and any material variance between the allegations and the proof is fatal to a recovery. Enc. P. & P., vol. 14, p. 342; Buffington v. Atlantic & Pac. Ry. Co., 64 Mo. 246; Waldheimer v. Hannibal & St. J. Ry. Co., 71 Mo. 514; Edners v. Hannibal & St. J. Ry. Co., 72 Mo. 212; Gurley v. Missouri Pac. Ry. Co., 93 Mo. 445; Elliott v. Carter White Lead Co., 73 N. W. 949; Jenkins v. Kirtley, 79 Pac. 675; McCain v. Louisville & N. R. Co., 18 N. E. 537; C. L. 1897, p. 700, sub-secs. 78-80.

A finding of fact outside of the issues made by the pleadings will not support a judgment. 8 Enc. P. & P. 945 and notes; Male v. Schaut, 69 Pac. 137, 138; Gomanche v. School Dist., 65 Pac. 301; Newby v. Myers, 24 Pac. 971; Johnson v. Hosford, 110 Ind. 572; C. L. 1897, sec. 2685, sub-secs. 62, 96.

"If the new evidence tends to establish a new fact not in dispute at the trial, such evidence is not cumulative merely because it tends to establish the same claim or defense." Enc. P. & P. 791, and authorities cited; Alexander v. Solomon, 15 S. W. 906; People v. Holmes, 52 N. Y., supp. 939; Winfeld Building and Loan Co. v. McMullen, 53 Pac. 481.

E. V. CHAVEZ for appellees.

The law is very liberal in allowing amendments to the pleadings. C. L. 1897, sec. 82.

The law of this territory only requires that a cause of action be stated plainly and concisely. C. L. 1897, sec. 2685, sub-secs. 32, 49.

Where there is evidence to sustain the findings of the lower court sitting as a jury, they will not be disturbed on appeal.

STATEMENT OF FACTS.

In 1880, Santiago Baca surveyed and filed a plat of an addition to the town, now city of Albuquerque, and in 1881 a new survey was made of this addition, a new plat was also filed, and from an examination of these plats, it appears that the lots of same number do not cover the same ground; the lots in the survey of 1880 being twenty-five feet wide, and the lots in the survey of 1881 being twenty-five feet in width except Lot 3, Block 2, now owned by the plaintiff Chaves, which is twenty-two feet wide. On June 4, 1881, Santiago Baca and wife conveyed to Augustus Sweeney lot 3, block 2 of the Baca Addition, according to the survey of 1880. In September, 1882, Sweeney conveyed the same to Daniel Gary, and on November 20, 1884, Gary conveyed to Juan Chaves y Pena and wife a lot numbered the same, but according to the survey of 1881. It appears that the lots, not being marked on the ground under the survey of 1881, the grantee requested the grantor to stake out the lot, which was done, and the grantee took possession of the same as thus marked by stakes. In 1884 and 1885, Juan Chaves y Pena and wife erected an adobe building one hundred and thirty feet long by twenty-two and three or four inches wide on the lot which they understood they had purchased, erecting the north wall on the north line of the lot as staked out to them. This building is the one, for injury to the north wall of which, damages are sought to be recovered in this case. Juan Chaves y Pena and wife sold to Ignacio Baca y Chaves lot 3, block 2, December 13, 1885. Ignacio Baca y Chaves died about thirteen years ago, and on April 25, 1898, Eduardo Chaves, the plaintiff, purchased said lot from Maria de Baca, wife of Ignacio Baca y Chaves, and has continued to occupy the store building erected upon said lot by Juan Chaves y Pena, to the present time. On February 6, 1885, Baca and wife sold lots one and two of block 2, to John D. Torlina,

the defendant in this case, and the defendant took possession of them according to the survey of 1881. In 1889, the defendant began the erection of what is now known as the Eight-Spot Saloon upon lot 2, block 2, which adjoins the lot occupied by plaintiff's store building, and for the first time a question arose as to the boundary line between the two lots. A surveyor was employed by the defendant to determine the boundary, and the survey made by him discloses the fact that the lot owned by the plaintiff was only twenty-two feet wide, whereas the lot of the defendant was twenty-five feet wide, and disclosed the further fact and reported the same to the defendant that the north wall of the building occupied as a store by the plaintiff and which had been erected long years before by Juan Chaves y Pena, was upon the lot of the defendant to the extent of two feet and one inch. It appears from the testimony, that the defendant notified Ignacio Baca y Chaves, who at that time owned the store building and the lot upon which it was situated, to remove the north wall of his building from the defendant's ground, and the result of this notice was an agreement stated in the testimony between the defendant and Ignacio Baca y Chaves, that Baca's building should remain on the defendant's ground until the defendant demanded it from him, and it is admitted by the defendant that no demand was ever made, either of Baca or the plaintiff for this ground, or for the removal of this wall. Baca died some time later—the particular time is not disclosed by the evidence—and his wife continued to use the store building, and in 1898, sold the same to Eduardo Chaves the plaintiff. So far as the evidence shows, Chaves knew nothing of the dispute as to the boundary line between the defendant and Ignacio Baca y Chaves, nor was he aware of the fact that the north wall of the building was upon the ground of the defendant. All that the evidence discloses upon this point is, that when the wall had been damaged, so that it became necessary to re-erect the same, the defendant observing the work of re-building this wall, some time in 1903, stated to the plaintiff Chaves, that this wall was

upon his ground, to which Chaves replied that it was not, and continued the erection of the wall. On July 31, 1903, the plaintiff Eduardo Chaves brought this suit, in which he claimed damages to the extent of $1250, alleging in the second paragraph of the complaint that the defendant between the first day of February, 1902, and the 22nd day of April, 1903, maliciously intending and contriving to injure and destroy the property of plaintiff, unlawfully and with force of arms entered upon said premises and cut, tore down, injured and destroyed the walls of said plaintiff's store-room or building, so that by reason thereof, a large portion of the walls of said store building were cracked, settled, injured, weakened and destroyed to plaintiff's damage in the sum of one thousand dollars. In the third paragraph of the complaint, it is alleged that between the same dates above stated the defendant by reason of rain waters which washed and ran down from the roofs and from below, of water closets, out-houses, houses and buildings belonging to the defendant, and which the defendant has built upon, against, touching and abutting against the north wall of plaintiff's said store building, so that by reason of the large quantities of rain waters so running against and upon said wall, from and off the roofs of said water closets, out-houses, and houses and buildings belonging to the defendant, a large portion of the walls of said store building were cracked, washed down, settled and destroyed, and so injured and weakened and destroyed, as to make it wholly unfit for the carrying on of plaintiff's business, to-wit, general merchandise, to the damage of plaintiff in the sum of one thousand dollars. In the fourth paragraph of the complaint, it is alleged that by reason of said store building having been so injured and destroyed, it became impossible for plaintiff to continue his business therein, and that he was compelled to move out of the said store building into another place of business, incurring damages to the extent of two hundred and fifty dollars.

Demurrer was sustained to this complaint, and it was amended at a later date, and at a still later date,

after the testimony had been taken, the complaint was again amended at the plaintiff's request, so as to conform to the evidence. Jury was waived, trial was had before the court, and judgment rendered in damages for the sum of four hundred and seventy five dollars. Appeal was prayed to this court, and granted.

OPINION OF THE COURT.

McFIE, J.—There were two surveys made of the Baca Addition, one in 1880 and the other in 1881, and both were recorded. The lots are numbered the same, but the land is not. In the survey of 1880, the lots are twenty-five feet wide, but according to the second survey in 1881, the lots are twenty-five feet wide, except lot 3, block 2, which is only twenty-two feet wide. Santiago Baca, the owner of the addition, made his conveyances of lots 2 and 3, block 2, according to the survey and plat made in 1880, although he appears to have had both surveys made.

Baca and wife conveyed lot 3, block 2, to Augustus B. Sweeney in 1881, according to the survey of 1880. Sweeney conveyed to Daniel Geary in 1882, acording to the same survey, which survey made the lot twenty-five feet wide, but when Geary and wife conveyed to the wife of Juan Chaves y Pena in 1884, under purchase by her husband, they conveyed lot 3, block 2 according to the survey of 1881. The lot thus conveyed was not the same lot conveyed by the former deeds to Geary, and was only twenty-two feet wide. It appears, however, that under the survey of 1881, the boundaries of the lots were now marked on the ground, and when Chaves y Pena purchased, she had the surveyor stake out the lot. As she and her husband erected their building in 1884-5, to be used as a store and dwelling, leaving between two and three feet on the south side for an alley, and the building twenty-two feet and three or four inches wide, it is evident that the lot had been staked out to them twenty-five feet wide. Santiago Baca and wife conveyed lots 1 and 2, block 2, to the appellant Torlina in 1885, according to the survey of 1880, but as the court states in its

findings, the appellant took possession of lots 1 and 2 as shown by the survey of 1881. It will be observed that this overlapping occurred by reason of Geary's conveying under a different survey than that under which the lot was conveyed to him. When the defendant made this discovery, he had a written notice, dated June 10, 1889, served upon Ignacio Baca y Chaves, to whom Juan Chaves y Pena and wife had in the meantime conveyed the premises, notifying him that his building "trespasses" on defendant's lot 2, two and one-tenth feet; requesting him to remove "said trespass" from the ground without further notice, and that upon failure to do so he would be held liable for all damages and costs. After this notice was served, Ignacio Baca y Chaves and the appellant had a conference about the matter, the result of which was that the defendant and Juan Chaves y Pena entered into an agreement, concerning the effect of which the appellant testified as follows:—

"Q. And under the agreement or contract you had with him (meaning Chaves y Pena) how long was he to occupy it?

A. Until I demanded it.

Q. Did you ever demand it during his life time?

A. No, sir, I did not.

From these facts it appears, that Ignacio Baca y Chavez, was to continue his possession of the portion of appellant's lot upon which his building stood, until demand for possession was made upon him, by the agreement and consent of the appellant, Baca, was therefore,
1 a licensee, as suggested by the appellant's counsel. If a license, it was a personal privilege of Mr. Baca, which was not transferable, and which ceased to exist at his death. Baca died about the year, 1891, or 1892, as near as the witnesses were able to fix the time of his death.

In the case of DeHaro v. United States, 5th Wall. 627, the court said:—

"While a grant which passes some estate, must be in

writing and is irrevocable unless so provided, a license is a personal privilege, can be conferred by parole or writ-
2 ing, conveys no estate, is revocable by grantor, ceases with death of either party, cannot be alienated, and in no sense is property descendible to heirs." 1 Wash. Real Property 4th, 632; McLean v. Benton, 73 Cal. 340; Ruggles v. Leasure, 24 Prck. 187; Bleasdell v. R. R. Co., 51 N. H. 483.

Maria A. Chaves de Baca, the wife and sole heir at law of Ignacio, continued to occupy the premises, without objection from the appellant, from the death of her husband until the 15th day of April 1898, at which time she conveyed said lot 3, block 2, according to the survey of 1881, to the appellee Eduardo Chaves and one Ambrocio Gringas, and Gringas afterwards conveyed his interest therein to the appellee.

The appellee entered upon the possession after his purchase thereof and continued to occupy the same as a store and dwelling, with the full knowledge of the appellant, until this suit was brought and concluded. No demand was made upon him to vacate the premises or the overlapping portion of the building; nor did he have any knowledge that the building did overlap appellant's lot, nor notice of the controversy and agreement between appellant and Ignacio Baca y Chaves above referred to. So far as the appellee is concerned, the evidence fails to show that he had any knowledge of any confusion or dispute in regard to the boundaries of title of the lots involved. His purchase seems to have been made in good faith. Of course he was chargeable with notice of what the records disclosed as to the lot purchased.

The court permitted an amendment of the replication after trial, but before judgment, as appellee claimed, to conform to the evidence, and appellant assigns this ruling as error. Whatever the evidence may have been upon that issue at the trial below, the question of adverse possession will not be considered under this assignment. The
3 court below found against the appellee as to the ownership of that overlapping strip, by adverse possession,

and there being no cross appeal questioning that finding for the purposes of this hearing it must stand. This finding in favor of the appellant, he cannot complain of, and therefore the ruling of the court as to the amendment is harmless, so far as the appellant is concerned; but there is a phase of this question which becomes quite serious under other assignments. The pleadings and the evidence show that the appellee held possession of the strip involved, as his own, and adversely to the appellant, and appellee sought to establish his ownership by such hostile possession, upon the trial below. By this contention, the appellee disclaims the holding of possession as a tenant or licensee as these are inconsistent with each other, and cannot be
4 maintained at the same time. The appellee chose to stand upon this ground, and it devolved upon him to maintain it.

There is no evidence in the record that Maria A. Chaves y Baca knew anything about a conflict in the area of these lots, or about the agreement between her husband and appellant to the effect that he should remain upon appellant's land until demand was made upon him for it. She was sole heir to the lot, and became its absolute owner upon the death of her husband, and conveyed the same as such. The lot she occupied was only twenty-two feet wide, as shown by the last survey, but she occupied a space almost twenty-five feet wide. The wall of her store and dwelling was upon appellant's lot, but as she did not know this, and there is nothing to show that the appellant ever informed her of the fact, she undoubtedly claimed to own the building and the ground on which it stood. The appellee in his pleadings, claims the benefit of the peaceable possession of his predecessors in title, as he had a right to do in order that he may make out his title by adverse possession for ten years or more. There being no testimony to show that Mrs. Chaves held by any tenancy or license, it is difficult to conclude otherwise than that she held adversely to appellant, as her possession was peaceable and continuous for at least six years, when she sold and conveyed the premises, including the building, to the appellee

in 1898. To maintain a building upon another's land, is as substantial evidence of an adverse holding as could well be imagined, and this was done by Mrs. Chaves without any recognition of any right of the appellant to any part of the land on which her building stood. This tends strongly to establish an adverse and entirely peaceable possession in Mrs. Chaves for at least six years immediately preceding its conveyance to the appellee Eduardo Chaves and Ambrocio Gringas. Eduardo Chaves and Ambrocio Gringas continued in the peaceable possession and occupancy of the building and premises until 1901, when Gringas sold his interest therein to the appellee Chaves, and the appellee continued the same until the commencement of this suit, July 31, 1903. It is true that in 1903, after the alleged damage had been done to the wall of appellee's building, and he was preparing to rebuild the wall, the following colloquy occurred, as testified to by appellant:—

"And I told Mr. Chaves, why, your wall is on my ground. He says, it is no such thing—he says I will fix you; and says I, you cannot throw your rubbish in this yard—you throw your rubbish on your own side."

This conversation is of too casual a nature to be re-
5 garded as sufficient to suspend the operation of the law of adverse possession, but however that may have been, as this occurred about April or May of 1905, if we are correct in continuing the possession of Mrs. Chaves and that of Gringas and Chaves, more than eleven years elapsed before this conversation. Even if it were true that adverse possession had ripened in the appellee, it is not for this court to decide that issue, further than to point out what the evidence tends to show, as bearing upon the right of damages based upon the finding of the court below, that the appellant was liable because the appellee "had not been notified or requested to remove his building from the portion of said lot 2 which it covered, and was entitled to have it remain there until such notice." If the appellee is relying upon an ownership and possession hostile to the

true owner, we see no ground of liability of the true
6 owner, except for acts or omissions which are of malicious origin, and the court below found that appellant's acts or negligence complained of, were not malicious. If appellant was a stranger to the title, of course, it would be different, and the court's finding would be a correct statemen of the law of the case.

"The relation of landlord and tenant does not arise where the occupant of the land holds adversely to the owner, and the occupant in such case is not liable for rent. An entry on lands of another without right and not in subordination to the title of the owner is a mere tres-
7 pass, and no tenancy is created thereby." Jones on Landlord and Tenant, Sec. 2 and cases cited.

If then the relation of landlord and tenant did not exist between Chaves and Torlina, it was not necessary for Torlina to give Chaves notice to quit and remove the
8 wall from the strip of land owned by Torlina. Jones on Landlord and Tenant, sec. 257, and cases cited.

Nor was notice necessary if Chaves were held to be a licensee, but as has been said, he could not be a licensee and hold adversely at the same time. Now, was there an
9 adverse holding? We find absolutely no evidence in the record that Chaves at any time recognized the title of Torlina to the strip of land on which the north wall of his store and dwelling house stands. He testified that he owned the property on which he was doing business, and this business house covered the strip in dispute. There is no evidence that Chaves ever paid or agreed to pay the owner any rent, nor that Chaves ever knew that there was any question of his ownership until after the wall fell. From these facts it appears clear that he was not occupying in subserviency to the title of any other owner, but that he occupied the same as the owner of the title. After the wall had fallen, and he was engaged in rebuilding the same, the evidence shows that Torlina told Chaves that the wall was upon his, Torlina's, ground, and Chaves replied that it was not on Torlina's ground; a statement utterly inconsistent with an occupancy in subordination to the title of the true owner. This was the status of the case when the

court handed down findings of fact and conclusions of law. After the views of the court were known, counsel, on the 24th day of May, 1906, asked and obtained leave of the court to amend his complaint so as to show that he claimed title, except as to the strip of land upon which the north wall of his store stood. Counsel for the defendant duly excepted to the allowance of this amendment. The amendment being made after all of the testimony was taken, could not change the attitude of the plaintiff, (as disclosed by his testimony) as claiming adversely, the ground upon which his store was situated necessarily including the ground in dispute. Nor does the court's conclusion that plaintiff had not established title by adverse possession of the strip in dispute, change his attitude, as he might claim adversely notwithstanding his failure to establish his claim. In our opinion, the plaintiff's attitude was that of an adverse claimant, and not that of an occupant holding in subordination to the title of the true owner.

The court below, taking the view evidently, that by reason of the agreement for notice between Torlina and Ignacio Baca y Chaves, the appellee Eduardo Chaves was a licensee or tenant at will, and if so he was entitled to notice to quit; but for the reasons above stated, we are unable to agree to this with this finding, the license having expired with the death of the licensee, and no circumstances proved by which a tenancy of any kind could be established. The evidence shows that the appellee claimed the ownership of, and was occupying twenty-five feet of ground, whereas, the lot he purchased was only twenty-two feet wide as disclosed by the plat on record in the recorder's office of the county of Bernalillo, from which it appears that he did not have even color of title for the land in dispute, and the last amendment of his complaint admitted this. If therefore, appellee was holding adversely; as we have concluded he was, and his adverse holding had not ripened into title under the statute, he was not a licensee or tenant at will, or at sufferance, but a trespasser, without right of notice to quit by the real owner. If the appellee was a trespasser or even a licensee, the rule of law is

that "the owner is not liable to a trespasser, or one who is on his property by mere permission or sufferance, for
10 negligence of himself or agents." Gillis v. Pennsylvania R. R. Co., 59 Penn. State 129.

"If the city was under no obligation to the deceased to make the extension safer or to keep it in any particular condition, then the deceased is to be regarded as a trespasser, or at the most a bare licensee, and the only obligation resting upon the city would be to refrain from any wanton or willful act producing injury." Albert v. New York, 75 App. Div. (N. Y.) 556; Pittsburg Ry. Co. v. Bingham, 29 Ohio St. 364.

A bare licensee goes upon premises at his own risk, must take them as he finds them, and accepts the permission thus granted with its concomitant conditions and perils. Redigan v. Railroad Co., 155 Mass. 44; Fairplay Hydraulic Mining Co. v. Weston, 67 Pac. 160.

The court below found that the injuries complained of in this case, were not committed wantonly or maliciously, and under such circumstances, the true owner, Torlina, is not liable for damages in any sum whatever. Being a trespasser, by holding adversely the true owner did not owe him any duty except to avoid wanton and malicious injury; and this, the court below found he did.

The court below awarded the appellee damages in the sum of four hundred and seventy-five dollars, and gave judgment for that amount against the appellant. We are of the opinion that this was error, for which the judgment must be reversed.

It appears that the appellant notified the appellee that his, appellee's wall, was upon his ground, at the time he was preparing to rebuild the fallen wall. In view of
11 this fact, and the further fact that appellee was a trespasser upon appellant's ground, no damages could be recovered for the rebuilding of this wall.

"But if it be holden that a license to erect a dam implies also a license to repair the same at pleasure, it would seem, from the authorities, that the license cannot be sustained. It is said that such a license would give

a permanent interest in the land on which the license was to be exercised, and that such an interest cannot be created by parol." Carleton v. Redington, 21 N. H. 291, (307); Price v. Case, 10 Conn. 375.

Indeed, the law seems to be, in such cases that the party suffering from the encroachment, has no right to recover in damages. As the damages sought to be recovered, were, in large part, for the re-building of this encroaching wall, it would seem to be an additional reason for denying the right of recovery in this case.

We are further of the opinion that the cause of the injury complained of as disclosed by the evidence and found by the court, is not alleged in the amended complaint, inasmuch as the first two paragraphs fail to allege the cause of the injury claimed, and the third paragraph alleges the destruction of the wall to have been caused by the descent of rain water from the roof of appellant's building and outbuildings, which did not occur, as found by the court, until after the commencement of this suit.

In reversing this case, it seems proper to say, that there is reason to believe from the whole record, that the actions of the parties are to some extent due to confusion and honest mistake. And in view of that fact, the cause will be reversed and remanded with leave to reform the pleadings without prejudice as to the issue of adverse possession, excluded by the amended complaint.

W. H. Pope, A. J., concurs in the result.

[No. 1205, July 1, 1909.]

RICHARD DE PALMA and BERNARD RUPPE, Appellees, v. J. A. WEINMAN and JOSEPH BARNETT, Appellants.

SYLLABUS.

1. A previous ruling by an appellate court upon a point distinctly made in a case before it, becomes the law of that case.

2. A lessor who permits an adjoining lot owner to

enter the leased premises and excavate under the wall of the leased building, under a party wall agreement, was equally liable with such owner for damages to the lessee's goods through the falling of the wall.

3. The chief consideration which determines one to be an independent contractor is the fact that the employer has no right of control as to the mode of doing the work contracted for.

4. Contractor held to be servant of owner and not independent contractor where work was done under direction of superintendent who was agent of owner and had full control of the work.

5. Though one excavating for lot owner is an independent contractor, owner would still be liable if the agreed method of excavating under the wall in question worked an injury to the rightful occupant of the building on a lot adjoining.

6. It is not the law that a merchant must be able to recall from memory every article in his store and its value before he can recover damages for loss thereof by reason of some one's wrongful act. Any writing, may under such circumstances, be used for stimulating and reviving the memory of a witness, even though it was not made by witness himself and though it may be only a copy of the original writing. The memoranda may be read to the jury if the witness knows them to be correct, even though the writing itself cannot bring to his mind independently the separate items.

7. If appellants by their wrongful acts caused the destruction and injury of appellee's goods, appellee was entitled to recover the value of the stock and fixtures destroyed, damage to stock and fixtures not completely destroyed and reasonable expenses of moving to another location.

8. Where in consequence of a trespass, the plaintiff's business is destroyed, damages for loss of profits may be recovered.

9. There was not sufficient evidence to sustain a verdict for loss of profits, where there was no evidence of loss except a bald statement as to the net profits per month even though witness referred to some memoranda to refresh his

memory but it nowhere appears what the memoranda were nor when and by whom made or that witness knew or believed them to be correct.

10. Interest is not allowable as a matter of law, except in cases of contract, or the unlawful detention of money, unless so provided by statute. In an action for damages to plaintiff's business and stock of merchandise through wrongful injury to his store building, it was error to instruct the jury to allow interest. In cases of tort the allowance of interest as damages rests in the discretion of the jury.

Appeal from the District Court for Bernalillo County, before IRA A. ABBOTT, Associate Justice. Reversed and remanded.

NEILL B. FIELD for Appellant Barnett.

All questions not passed upon at former trial are open to review to the same extent that they would have been had there been no former appeal. Crary v. Field, 10 N. M. 257.

Whenever in the trial of a civil case it is clear that the state of the evidence is such as not to warrant a verdict for a party, and that if such a verdict were rendered the other party would be entitled to a new trial, it is the right and duty of the judge to direct the jury to find according to the views of the court. Merchants' Bank v. State Bank, 10 Wall. 604, 637; Improvement Company v. Munson, 14 Wall. 442; Pleasants v. Fant, 22 Wall. 116; Ryder v. Wombwell, Law Rep. 4 Ex. 32; Giblin v. McMullin, Law Rep. 2 P. C. 335; Bowditch v. Boston, 101 U. S. 18; Sorenson v. Paper Co., 56 Wis. 342; Candelaria v. R. R. Co., 6 N. M. 266; Morrison v. Construction Co., 44 Wis. 411; Orth v. Ry. Co., 47 Minn. 388, 389; Asbach v. Ry. Co., 74 Ia. 250; Hughes v. R. R. Co., 16 S. W. 275; 82 Pac. 362.

A tenant can maintain trespass only where there is an interference with his possession; the landlord is the proper party to sue where the trespass results in an injury to the inheritance. Northern Trust Co. v. Palmer, 49 N. E. 555; Bobb v. Syenite Granite Co., 41 Mo. App. 642; 56 Mo. App. 138, 139; 1 Taylor's Landlord & Tenant,

sec. 174; Proud v. Hollis, 1 B. & C. 8; Penley v. Watts, 7 M. & W. 601; Shaw v. Commisky, 7 Pick. 76; Peterson v. Edmundson, 5 Harr. 378.

An independent contractor alone is responsible if by his departure from the requirements of the plans and specifications injury is inflicted. Casement v. Brown, 148 U. S. 615; Chicago v. Robbins 67 U. S. 418; Transportation Co. v. Chicago, 99 U. S. 635; Sulzbacher v. Dickie, 51 How. Pr. 500; Norwalk Gas Co. v. Norwalk, 63 Conn. 495; Conners v. Hennessey, 112 Mass. 96; Engel v. Eureka Club, 33 Am. St. Rep. 693; Dillon v. Hunt, 24 Am. St. Rep. 374; Charles v. Rankin, 66 Am. Dec. 642 and note; Gilmore v. Driscoll, 122 Mass. 199.

It was incumbent on plaintiffs to produce the best evidence of which the case was susceptible. Central Coal and Coke Co. v. Hartman, 111 Fed. 102; 17 Wend. 161; 23 Wend. 431; 24 Wend. 668; 5 Hill, 603; 7 Hill 61, 77; Blanchard v. Ely, 21 Wend. 342; Brill v. Flagler, 23 Wend. 354; Giles v. O'Toole, 4 Barb. 263, 264; Gildersleeve v. Overstoltz 90 Mo. App. 530; 1 Green Ev. s. 436; 1 Phil Ev. 289; 2 Cowan & Hill's Notes 750; Abbott's Trial Ev. 320; 1 Wig. Ev. ss. 744-763 inc.; Clark v. Holmes, 43 Atl. 194; Watterson v. The Allegheny Valley Ry. Co., 74 Pa. St. 209; Boston & Albany R. R. Co. v. O'Reilly, 158 U. S. 334; Swift & Co. v. Johnson, 138 Fed. 867; Richmond & Danville R. R. Co. v. Elliott, 149 U. S. 266; The City of Cincinnati v. Platt Evans, 5 O. S. 594; Howard v. Stillwell & Bierce Mfg. Co., 139 U. S. 199; Silurian Mineral Spring Co. v. Kuhn, 91 N. W. 508; Douglass v. Ohio River R. C., 41 S. E. 911; Paquin v. St. Louis & S. Ry. Co., 90 Mo. App. 118; Gochel v. Hough, 26 Minn. 252.

Instructions as to damages. Karbach et al v. Fogel, 88 N. W. 660; Hayden v. Florence Sewing Mach. Co., 54 N. Y. 225; Howard v. Stillwell & Bierce Mfg. Co., 139 U. S. 206; 3 Suth. on Dam. 3 ed., sec. 864, p. 2580; Shafer v. Wilson, 44 Md. 268; Casper v. Klipper, 61 Minn. 353, 63 N. W. 727; Des Allemande Lumber Co. v. Morgan City Timber Co., 41 So. 332; Silurian Mineral Spring Co. v. Kuhn, 91 N. W. 508; Douglas v. Ohio River R. Co.,

41 S. E. 911; Paquin v. St. Louis & S. Ry. Co., 90 Mo. App. 118; Griffin v. Colver, 69 Am. Dec. 718; Butler et al v. Collins, 12 Cal. 457; Ft. Pitt Gas Co. v. Evansville Contract Co., 123 Fed. 63; Louisa Douai Wehle v. John G. Haviland, et al, 68 N. Y. 448; 1 Sedgewick on Dam., 79, p. 128, 7 ed.; Cincinnati Siemens-Lungren Gas Illuminating Co. v. Western Siemens-Lungren Co., 152 U. S. 200; Central Trust Co. of N. Y. et al v. Clark, 92 Fed. 293; Dietrich v. Rumsey, 45 Ill. 209.

Plaintiffs were not entitled to recover interest as damages. C. L. 1897, secs. 3550, 3219; Robertson v. Hope, 121 Mo. 40; Lincoln v. Claflin, 74 U. S. 139, 19 L. ed. 109; Brent v. Thornton, 106 Fed. 38; N. Y. Lake Erie & Western R. Co. v. Estill, N. Y., Lake Erie & Western R. Co. v. Leonard, 147 U. S. 621; District of Columbia v. Robinson, 180 U. S. 107; A. T. & S. F. R. Co. v. Ayers, 42 Pac. 724; Emerson v. Schoonmaker, 135 Pa. St. 440; Hawley v. Barker, 5 Colo. 118; Illinois Cent. R. Co. v. Cobb, 72 Ill. 148; City of Chicago v. Allcock, 86 Ill. 384; Atkinson v. Atl. & Pac. R. Co., 63 Mo. 367; Kenny v. Hannibal & St. J. R. Co., 63 Mo. 99; Denver, S. P. & P. R. Co. v. Conway, 5 Pac. 142; Reiss v. N. Y. Steam Co. 12 N. Y. Sup. 557; Missouri & K. Telephone Co. v. Vanderwort, 79 Pac. 1068; Union Pac. R. Co. v. Holmes, 74 Pac. 606, 607; Gilpins v. Consequa, 10 Fed. Cases 420; Lincoln v. Claflin, 74 U. S. 132; Feller v. McKillip, 81 S. W. 641.

The tenant is put to his election to continue as a tenant or to treat his eviction as a breach of the covenant for quiet enjoyment, in which latter event "the right of action accrues at the time the covenant is broken and all damages that have been or will be sustained may be immediately recovered." 3 Suth. on Damages, sec. 864, p. 2580; Skally v. Shute, 132 Mass. 370; International Trust Co. v. Schumann, 158 Mass. 291; Bartlett v. Farrington, 120 Mass. 284; Royce v. Guggenheim, 106 Mass. 201; Bennett v. Bittle, et al, 4 Rawle 381.

The giving of two or more instructions which are inconsistent with each other is calculated to mislead the jury and leave them in doubt as to the law. Brown v.

McAllister, 39 Cal. 577; Hoben v. Railroad Co., 20 Iowa 567; Haight v. Vallet, 89 Cal. 245; Bank of Metropolis v. New England Bank, 6 How. 212.

W. B. CHILDERS for Appellant Weinman.

In the absence of fraud or concealment by the lessee of the condition of the property at the date of the lease, the rule of caveat emptor applies. 24 Cyc. of Law, pp. 1047, 1049; Dulton v. Gerlish, 9 C. 89, 55 Am. Dec. 45; Roth v. Adams, et al. 70 N. E. 445; Davis v. George, 39 At. R. 979.

"Nor is the landlord under any obligations to protect the tenant from danger due to the removal of a building adjoining the demised premises." 18 Enc. L. 217; Howard v. Doolittle, 3 Duer. 464; Brewster v. Defremey, 33 Cal. 345; Moore v. Webber, 10 Am. Rep. 708; Ward v. Fagan, 20 Am. St. Rep. 650.

Effect of party wall agreement. Garham v. Gross, 117 Mass. 444, 3 Lathup; Glover v. Mersman, 4 Mo. Ap. 90; 2 Washt. on Real Prop. 4 ed. 363; Ketcham v. Newman, 141 N. Y. 205, 24 L. R. A. 102.

The construction of the party wall did not necessarily involve a trespass. 18 Am. & Eng. Enc. L. pp. 546, 548, 550, 551, 163 and authorities cited; 1 Taylor Landlord and Tenant, 8 ed. 12; Winn v. Abeles, 52 Am. Rep. 138; Sullivan v. Zeiner, 98 Cal. 346; Aston v. Nolan, 63 Cal. 269, 272; Obert v. Dunn, 140 Mo. 476; Myer v. Hobbs, 57 Ala. 175; McGuire v. Grant, 25 N. J. L. 356.

"The owner will not be liable for injuries done to a house on an adjacent lot caused by excavations made for building purposes on his own lot when the work is done by a skilled contractor to whom the job has been let." Charles v. Rankin, 66 Am. Dec. 650; Casement v. Brown, 148 U. S. 615; Chicago v. Robbins, 67 U. S. 418; Transportation Co. v. Chicago, 99 U. S. 635; Sulzbacher v. Dickie, 51 How. Pr. 500; Norwalk Gas Co. v. Norwalk, 63 Conn. 495; Conners v. Hennessey, 112 Mass. 96; Engel v. Eureka Club, 33 Am. St. Rep. 693; Dillon v. Hunt, 24 Am. Rep. 374; Gilmore v. Driscoll, 122 Mass. 199; Carmen v. Steubenville & Indiana Railroad Co., 4 Ohio,

St. 399-414; Garvin v. American Mills, 27 Connecticut 274; Wood on Master and Servant, 610, par. 314.

"The giving of instructions which are inconsistent with or contradictory to each other is error." Thompson on Trials, vol. 2, p. 1682, secs. 2314, 2326, and authorities cited in note 4; 2 Blackstone Commentaries 454; 11 A. & E. Enc. Law, pp. 145-147, 454; City of Pekin v. Raynolds, 83 Am. Dec. 244 and notes; Curtis v. Innerarity, 6 How. U. S. 154; Lloyd v. Scott, 4 Peters 205.

"In as much as the liability of several persons for the same tort is ordinarily separate as well as joint, it does not lose its character by the mere commencement of a joint action against them; but such action may proceed to different results with regard to different defendants." 2 Hillard on Torts, 4 ed., pp. 264, 265; Cooley on Torts, 126; Laverty v. Van Arsdale, 65 Pa. St. 507; Hamilton v. McGee, 19 Md. 43; Powers v. Sawyers, 46 Me. 160.

O. N. MARRON and A. B. MCMILLEN, for Appellees.

Any unauthorized trespass upon the land of another or unauthorized intermeddling with the goods of another is an actionable trespass. 1 Sutherland on Damages 12 and cases cited; 3 Sutherland on Damages 364; Bishop Non-Contract Law, sec. 819; Wood Landlord and Tenant 917.

There are no accessories in trespass. Whitney v. Turner, 1 Scam. 253; Northern Trust Co. v. Palmer, 49 N. E., Ill. 555; Bishop on Non-Contract Law, sec. 522 and cases cited; 1 Sutherland on Damages 211; Lovejoy v. Murray, 3 Wall. 11.

"When one makes a contract with another to do some act which when done necessarily invades the right of a third person or injures his property, each of the contracting parties becomes liable to the one injured, the same as though both had performed the act. Bishop Non-Contract Law, sec. 522, 604; Whitney v. Turner, 1 Scam. 253; Olsen v. Upsohl, 69 Ill. 273; City of Joliet v. Harwood, 86 Ill. 110; Florsheim v. Dullaphan, 58 Ill. Appeals 593; Northern Trust Co. v. Palmer, 49 N E. Ill. 555; Jefferson v. Chapman, 27 Ill. Appeal 44; Water Company v. Ware,

16 Wall. 566-576; Robins v. Chicago, 4 Wall. 679; Lovejoy v. Murray, 3 Wall. 11; Carman v. Steubenville, etc., 4 O. S. 399-418; Palmer v. Lincoln, 5 Neb. 136; Gorham v. Gross, 125 Mass. 234; Sturges v. Educational Society, 130 Mass. 414, 415; Ellis v. Sheffield, etc., 2 Ellis & B. 767.

Although one procures a thing to be done through an independent contractor, if the thing itself, or the agreed method of doing it, works an injury to a third person, the former may be compelled to pay; not on the ground that the latter is his servant, for he is not, but because the procurer of a tort is answerable as doer. Bishop on Non-Contract Law, sec. 604; Ellis v. Sheffield Gas Con. Co., 2 Ellis & B. 767; Carman v. Steubenville, etc., Ry., 4 O S. 399, 418; Palmer v. Lincoln, 5 Neb. 136; Sturges v. Theological Ed. Soc. 130 Mass. 414, 415; Cooley on Torts, 2 ed., 644 and cases cited; Water Co. v. Ware, 16 Wall. 566, 576; Bower v. Peate, L. R., 1 Q. B. D. 321; Stevenson v. Wallace, 27 Grat. 77; Wertheimer v. Saunders, Wis., 37 L. R. A. 146; Robins v. Chicago, 4 Wall. 679; Chicago v. Robins, 2 Black. 426, 427; Cristler v. Ott, 16 So. 416; Lawrence v. Shipman, 39 Conn. 586; Hilliard v. Richardson, 3 Gray 349; Conners v. Hennessey, 112 Mass. 96; Gorham v. Gross, 125 Mass. 232; Butler v. Hunter, 7 H. & N. 826; Dalton v. Angus, L. R. 6 App. Cas. 829; Northern Trust Co. v. Palmer, 49 N. E. R., Ill. 555; 1 Sutherland on Damages, 1 ed. 769 and cases cited; Snow v. Pulitzer, N. Y., 36 N. E. R. 1059.

"Where a landlord wrongfully enters into any part of the demised premises which are let for an entire rent, and expels his lessee therefrom, there is a total suspension of the rent until the tenant is restored to the whole possession." Wood on Landlord and Tenant, secs. 473 and cases cited.

"In actions of torts, damages, which are the natural and proximate consequences of the defendant's wrongful act, may be recovered, though not contemplated by the wrongdoer." 1 Sutherland Damages, 173, 174, 629 and cases cited; 3 Sutherland on Damages 475, 476, 385 and cases cited, 387, 388, 153, 154, Wicker v. Hoppock, 6 Wall.

99; Snow v. Pulitzer, 36 N. E., N. Y. 1059, Schile v. Brokhaus, 80 N. Y. 619; Wood Landlord and Tenant 782; Show v. Hoffman, 25 Mich. 162; Hawthorne v. Siegel, 22 A. S. R. 291; Hexter v. Knox, 68 N. Y. 561; Chapman v. Kerby, 49 Ill. 211; Smith v. Underhill, 70 Ill. 426; Dobbins v. Duquid, 65 Ill. 464; N. Y. Academy of Music v. Hockett, 2 Hilt. 217; Allison v. Chandler, 11 Mich. 542; Seyfert v. Bean, 83 Pa. St. 450; Lacour v. Mayor, etc., 3 Duer 406; St. John v. Mayor, 13 How. Pr. 527; Eten v. Luyster, 60 N. Y. 252; Shafer v. Wilson, 44 Md. 268; Glass v. Garber, 55 Ind. 336; Clark v. St. Clair, etc. Co., 24 Mich. 508; Fradenheit v. Edmundson, 36 Mo. 226; Kemper v. City of Louisville, 14 Bush. 87; City of Terre Haute v. Hudnut, 112 Ind. 542, 13 N. E. 686; Gibson v. Fischer, 68 La. 29, 25 N. W. 914; Simmons v. Brown. 5 R. I. 29, 73 Am. Dec. 66; Lawson v. Prince, 45 Md. 123; Oliver v. Perkins, 92 Mich. 304, 52 N. W. 609; Goebel v. Hough, 26 Minn. 252, 2 N. W. 847; Downell v. Jones, 52 Am. Dec. 194; Anvil Mining Co. v. Humble, 153 U. S. 459.

A witness may refresh his memory with writing which is used only for the purpose of assisting his memory. Counsel have the right to inspect the memoranda and the jury may also inspect them upon the proper request, but it is not in itself evidence to go to the jury. It is not necessary that the writing should have been made by the witness. The memoranda need not be made contemporaneously with the facts recorded. The manner of using memoranda of this character is left largely to the discretion of the court. Jones on Evidence, secs. 678, 879, 880, 882, 883; 1 Wigmore on Evidence, sec. 762; Henry v. Lee, 2 Chitty 124; Gregory v. Taverner, 6 C. & P. 281; Com. v. Jeffs, 132 Mass. 5.

For destruction of property the plaintiff is entitled to the value of the property with interest from the time of its destruction. Sutherland on Damages, vol. I, pp. 173, 174, 356, 629; Young v. Godby, 15 Wall. 562; Lincoln v. Claflin, 7 Wall. 132; Nashua, etc. Ry. v. Boston, etc., Ry., 61 Fed. 248; St. Louis, etc., Ry. v. Biggs, 50 Ark. 177, 6 S. W. 727; Jacksonville, etc., Ry. Co. v. Penin-

sular etc., Ry. Co., 27 Fla. 140, 9 So. 685, 17 L. R. A. & N. 61; Frazer v. Bigelow, 141 Mass. 128, 4 N. E. 622; Kendrick v. Towle, 60 Mich. 368, 1 A. S. R. 529; "Scotland," 105 U. S. 24; The Vaughn and Telegraph, 14 Wall. 258; Murray v. Charming Betsey, 2 Cranch. 64; The Anna Maria, 2 Wheat. 327; The Amiable Nancy, 3 Wheat. 546; Smith v. Condry, 1 How. 28; Williamson v. Barrett, 13 How. 101; New York etc., Ry. Co. v. Estill, 147 U. S. 501; Mobile & Montgomery Railway v. Jurey, 111 U. S. 584; Gray v. Missouri River Packet Co., 64 Missouri 47; Dunn v. Hannibal & St. Jo. R. R., 68 Mo. 268; Hutchinson on Carriers, 2 ed., sec. 771; Elliott on Appellate Procedure, sec. 642: Hughes on Instructions, sec. 241, 243; Kendrick v. Towle, 1 A. S. R. 529; Lucas v. Wattles, 49 Mich. 383; Hoyt v. Jeffers, 30 Mich. 192; Winchester v. Craig, 33 Mich. 205; Beals v. Guernsey, 8 Johns. 446; 5 Am. Dec. 348; Johnson v. Summer, 1 Met. 172; Derby v. Gallup, 5 Minn. 119; Rhenke v. Clinton, 2 Utah 230; Shepard v. Pratt, 16 Kan. 209; Sedgwick on Damages, 7 ed. 189, note; The Amalia, 34 L. J. N. S., Adm. 21; Parrott v. Knickerbocker Ice Co., 46 N. Y. 361; Mailler v. Express Propeller Line, 61 N. Y. 312; Chapman v. Chicago & N. W. Ry. Co., 26 Wis. 295, 304, 7 Am. Rep. 81; Sanborn v. Webster, 2 Minn. 277; Railroad Co. v. Cobb, 35 Ohio St. 94; City of Chicago v. Allcock, 86 Ill. 384; Lincoln v. Claflin, 7 Wall. 132, 139; Old Colony R. R. v. Miller, 125 Mass. 1, 28 Am. Rep. 194; Frazer v. Bigelow Carpet Co., 141 Mass. 126.

Where a material fact is conclusively shown by undisputed evidence or is admitted to be true, the court may assume such fact in the instructions. Hughes on Instructions, sec. 196 and cases cited.

STATEMENT OF FACTS.

The appellants, Weinman and Barnett, were the owners of lots two (2) and one (1) respectively, of block sixteen (16) of the town of Albuquerque, at all times during which the events leading up to the bringing of this action transpired, and in December, 1901, on each lot stood a

building with separate walls between but very close together and perhaps touching part or all the way where they ran parallel to each other. On December 15, 1901, Weinman leased his building on lot two, to appellees who subsequently, up to June 30, 1902, used and occupied it as a retail drug store, the lease running for two years and the rent reserved being ninety dollars per month, payable monthly in advance. Sometime in May or June, 1902, and while the Weinman building was being so occupied by appellees, Barnett took down and removed his building on lot one, including the wall adjacent to the Weinman building, and with a view of erecting a new building on said lot. The east wall of the Weinman building, which was an old adobe wall and had stood for many years, was crooked and bulged and out of plumb and had been for some time as shown by the evidence. After the removal of the Barnett building the appellants, Weinman and Barnett, entered into a party wall agreement whereby Barnett was to be permitted to build a party wall on the line between the two lots, said wall to stand one half its full thickness on each lot and to be forty (40) inches wide at the bottom or footing course of the foundation and eighteen inches wide at the floor joists, first and second story walls to be thirteen inches thick and the fire wall nine inches thick. It was also specified in said agreement that Barnett should be permitted to take down any part of the east wall of the Weinman building which might be necessary to locate the new wall centrally over the line. The evidence discloses that the appellee Ruppe, who was in charge of the drug store in question, was apprised of this agreement before any steps were taken to carry it into effect and made no objection thereto.

Barnett excavated a cellar on his lot preparatory to erecting his new building, leaving a bank on the west side next to the Weinman building variously estimated by the witnesses from two to five feet wide, and on June 30, 1902, had a contractor engaged in the building of the foundation of the new building, including the party wall, as per agreement with Weinman. The contractor, on that day

or just prior thereto, had excavated for a space of about five feet long on the line between the two lots at the northeast corner of the Weinman building, and according to the testimony of some of the witnesses, extending under the east wall of that building from ten to fourteen inches and of a depth of seven or eight feet.

At about five thirty on the afternoon of said day, the east wall or a portion of it, from a point fifty five feet south of the front line and up to the northeast corner where the excavation just referred to was situated, fell causing the damages of which appellees complain. It seems pretty well established by the evidence that the first crack in the falling wall appeared fifty-five feet back from the sidewalk and that the wall in falling moved slightly to the north or front of the building and that the stone foundation under the excavation heretofore referred to, fell in such excavation while the foundation of the remaining fifty feet of the fallen wall remained in place.

There is considerable conflict in the evidence as to just how the wall fell and what portion of it fell inside and what portion outside of the Weinman building. There is considerable testimony to the effect that the east wall of the Weinman building was weak and in an unsafe condition, and to support the appellants' theory that it fell from its inherent weakness and from the removal of Barnett's wall and the excavation on lot one depriving it of lateral support.

Immediately after the falling of the wall, the appellees removed to another location what remained of their stock and fixtures and apparently occupied the same premises up to the time their lease of the Weinman lot and building expired by its terms. Upon demand by Weinman, after the wall fell, for the rent for July, 1902, appellees refused to pay it and Weinman thereupon took possession and sold his lot to Barnett who went into possession and occupied it. The appellees brought suit for damages against both Weinman and Barnett, claiming damages in the sum of ten thousand dollars; for stock and fixtures injured and destroyed, three thousand dollars; for the value of the un-

expired term of the lease, one thousand dollars; for being compelled to remove to a less favorable location, five hundred dollars; and for loss of profits to their business five thousand five hundred dollars, and from a judgment in appellees' favor in the sum of four thousand dollars, based upon the verdict of the jury to which the cause was tried in the trial court, appellants, bring the cause to this court by appeal.

OPINION OF THE COURT.

MANN, J.—This is the second time this cause has been up for hearing in this court. At the January, 1905, term it came up on error to the District Court of Bernalillo County and was reversed and remanded to that court for further proceedings in accordance with the opinion then rendered. The opinion was written by Mr. Justice Pope and concurred in by the other members of the court. It will be found reported in 13 N. M. at page 236, 82 Pacific Reporter, page 360.

The first question confronting us is, what did that decision establish as the law of the case, it being well settled that a previous ruling by an appellate court upon a point distinctly made in a case before it, becomes the law of that case and is binding upon the courts and the litigants. Crary v. Field, 10 N. M. 257; Flournoy v. Bank, 11 N. M. 87; Dye v. Crary, 13 N. M. 439.

A careful analysis of the former decision discloses that it settled two points, viz: (1) That the question of the proximate cause of the fall of the wall involved in this cause was a question for the jury on the evidence adduced and (2) that the party wall agreement was admissible in evidence.

At the second trial of the case the first proposition was submitted to the jury and the party wall agreement was introduced and admitted in evidence and the jury by their verdict must have found that the wall in question fell by reason of the excavation under the northeast corner of the building occupied by appellees, which excavation it seems to be conceded, was made by the contractor of the

appellant Barnett, under the terms of the party wall agreement between Barnett and Weinman.

The question then arises whether the appellant Weinman, who was the owner of the lot on which the injured building stood, and the lessor of the appellees, became a joint trespasser with Barnett by reason of the license granted Barnett by the party wall agreement. No question as to the breach of the implied covenant for quiet enjoyment in the lease between Weinman and the appellees is involved, for this is an action sounding wholly in tort, there being no contractual relations between the appellees and Barnett, and consequently a want of mutuality that precludes any question of breach of contract. In other words, Weinman cannot be held for breach of contract and Barnett for trespass in a joint action and by a joint judgment though a separate action against each might have been maintained.

The relation of landlord and tenant between the appellees and appellant Weinman then is important only because of the party wall agreement between appellants Weinman and Barnett, the former being the owner of the fee of the leased premises, and his liability so far as this case is concerned, must rest upon that agreement. If his license to Barnett to excavate under the wall of the leased building amounted in itself to a trespass, then he is liable; otherwise it was error to permit a joint judgment against him and Barnett for the alleged injuries to the goods of appellees in the leased premises. The party wall agreement shows on its face that Weinman and Barnett contemplated possible injury to the wall involved in the controversy for by the sixth paragraph of the agreement (p. 67 record) they provided for the payment by Barnett of such damages as might be done to the building by carrying out the agreement from Barnett's fault, such damages to be paid to Weinman, and while the agreement does not in terms provide that it shall be carried out during the tenancy of the appellees, yet there is nothing therein to
2 the contrary and it was in fact begun to be performed when the wall fell.

A very similar state of facts to those in the case at bar is set up by the defendants in their answer in Collins v. Lewis, a Minnesota case reported in 19 L. R. A. 822, and the following quotation from the opinion in that case, written by Mr. Justice Collins, seems applicable here:

"It is difficult to understand how the landlord could authorize the performance of the acts provided for in the agreement without fully realizing that a trespass was to be committed, and that his tenant's right to quietly enjoy the premises invaded, unless his consent to the excavation was first obtained. In fact, this invasion was expressly sanctioned, aided and abetted by the agreement and without its execution it is safe to say would not have occurred.

"It is obvious that under a claim of title the landlord has interfered with the tenant's possession of demised premises and has prevented him from having the use and enjoyment of a part thereof."

The court held that in a suit for rent by the landlord against the tenant, the latter could maintain a counterclaim for the damages sustained by reason of the party wall agreement referred to, on the theory, it is true, of a breach of the implied covenant for quiet enjoyment in the lease, but is it alone upon that theory that appellees might recover?

In Cooley on Torts (2nd ed.) page 104, we find the following:

"Indeed, in many cases, an action as for tort or an action as for breach of contract may be brought by the same party on the same state of facts. This, at first blush, may seem in contradiction to the definition of a tort, as a wrong unconnected with contract; but the principles which sustain such actions will enable us to solve the seeming difficulty."

And we gather from the distinguished writer that cases where fraud or force enter into such a breach of contract, it may be treated either as a breach of contract or a tort and an action be maintained for either. In the case at bar the party wall agreement amounted to a license or permission to another party to enter the leased premises

and to excavate under the wall of the leased building in such a manner as to greatly endanger the goods and fixtures of his tenants, a fact which Weinman must have known, and it seems to us that under the doctrine that he who commands or approves is equally guilty with him who performs the act, he was guilty of a trespass in conjunction with Barnett with whom he contracted, permitting him to do the actual wrong. Whitney v. Turner, 1 Scam. 253; Northern Trust Co. v. Palmer, 49 N. E. (Ill.) 555; 28 Am. and Eng. Enc. of Law, (2nd ed.) 566.

In the case of Northern Trust Company v. Palmer, supra, the facts were very much like the case at bar. Hawley the lessor in that case had contracted with the Florsheims, who were adjoining lot owners with the leased premises, to take down and build a new party wall, the tenant's goods were damaged by such removal of the wall and she brought a joint action against the lessor and the adjoining lot owners for damages.

In that case the Supreme Court of Illinois, says:

"Hawley could not, by the contract, without the consent of his tenant Fenton, take down and erect a new wall to the building, the necessary or probable effect of which would be to injure the tenant in her rightful and quiet possession, without being liable, jointly or severally with the Florsheims, the other wrongdoers, for damages.

"In Whitney v. Turner, 1 Scam. 253, this court said: 'The doctrine in relation to trespass is well settled that there are no accessories. All are principals who are in any wise concerned in the trespass. The person who commands or approves is equally guilty with the one who performs the act.'" Cooley on Torts (2nd ed.) 153; Bishop Noncontract Law, Sec. 522-524.

Both Weinman and Barnett seek to avoid liability on the theory that Grande, the contractor who was excavating for Barnett's building and doing the actual work of excavation at the time the wall fell, was an independent contractor and therefore solely liable for the consequences of his acts.

The contract between Barnett and Grande is set out

in the record at pp. 70-71, and so much thereof as is material to this discussion, reads as follows:

"That the said party of the first part, for the consideration hereinafter mentioned, covenants and agrees with the said party of the second part to do all the excavation and stone work required in the erection and completion of a basement to be erected on the southwest corner of Railroad Avenue and Second Street, in the above said city, county and Territory, all to be done in accordance to the plans and specifications, and as directed by J. L. La Driere, the superintendent."

The chief consideration which determines one to be an independent contractor is the fact that the employer has no right of control as to the mode of doing the
3 work contracted for. 16 Am. and Eng. Enc. of Law (2nd ed.) 187; Singer Mfg. Co. v. Rahn, 132 U. S. 518; Railroad Co. v. Hanning, 15 Wall. 649; Comers v. Hennessey, 12 Mass. 96; Forsyth v. Hopper, 11 Allen (Mass.) 419.

Mr. La Driere was the architect who drew the plans and superintended the construction of the new Barnett building and his testimony was to the effect that he merely saw to it that the excavation was done as provided in the plans and specifications.

But it is immaterial what control over the work was actually exercised by Barnett or his representative, the question is what he might have exercised under the contract with Grande. Campbell v. Lunsford, 83 Ala. 512; Linnehan v. Rollins, 137 Mass. 123.

It is then a matter of construction of the contract as to what power of control was reserved by Barnett over the acts of Grande and his employees, which determines whether Grande was in fact an independent contractor or merely a servant and employee of Barnett.

The contract specifically states that the excavation and stone work to be done by Grande under its terms was to be "as directed by J. L. La Driere, the superintendent."

The intent of the parties seems to be clear and un-

ambiguous upon its face. If LaDriere, who was unquestionably the agent of Barnett, could direct the work of excavation, he had full power and control over it as to how, when and by what means it should be done. "Direction means general instructions as to the manner of doing it." Bershire Woolen Company v. Day, 12 Cush. (Mass.) 128.

Speaking of the contract in Railroad Co. v. Hanning, 15 Wall. 649, Mr. Justice Hunt says:

"The company have the general control, and it may prescribe where each pile shall go, where each plank shall be laid, where each stringer shall be put down, where each nail shall be driven. All details are to be completed under their orders and according to their directions."

The contract in this case seems as broad in its terms. In superintending and directing there is no limitation upon the power of La Driere, so long as he staid within the plans and specifications. He could direct where every stone should be laid and every shovel full of dirt should be taken out. Grande was therefore a servant of Bar-
4 nett, who though he was to receive a stipulated price for his work, executed it under the direction and superintendence of his employer. Bishop on Non-contract Law, sec. 602.

But even though Grande were in fact an independent contractor, Barnett would still be liable if the agreed method of excavating under the wall in question worked an
5 injury to the rightful occupant of the building, on the theory that the procurer of a tort is answerable as doer. Bishop on Non-contract Law, Sec. 604; Carman v. S. & I. Ry. Co., 4 Ohio, St. 399; Palmer v. City of Lincoln, 5 Neb. 136; Gorham v. Gross, 125 Mass. 232; Sturgess v. Theological Ed. Soc., 130 Mass. 414.

In the case at bar the jury must have found under the instructions and from the evidence that the injury was caused as a direct result of the excavation under the wall, which it seems was being done under the plans and specifications furnished by Barnett and his architect. In other words, it is not shown that the contractor or his employes were careless or negligent in excavating, but on the

contrary that Mr. LaDriere, on the very day the wall fell, was seeing to it that the excavation at the north east corner of the Weinman building was being done as per contract. (Record pp. 72-73).

Both appellants complain of the action of the trial court in permitting the witness Ruppe to refresh his memory by reading from the bill of particulars filed in the case by order of the trial court, as to the items of goods destroyed and their values. The witness, it is vigorously contended, merely read the bill of particulars to the jury, and a bill of exceptions duly allowed and signed appears at page 176 of the record, reciting that the court over the objection of counsel permitted the witness to read from the bill of particulars, etc.

Upon cross examination the witness testified that the items in the bill of particulars were made up from invoices and inventories taken by himself and his clerk just prior to the damage, deducting his sales and then checking up what was missing, and that it was, as he believed, correct at the time the bill of particulars was made up.

It is impossible to lay down an invariable rule upon the subject of the refreshment of a witness' memory, and just how and when it may be done is therefore subject to the circumstances of the particular case, to a great degree. It is laid down, however, that any writing may, under certain circumstances, be used for the purpose of stimulating and reviving the memory of a witness, even though it was not made by the witness himself, and though it may be only a copy of the original writing. 1 Wigmore on Evidence, Secs. 758, 759, 760; 3 Jones on Evidence, Secs. 884, 885.

In the case at bar the bill of particulars consisted of a long list of articles and the prices of the same, compiled by the witness and his clerk, and it would have been an utter impossibility for any person to have remembered the items therein set out.

In such cases it has been held, and we think properly, that the memoranda may be read to the jury if the witness knows them to be correct, even though the writing

itself cannot bring to his mind independently the separate items. Bonnett et al. v. Gladfelt, 120 Ill. 166; Hudnutt v. Comstock, 50 Mich. 596; Lipscomb v. Lyon, 19 Neb. 511, 27 N. W. 731.

The case of Hudnutt v. Comstock, supra, is, in so far as the question under discussion is concerned, almost identical with the case at bar. The court says (p. 601):

"The only errors alleged which we are to consider are those assigned as 1 and 2. The 1st, that plaintiff as a witness in his own behalf was permitted to read his bill of particulars to the jury. . . . . The first objection was to the witness reading from the bill of particulars to refresh his recollection, because it was but a copy from the books. The court overruled the objection and properly so, we think."

Under the circumstances of this case we do not think the court erred in permitting the witness Ruppe to read from the bill of particulars the several items of the goods destroyed, taken as it was from the only source from which anything like an accurate estimate of the goods and their value could be ascertained. It is certainly not the law that a merchant must be able to recall from memory every article in his store and its value before he can recover damages for loss thereof by reason of some one's wrongful
6 act. To so hold would be equivalent to saying there could be no recovery.

The trial court instructed the jury as to the measure of appellees' damages, in case of recovery, that they might take into consideration:

1st. Loss of profits occasioned by the removal to another location.

2nd. Value of the stock and fixtures destroyed.

3rd. Injury and damage to stock and fixtures not completely destroyed.

4th. Reasonable expenses of moving to another location.

5th. Expense of repairs to furniture and fixtures partially destroyed; and

6th. Such other items testified about as are the prox-

imate consequence of the acts of defendants complained of.

As to the 2nd, 3rd, and 4th items above set out we think there can be no question, but they were proper elements of damage to be considered by the jury, providing such loss and expense proven by any competent evidence. Certainly if appellants by their wrongful acts caused the destruction and injury of appellees' goods they were holden for the value of those destroyed and the injury to those damaged, and if such wrongful act caused appellees to have to move the remaining stock and fixtures to another
7 place to again resume their business it seems equally clear that they should pay such expense.

It also seems well settled that in a case where, in consequence of a trespass the plaintiff's business is destroyed. damages for loss of profits may be recovered, if proven.
8 3 Sutherland on Damages, (3rd ed.) Secs. 867-8-9; 1 Sutherland on Damages, (3rd ed.) Sec. 70.

The latter section (70) seems to state the rule concisely, both as to the right of recovery and proof required, as follows:

"In actions for torts injurious to business the extent of the loss is provable by the same testimony as in actions to recover for the loss of profits caused by the breach of contracts, and recovery may be had for such as is proved with reasonable certainty; it is enough to show what the profits would probably have been. Certainly it is very desirable in estimating damages in all cases; and where, from the nature and circumstances of the case, a rule can be discovered by which adequate compensation can be accurately measured, it should be applied to actions of tort as well as to those upon contract. *The law, however, does not require impossibilities,* and cannot, therefore, demand a higher degree of certainty than the nature of the case admits. If a regular and established business is wrongfully interrupted the damage thereto can be shown by proving the usual profits for a reasonable time anterior to the wrong complained of."

The case of the City of Terre Haute v. Hudnutt et al.,

112 Ind. 542, is a very interesting and instructive case upon the subject of loss of profits and the means of proving same. The rule there laid down and one which seems to be generally followed is that where a regular established business is injured, the average profits that the business is then earning and has earned is competent proof as to the loss of profits and a clear distinction is made between past and present profits as against speculative future profits, where the business has never been commenced and where the estimate of what the profits might be are necessarily speculative and uncertain.

In Nat'l Fibre Board Co. v. Auburn Electric Light Co., 95 Me. 318, the court in announcing the rule say:

"The defendant again contends that the net earnings or profits alleged to be lost are not recoverable because too uncertain and speculative. . . . . When, however, one has acquired or erected a valuable plant with an established business connected therewith yielding regular profits, and his plant is impeded or destroyed in its efficient operation by the tortious act of another, so that his regular profits are thereby lessened, he cannot be made whole unless he is reimbursed for the lost earnings of his plant. . . . . He is justly entitled to the profits which his sagacity, skill and industry would bring him in the business if not interfered with. If he cannot recover from the wrong-doer this actual loss over and above the decrease in the rental value, he suffers wrong, to the great reproach of the law."

The learned judge adds that the law is not open to such reproach and quotes from numerous authorities in support of the rule allowing damages for loss of profits to an established business.

There is, however, no evidence of loss of profits except the bald statement of the witness Ruppe as to the net profits per month during the time he occupied the Weinman premises; and at the location to which he removed his stock after the wall fell; true, the record shows that he referred to some memorandum to refresh his memory, but it nowhere appears what the memorandum was, nor when or by

whom it was made; nor does he state that he knows or even believes it to be correct. This being true, it was error to submit the question of loss of profits to the
9 jury, there being no sufficient evidence to sustain a verdict of such loss.

Nor was there any competent proof of the damage to goods not entirely destroyed, that is, of damage suffered to goods made unsalable by dirt, torn boxes, etc., the testimony of Mr. Ruppe on that item being purely an estimate on his part as shown by pp. 196-197 of the record.

The court instructed the jury (p. 504, record) as follows:

"19.

"If you find the plaintiffs suffered any damage you will also allow interest at the rate of 6 per cent per annum on the amount of property injured or destroyed, if you find that any property in any amount was injured or destroyed from the 30th day of June, 1902, and if you find from the evidence that there was any injury to the business of the plaintiffs occasioned by the wrongful acts of the defendants, then you will also allow interest at the rate of six per cent per annum upon the amount if any found by you, from the 15th day of December, 1903."

To this instruction both the appellants duly excepted and it is complained of as error by each of them.

It seems to be a well settled rule that interest is not allowable as a matter of law, except in cases of contract, or the unlawful detention of money, unless so provided
10 by statute. In cases of tort its allowance as damages rests in the discretion of the jury. Lincoln v. Claflin, 7 Wall. 132; Brent v. Thornton, 106 Fed. 35; Dist. of Columbia v. Robinson, 180 U. S. 92.

In Brent v. Thornton, supra, McCormick, Circuit Judge, speaking for the Circuit Court of Appeals for the fifth circuit, says:—

"The matter thus being in the discretion of the jury, if they had under a proper instruction returned the verdict in the terms in which it was rendered in this case, it would not have been subject to objection, because the two sums

added together would have shown distinctly the damage found by the jury. But the matter of interest should have been left to the discretion of the jury. They might have been charged that they could take into consideration the time intervening from the commission of the tort to the rendering of their verdict, if, in their judgment, the circumstances of the case so required. It was one element of damage that they had a right to consider, and it was their province to consider it, and to pass upon it, and was not the province of the court to decide as a matter of law."

We hold that the 19th instruction given by the trial court was therefore erroneous.

Much is said in brief of appellant Weinman's counsel as to whether or not the conduct of Weinman amounted to an eviction of his tenants, but as the court did not instruct the jury that it could find any damages as to the value of the unexpired lease and there is no counter claim or set off for the rent, after the wall fell, it becomes immaterial to the issues in this case. As has been hereinbefore said it is an action sounding wholly in tort and were it not for the effect given the party wall agreement between Weinman and Barnett, the former stands as though he were a stranger to the title, a mere joint trespasser with Barnett.

If the sum found by the jury for the actual loss and damage to the stock and fixtures less interest and that found for loss of profits and goods injured, could be computed, this verdict might be allowed to stand upon the filing of a remittitur, but we find it impossible to determine such amount and the cause is therefore reversed and remanded to the District Court of Bernalillo County with instructions to grant a new trial.

POPE, J.—(Dissenting from the result.)—This case has been twice before this court and is now being sent back for a third jury trial. There should be an end of litigation. As the exceptions sustained relate only to the award recoverable, I am of opinion that upon the new trial of the case the question of liability should be considered determined and the enquiry restricted to the

question of amount. The mandate should go down in that form. Lisbon v. Lyman, 49 N. H. 553; Kent v. Whitey, 9 Allen 62.

[No. 1255, July 1, 1909.]

TERRITORY OF NEW MEXICO, Appellee, v. MALAQUIAS CORTEZ, Appellant.

SYLLABUS (BY THE COURT.)

1. An indictment charging the unlawful killing of cattle, under Sec. 79, C. L. 1897, which omits to allege that such killing was "knowingly" done, is fatally defective.

2. A defect in the indictment which is one of substance and not of form, merely, is not aided or cured by verdict.

Appeal from District Court for Taos County, before JOHN R. MCFIE, Associate Justice. Reversed and remanded.

A. B. RENEHAN for Appellant.

The admission of irrelevant testimony, such as that in question, is error where its effect, direct or incidental, is to injure the objecting party, as by exciting a feeling of sympathy for the adverse party or a feeling of hostility to himself, or to mislead the jury as to the issues. or to confuse them in their deliberations or to injure the objector in any other way patent to the eye of the reviewing court. 11 Ency. Ev. 210, 211; 6 Enc. Ev. 443, 450; Hopt v. Utah, 110 U. S. 579-580; Mima Queen v. Hepburn, 7 Cranch. 290, 295; Ellicott v. Pearl, 10 Pet. 434; Lund v. Inhabitants, 9 Cush. 36; Young v. Godbe, 15 Wall. 565.

J. M. HERVEY, Attorney General, for Appellee.

Even if it is found, that testimony was incompetent and erroneously admitted, it is not reversible error when it very clearly appears from the state of the record that the testimony complained of had no effect one way or another upon the deliberations of the jury.

A party will not be heard to complain of testimony

which he himself elicits. Davis v. State, 51 Neb. 334; Com. v. Carbin, 143 Mass. 124, 8 N. E. 896; Kelly v. State, 1 Tex. App. 628; Speights v. State, 1 Tex. App. 551; Cotton et al v. State, 87 Ala. 75, 6 So. 396.

OPINION OF THE COURT.

MANN, J.—The defendant was convicted at the May, 1908, term of the District Court of Taos County, on an indictment charging: "That Malaquias Cortez and Gregorio Garcia, late of the County of Taos, Territory of New Mexico, on the 23rd day of June, in the year of our Lord one thousand nine hundred and four, at the County of Taos, aforesaid, did unlawfully and feloniously kill one yearling steer of the property of C. L. Craig, the said steer being black in color and without brand, of the value of fifteen dollars; contrary to the form of the statute in such case made and provided and against the peace and dignity of the Territory of New Mexico."

This indictment was undoubtedly attempted to be drawn under Sec. 79 of the Compiled Laws of 1897, which provides that, "any person who shall steal, embezzle or knowingly kill, sell, drive, lead or ride away, or in any manner deprive the owner of the immediate possession of any neat cattle, etc., shall be deemed guilty of a felony," etc.

It will be observed that the indictment does not use the terms, steal or embezzle, but that the charge is confined to unlawfully and feloniously killing the animal in question. This section of the statute, (Sec. 79 C. L. 1897) was held in Wilburn v. The Territory, 10 N. M. 402, 62 Pac. 968, to be a statutory crime of a special nature and for the purpose of reaching a specific class of offences not contemplated in the general laws relating to larceny. It enumerates three distinct crimes, viz: 1st, Stealing of animals; 2nd, Embezzlement of animals, and 3rd, Knowingly killing or otherwise depriving the owners of animals of their immediate possession.

It is significant that the word, knowingly, does not precede either of the first two crimes named in the statute, doubtless because stealing and embezzling were both crimes

at common law, and the elements entering into such crimes were well known and defined by other stat-
1 utes, but the third crime created by this section is a purely statutory one and the use of the word "knowingly" immediately preceding it, makes knowledge an element of the crime, and an indictment failing to allege it in the words of the statute or words of similar import, fails to state the offence. Bishop on Statutory Crimes (2 ed.) sec. 733; 22 Cyc. 328; U. S. v. Carll, 105 U. S. 611, 26 L. ed. 1135; U. S. v. Watkinds, 6 Fed. 142, 7 Sawy. 85; Tynes v. State, 17 Tex. App. 123; 1 Bishop Crim. Pro. sec. 612; Davis v. State, 68 Ala. 58, 44 Am. Rep. 128.

The language of the Supreme Court of Alabama in the last named case, with reference to the point under discussion, seems equally applicable to the case at bar. It is as follows:

"We are of the opinion however, that the indictment is defective in another respect. It fails to charge that the defendant knowingly committed the act for which he is criminally indicted. The statute is highly penal in its character, and creates a new crime unknown to the common law. Sec. 5, Laws 1878 and 79, p. 226, makes knowledge of the facts essential to the crime, deeming him alone guilty 'who knowingly violates any of the provisions' of the act. The general rule of pleading is that every indictment, information or other criminal proceeding ought to contain all that is material to constitute the crime, or every necessary ingredient of the offense, stated with precision, or at least certainty, and in the customary forms of law. 3 Grennel Ev., sec. 10; Beasley v. State, 18 Ala. 535."

It is stated in brief of counsel for appellant that the question of the sufficiency of the indictment was raised by a demurrer thereto, *ore tenus,* and the overruling
2 of such demurrer is set up as error in the motion for new trial, but the record fails to show that the question was thus raised and passed upon by the learned trial court. However, the defect is one of substance and not of form, and therefore is not aided or cured by the verdict.

U. S. v. Hess, 124 U. S. 483; U. S. v. Carll, 105 U. S. 611; Rex v. Perrott, 2 M. & S. 379, Eng. Rul. Cases 116.

Briefs of counsel in this case discuss matters relative to the introduction of evidence, which, under the view we take of this case, it is unnecessary to decide. The judgment of the lower court is reversed and the cause remanded for further proceedings, in accordance with the views herein expressed.

[No. 1229, July 1, 1909.]

J. A. STREET, Appellant, v. MINNIE SMITH, Appellee.

SYLLABUS (BY THE COURT).

1. Under section 67 of the Code of Civil Procedure material averments of the complaint not denied by the answer are taken as true.

2. Under Laws of 1907, Chapter 57, Section 24, where causes are tried without a jury, the certificate of the official stenographer is not alone sufficient to make the transcript of the testimony an element in the review of the case. Such transcript must in addition be properly certified as correct by the trial judge.

3. Upon a doubtful or deficient record every presumption is indulged in favor of the correctness and regularity of the decision of the trial court.

4. The present record examined and under the rules just stated the cause affirmed.

The facts are stated in the opinion.

Appeal from the District Court for Union County, before WILLIAM J. MILLS, Chief Justice. Affirmed.

M. C. MECHEM and C. C. DAVIDSON for Appellant.

"The pleadings in a cause are for the purpose of use in that suit, not mere ordinary admissions but judicial admissions." Wigmore on Evidence, secs. 1057, 1064; 2588;

1 Enc. of Evidence 399, note 3; White v. Smith, 46 N. Y. 418.

M. C. MECHEM for Appellant on motion of Appellee to affirm judgment.

Where an appellant files his assignment of errors and transcript, but not until after the time for filing same has expired, a motion for affirmance on that ground not made until after appellant has filed his transcript will be denied. Armijo et al., v. Abeytia et al., 5 N. M. 533; C. L. 533; C. L. 1884, sec. 2189; L. 1907, ch. 57, sec. 21; 7 Cranch. 99; 10 Pet. 24; 3 Wall. 103; Evans v. Bank, 134 U. S. 330; U. S. v. Sena, 12 N. M. 397, and Haynes v. U. S. 9 N. M. 519, differentiated, L. 1901, ch. 99.

W. B. BUNKER and W. J. LUCAS for Appellee.

The failure of the appellant to follow either of the courses prescribed by Chapter 57 of the Laws of 1907 to have the testimony adduced in the trial of the cause in the District Court reviewed by the Supreme Court, deprives this court of jurisdiction to inquire into any of the proceedings of the court below except such as are evidenced by the record proper. Haynes et al., v. U. S., 9 N. M. 519; U. S. v. Sena, 12 N. M. 397.

In construing a judicial admission in a pleading the whole must be considered and not any part thereof that the appellant might desire to make use of. Shrady v. Shrady, 42 N. Y. App. Div., 9 N. Y. Sup. 546.

There being no evidence before this court, it will assume that the evidence in the court below should support its verdict therein. Spiegelberg v. Mink, 1 N. M. 308; Pino v. Beckwith, 1 N. M. 10; Schaefer v. Second National Bank, 4 N. M. 292; U. S. v. S. B. & C. del Agua Co., 4 N. M. 599; Farish v. Mining Co., 5 N. M. 289; Lamy v. Catron, 5 N. M. 373; Territory v. Barrett, 8 N. M. 70; Witt v. Cuenob, 9 N. M. 143; Cattle Company v. Sully, 144 U. S. 209; L. L. & L. Mining Co. v. Hendric, 9 N. M. 149.

OPINION OF THE COURT.

POPE, J.—Smith sued Street, her complaint setting up two causes of action. The first is for a balance of seven hundred dollars on five notes of two hundred dollars each, the second for a balance of seven hundred dollars alleged to be due on an original indebtedness of one thousand dollars with interest, on the purchase of certain furniture and fixtures, after deducting four hundred dollars paid thereon. The pleadings do not indicate other than that the two causes of action are distinct transactions totally disconnected with each other. The answer pleads failure of consideration to the notes. To the second cause of action no defense is pleaded unless the following from the answer constitutes such:

"This defendant denies each and every allegation of the complaint inconsistent with the foregoing statement." The "foregoing statement" is the defense of failure of consideration just referred to. It is clear that a claim for merchandise sold and delivered is not inconsistent with a defense of want of consideration to a series of notes not alleged to arise out of the same transaction. Under our view of the pleadings there is, therefore, no denial to plaintiff's second cause of action and under Section 67 of
1 the Code it "must be taken as true" and justifies the judgment complained of.

It is contended, however, that the complaint was treated as denied in the trial below and the case thus within Keator Lumber Co. v. Thompson, 144 U. S. 434. The condition of the record, to be presently referred to, leaves us without full information on this point. This being asserted however, we prefer to rest our decision upon further grounds.

The transcript contains what purports to be the testimony in the case but that is not "properly certified to" by the trial judge as provided by Chapter 57, Section
2 24, Session Laws of 1907, and may therefore not be considered as an element in the review of the case. The trial court found for the defendant on the first cause of action. On the second cause it disallowed plaintiff's claim for certain merchandise described as "delivered by Gross Rich-

ards Company," the value of which is not stated, and it finds in her favor for what is described as the "Barnes and Rankin merchandise" of the value of $465.64 and gave her judgment for that amount. It is complained by the appellant that the court below failed to allow him as against this finding the payment of four hundred dollars admitted by the complaint to have been made on the original indebtedness. But does the record establish this? With the testimony not legally before us we must decide the case upon the record proper. From this it appears that upon a claim of a thousand dollars, exclusive of interest, the court has found for plaintiff in a sum less than five hundred dollars. This leaves ample margin for the credit
4 contended for and it must be assumed in the absence of anything to the contrary, that the trial judge allowed the credit in awarding judgment. Certainly we cannot presume that he did not. Error must be shown before it can be declared.

Upon a doubtful or deficient record every presump-
3 tion is in favor of the correctness and regularity of the decision of the court below.

[No. 1232, July 1, 1909.]

FRANK H. JONES, Trustee in Bankruptcy of the Oro Dredging Company, a Bankrupt, Appellant, v. CHARLES SPRINGER, Appellee.

SYLLABUS (BY THE COURT).

1. A purchaser of property sold under Section 2716, C. L., who was a bona fide purchaser for value, without notice, has a perfect title to such property.

2. Where a state or Territorial Court sells attached property, as perishable or liable to be lost or diminished in value during the pendency of bankrupt proceedings against the attachment creditor, of which neither the court, the officer making the sale, or the purchaser had any notice until after the sale was confirmed, the trustee in bankruptcy must

take the proceeds of such sale in lieu of the property so sold.

3. A bona fide purchaser for value at such sale is specifically protected by the proviso following Section 67, of the Bankruptcy Act of 1898, (Stat. L. 565.)

Appeal from the District Court for Colfax County, before WILLIAM J. MILLS, Chief Justice. Affirmed.

ELMER E. STUDLEY and SCOTT, BANCROFT & STEPHENS for Appellant.

The dredge sold was not perishable property within the meaning of Section 2716, Compiled Laws, 1897. Mosher v. Bay Circuit Judge, 108 Michigan, 578, 66 N. W. Rep. 478; Oneida National Bank v. Paldi, 2 Michigan N. P. 221; Newman v. Kane, 9 Nev. 234; Goodman v. Moss, 64 Miss. 303, 1 So. Rep. 241; Weis et al v. Basket, 71 Miss. 771, 15 So. Rep. 659, Young v. Kellar, 94 Mo. 581.

The jurisdiction of the Bankruptcy Court is exclusive. Bankruptcy Act of 1898, sects. 2 and 70; In re Watts & Sachs, 190 U. S. 1, 27, 28, 30; In re Tune, 115 Fed. Rep. 906; Bear v. Chase, 99 Fed. Rep. 920.

The lien of attachment was made null and void upon the filing of the petition in bankruptcy. Bankruptcy Act of 1898, sec. 67 F; Loveland on Bankruptcy, 2 ed. 279; Chaplain v. Brewer, 114 U. S. 158, 169; Michaels v. Post, 21 Wallace 398; In re American Brewing Co., 112 Fed. Rep. 572; State Bank v. Cox, 143 Fed. Rep. 91; Clark v. Laremore, 188 U. S. 486; In re Frances Valentine Co., 94 Fed. Rep. 793; In re Kenney, 105 Fed. Rep. 898; First National Bank v. Staake, 202 U. S. 141; In re Rogers, 116 Fed. Rep. 435; In re Jennings, 8 A. B. R. 358; Bear v. Chase, 99 Fed. Rep. 920; Metcalf v. Barker, 187 U. S. 165; Eyster v. Gaff, 91 U. S. 521.

The bankruptcy proceedings are in rem and notice to all the world and there cannot be a valid sale of the assets of a bankrupt subsequent to the entry of the order of adjudication, except by a trustee in bankruptcy. Bankruptcy Act of 1898, sects. 67 F and 70, par. 6, sub-sec. E; Bank v. Sherman, 101 U. S. 403, 406; Mueller v. Nugent.

184 U. S. 1, 14; Van Fleet on Collateral Attack, sec. 410; Lamp Chimney Co. v. Ansonia Brass Co., 91 U. S. 656; In re Granite City Bank of Dell Rapids, 137 Fed. Rep. 818; In re Benedict, 140 Fed. Rep. 55; Bryan v. Bernheimer, 181 U. S. 188; Bardes v. Havarden Bank, 178 U. S. 524; Conner v. Long, 104 U. S. 228; Duffield v. Horton, 73 N. Y. 218; State Bank v. Cox, 137 Fed. 91; In re Billings, 17 A. B. R.; In re Goldberg 10 A. B. R. 97; In re Rodgers, 125 Fed. 169, 60 C. C. A. 567; In re Kellogg, 131 Fed. 333, 57 C. C. A. 547; White v. Schloerb, 178 U. S. 542, 20 Sup. Ct. 1007, 44 L. ed. 1183; In re Kenney, D. C., 97 Fed. 557, 558; In re Reichman, D. C., 91 Fed. 624; In re Fellerath, D. C., 95 Fed. 121; In re Rome Planing Mill, D. C., 96 Fed. 812; In re Vaughan, D. C., 97 Fed. 560; In re Higgins, D. C., 97 Fed. 775; In re Burns, D. C., 97 Fed. 926; Bear v. Chase, 40 C. C. A. 182, 99 Fed. 920-925.

CHARLES A. SPIESS for Appellee.

The ordinary tribunals are not deprived by mere force of an adjudication in bankruptcy of jurisdiction over suits against the bankrupt. In re Irwin Davis, First Sawyer 260; Eyster v. Gaff, 91 U. S. 521; Doe v. Childers 21 Wallace 642; Kent v. Downing, 44 Ga. 116; In re Fuller, First Sawyer 243; Bracket v. Dayton, 34 Minn. 219; Revere Copper Co. v. Anthony W. Dimock, 90 N. Y. 33; Muser v. Kern, 55 Fed. 916; Morning Telegraph Publishing Co. v. S. B. Hutchison Co., 8 L. R. A., New Series, 1232; Mueller v. Nugent, 184 U. S. 1; York Mfg. Co. v. Cassell, 135 Fed. 52; Conner v. Long, 104 U. S. 228.

A sale conducted by necessity will confer a good title on the purchaser, although the vendor has none, because the true owner is of all men the most interested in having the property turned into money if it cannot be preserved. C. L. 1897, sec. 2716; Young v. Keller, 94 Mo. 581; Baker v. Baker, First Vent 313; Rorer Judicial Sales, sec. 526; Mo. Revised Statutes, sec. 356; Jennings v. Carson, 4 Cranch. 26; Foster v. Cockburn, Parker's Report 70; Eyston & Studd Plowd. Com. 465, 466; Wreck by 11

Westm. Ch. 4; Megee v. Beirne, 39 P. St. 50; Griffith v. Fowler, 18 Vt. 390; 2 Smith,s Leading Cases 973 et seq.; Betterton et al v. Eppstein et al, Tex., 14 S. W. 861; Crocker v. Baker, 35 Mass. 407; O'Brien v. Norris, 77 Am. Dec. 284; State v. Judge, 37 La. Ann. 253; Hall v. Richardson, 16 Md. 396; O'Brien v. Norris, 16 Md. 122; National Bank v. Thomts, 125 Mass. 278; Franke v. Ely, 50 Mo. App. 579; Pace v. Smith, 57 Tex. 555; Richmond v. Collamer, 38 Vt. 68; State v. Judge, 44 La. Ann. 87; Pollard v. Baker, 101 Mass. 259; Taylor v. Thurman, 12 S. W. Rep. 614; Welsh v. Lewis, 81 Ga. 387; Peters v. Aehle, 31 Mo. 380; York v. Sandborn, 47 N. H. 403; McCreary v. Barney Natl. Bank, 116 Ala. 224; Runner v. Scott, 150 Ind. 441; Dunn v. Salter, 1 Dno. Ky. 342; In re Le Vay, 125 Fed. 990; Young v. Davis, 30 Ala. 113; Schumann v. Davis, 13 N. T. Sup. 575; Southern Railroad Co. v. Sheppard, 20 S. E. 481; Anonymous v. Horse and Chaise, 18 N. J. Law 26; Mosher v. Bay Circuit Judge, 108 Mich. 579.

A court cannot take judicial notice of bankruptcy proceedings carried on in a foreign jurisdiction. Eyster v. Gaff, 91 U. S. 521; Bankruptcy Act 1898, secs. 57, 67, par. F, 70; Clark v. Larremore, 188 U. S. 486; Metcalf v. Barker, 187 U. S. 165; In re Franks, 95 Fed. 635; In re Mueller, 101 Fed. 413; Collier on Bankruptcy 574, 5th ed.; Harrel v. Beale, 17 Wall. 590; Spicer v. Waters, 65 Barb. 227; Perry on Trusts 218; Alden v. Trubee, 44 Conn. 455; Wigmore on Ev. vol. I, sec. 714; Lawson on Expert and Opinion Ev. 61.

STATEMENT OF FACTS.

On February 26th, 1906, one J. Van Houten brought an action by attachment against The Oro Dredging Company, a corporation organized under the Laws of the State of Illinois, but doing business in Colfax County, New Mexico. Said Van Houten caused a writ of attachment to issue out of said court, and the same was levied on the property of said Dredging Company, located in said Colfax County, consisting of certain real estate and some personal property, among the latter being the dredge in

controversy. There is no contention, but the attachment was regular in all things, though there was no personal service on the Oro Dredging Company, but by publication, and an appearance entered for it by the clerk, upon the order of said court; jurisdiction of the property attached was thus acquired.

The writ of attachment was served on February 27th, 1906, as shown by the sheriff's return, and on March 21st, of the same year, an application for a special receiver was made to take charge of the dredge, and upon a showing by affidavits that such receiver was necessary, the court on said day, appointed one James K. Hunt, as such receiver, who qualified and appears to have taken possession of the dredge at or about that time. Afterwards, on May 1st, 1906, a motion was made by Van Houten's attorney, to have the dredge sold by the receiver, and on that day an order for its sale was made by the court, said order reciting that "The court having considered testimony, heretofore produced, before him on the application for the appointment of a receiver, and the further testimony of William C. Wrigley, Esq., attorney for plaintiff, in the suit of H. J. Reiling v. Oro Dredging Company, brought in this court, and finding that it is expensive to protect and conserve said dredge, and that the same is deteriorating in value, and that the best interest of the defendant, Oro Dredging Company, as well as of creditors, and all parties (concerned) in the same are best protected by a speedy sale of said dredge, etc."

At the sale, on June 26th, 1906, which appears to have been conducted in accordance with the order of the court, one Charles Springer was the purchaser for $5,000.00 cash, and the sale was confirmed and the possession of the dredge taken by Springer. Appellants counsel seem disposed to dispute the confirmation of the sale in their brief, but as it is pleaded by appellant in par. 12 of his amended petition in intervention, counsel's argument must be the result of an oversight.

After the attachment proceedings were brought by Van Houten in Colfax County, N. M., as aforesaid, certain

creditors of The Oro Dredging Company, filed a petition in bankruptcy against said Company in the United States District Court for the Eastern Division of the Northern District of Illinois, and on April 23rd, 1906, said The Oro Dredging Company was duly adjudged a bankrupt in said court. On July the 9th, of said year the intervenor, Frank H. Jones, of Chicago, Illinois, was duly appointed Trustee in Bankruptcy for said bankrupt, and became duly qualified by giving the required bond, which was approved on July 16th, 1906.

The first intimation that the District Court of Colfax County, New Mexico, or any of the litigants or parties interested in the attachment proceedings, including Springer, the purchaser at the sale, seem to have had of the bankruptcy proceedings, was on August 2nd, 1906, when an appearance was entered in said District Court of Colfax County, for the purpose of moving that court to dissolve the attachment, and order all the attached property, including the dredge, turned over to the trustee in bankruptcy.

This motion was filed, and on motion of Van Houten's counsel, was, by the court, stricken from the files.

The trustee in bankruptcy, thereafter, on August 4th, 1906, filed in the District Court of Colfax County, aforesaid, an order of the Bankruptcy Court authorizing him, said trustee, to intervene in the attachment suit, which he accordingly did, setting up the bankruptcy proceedings, etc., and praying for the dissolution of the attachment, and the possession of all the attached property, including the dredge, which had been sold and delivered to Springer. Springer answered setting up the attachment proceedings, and the sale of the dredge to him. The issue thus joined was submitted to Honorable Wm. J. Mills, Chief Justice of the Supreme Court, and Judge of the Fourth Judicial District on the pleadings, evidence, and stipulation of counsel, as to certain facts, who, after due hearing dissolved the attachment as to all the property involved, except the dredge, which he awarded to Springer,

and from the judgment in Springer's favor, appellant duly appealed to this court.

OPINION OF THE COURT.

MANN, J.—The question of law involved is, whether or not Charles Springer is a bona fide purchaser for value, within the meaning of the proviso in paragraph f of Sec. 67, of the Bankruptcy Act, 30 Stat. L. 565; 1 Fed. St. Am. 693.

The answer to this question depends upon whether or not the trial court in the attachment case had authority to order the sale and if such authority existed, whether or not Springer was a purchaser for value in good faith, and without notice or reasonable cause for inquiry, as to the bankruptcy proceedings.

The statute under which the dredge was sold is section 2716, C. L. 1897, and reads as follows:

"In all suits in the District Courts by attachment, when the property attached shall be of a perishable nature, and liable to be lost or diminished in value before the final adjudication of the case and the defendant shall not give bond to retain the possession of the same, the plaintiff or defendant may make out a petition in writing setting forth the kind, nature and condition of the property, and present said petition to the judge of the district in vacation; and if he shall find it sufficient in form and conditions, he may hear the testimony of witnesses as to the property, and if he shall believe that the interests of both plaintiff and defendant will be promoted by the sale of the property, may order such sale to be made, and direct the manner thereof."

We think this statute is clearly intended to provide for two contingencies (a) When goods are perishable in their nature. (b) When they are liable to be lost or diminished in value before the final adjudication of the case. This must be true, else the second clause of the statute must be taken as wholly meaningless, for property that is "perishable in its nature" would certainly be liable to be lost or diminished in value.

It is a well settled rule of statutory construction that "a statute must receive such reasonable construction as will, if possible, make all its parts harmonize with each other, and render it consistent with its scope and object." 2nd Lewis Sutherland Stat. Cons. (2nd. ed.) Secs. 368-370.

The order of sale recites that the dredge in question was deteriorating in value, which brings it within one of the classes specified in the statute, so that the trial court had jurisdiction to order its sale. McCrery v. Berney Natl. Bank., 116 Ala. 224; 67 Am. St. Rep. 105; Bueler v. Woods et al., 43 Mo. App. 494; Young v. Kellar, 94 Mo. 581.

Much has been said by counsel in their briefs and many cases cited, as to what kinds of property may be sold under statutes similar to ours, as perishable, and many cases are to be found which hold that it must be property that has an inherent tendency to decay or become a total loss, such as fruits, fresh meats, fish and like articles, which from their nature will become a total loss unless sold at once, but the modern doctrine and we think by far the more practical and common sense view is that stated in McCrery v. Berney Natl. Bank, supra.

"This theory would limit the power of the court to order the sale of only such property as contained in itself the elements of speedy decay, such as fruits, fish, fresh meats, et cetra, or such as from its nature could be said to be perishable without any evidence to prove the fact and cannot be sustained without giving to our statutes regulating the subject, a constructon so narrow as to defeat the manifest purpose intended to be accomplished by the legislature in their enactment, and to defeat also in many instances the purpose of the statutes authorizing the remedy by attachment."

The very fact that our statute gives the judge authority to hear the testimony of witnesses as to the property, and if he shall believe that the interests of both plaintiff and defendant will be promoted by the sale of the property, may order such sale to be made and direct the manner thereof, would indicate an intention on the part of the

legislature to leave the question of what property or class of property might be thus ordered sold, in the discretion of the judge in each particular case.

It is contended that the judge of the District Court had no power to order the sale because no formal petition therefor appears in the record.

The third finding of fact of the learned trial court on page 144, of the record, is to the effect that on the first day of May, 1906, a petition was duly presented to the judge of this court for an order directing the sale of said mining dredge, etc.," and in the stipulation of counsel at p. 120 of the record, Mr. McLeisk, appellant's counsel states:

"The application to sell the dredge was made, as I understand it, under a statute of this Territory, which provides for the sale of perishable property."

It therefore seems that no such claim was made at the trial, and no such issue raised in the trial court, and this court will therefor indulge the presumption that the petition was duly filed in the absence of affirmative proof to the contrary.

If the sale was regularly made upon an order of a court of competent jurisdiction, and if Springer was a purchaser of the dredge in good faith, and without notice, can his title be questioned?

The case of Young v. Keller, 94 Mo. 581, is a very instructive case upon this point, and after collating and analyzing the authorities lays down the rule that "where attached property is sold under an order of the court,
1 because of its perishable nature, the purchaser takes a title good, as against the world."

The reason for this rule is obvious, such sales are made upon the theory that it is for the interest of all parties concerned. The title to the property is in dispute and the property itself in *custodia legis* to abide the result of the suit. It is made to appear to the court that unless the sale is made the result of the suit will avail neither party, as its value will be diminished or destroyed before the right to the thing can be determined, in due course of law. It is

therefore ordered changed from its perishable form into money, which is imperishable so that he who prevails in the suit may not be deprived of the benefits of his victory.

The purchaser at such a sale stands upon different ground than the ordinary purchaser at a Judicial Sale, upon execution, after judgment. He not only succeeds to the title of the judgment creditor but to the rights of all parties, to the suit, which may be afterwards determined, and the rights of all the parties to the suit attach to the proceeds of the sale in lieu of the thing sold.

The proceeds of this sale then passed to the Trustee in Bankruptcy in lieu of the dredge itself, Springer, the purchaser at the sale, being a bona fide purchaser for value, without notice or reasonable cause for inquiry within
3 the meaning of the proviso to Section 67 f, of the Bankruptcy Act of 1898, (30 Stat. L. 565); Clarke v. Larremore, 188 U. S. 486; in re Kenney, 105 Fed. Rep. 897; Id. 95 Fed. Rep. 427; in re Franks, 95 Fed. Rep. 635.

In the case of York Manufacturing Company v. Cassell, 201 U. S. 344, the Supreme Court of the United States, speaking of the rights of the Trustee in Bankruptcy under the present bankruptcy law, through Mr. Justice Peckham says "Under the provisions of the bankrupt act the trustee in bankruptcy is vested with no better right or title to the bankrupt's property than belonged to the bankrupt at the time when the trustee's title accrued. x x x x The remark in Mueller v. Nugent, 184 U. S., that the filing of the petition (in bankruptcy) is a caveat to all the world, and in effect an attachment, and injunction, was made in regard to the particular facts in that case."

In this case neither the court below, the receiver making the sale, or the purchaser had any notice of the bankruptcy proceedings in the United States Court for the Northern District of Illinois. The sale was regularly made, under the order of the court, and without any knowledge whatever of the bankruptcy proceedings. The court passed upon the necessity of selling the dredge and it was sold,

and the proceeds are apparently still in the hands of the court. Under these circumstances the learned trial
2 court was right in refusing to set aside the sale of the dredge and ordering it turned over to the trustee, and the judgment is affirmed.

(No. 1238, July 17, 1909.)

T. A. FABRO, Appellee, v. TOWN OF GALLUP, Appellant.

SYLLABUS.

Two-thirds of those actually voting and not a two-thirds of all the voters of a municipality are required to authorize the issue of municipal bonds under the Act of Congress of March 4, 1898, 30 Stat. 252, and the Act of New Mexico of March 16, 1907, Chapter 35, page 38, Session Laws of 1907, authorizing municipal bonds notwithstanding the limitations on municipal indebtedness, if two-thirds of the qualified voters as defined, shall vote therefor.

Appeal from the District Court for McKinley County, before IRA A. ABBOTT, Associate Justice. Reversed and remanded.

FRANK W. CLANCY for Appellant.

The voters of the town contemplated in the statute, are those who, after the required notice, come to the polls and deposit their ballots. St. Joseph v. Rogers, 16 Wall. 644, 646, 649, 664; Harshman v. Bates Co., 92 U. S. 569; Cass Co. v. Johnston, 95 U. S. 365, 366, 369; State v. Winkelmeier, 35 Mo. 103; State v. Mayor of St. Joseph, 37 Mo. 270; Hawkins v. Carroll Co., 50 Miss. 735; State v. Sutterfield, 54 Mo. 391; Carroll County v. Smith, 111 U. S. 557, 563-565; Sanford v. Prentice, 28 Wis. 362; Cronly v. City of Tucson, 56 Pac. 877, 878; McCrary, Elections, 3ed., par. 173; People v. Warfield, 20 Ill. 163; People v. Garner, 47 Ill.

246; People v. Wiant, 48 Ill. 263; Louisville & N. R. Co. v. Davidson County Ct., 1 Sneed 692; Ang. & A. Corp., 9 ed. 499, 500; Bridgeport v. Housatonic R. Co., 15 Conn. 475; Talbot v. Dent, 9 B. Mon. 526; Lamb v. Cain, 129 Ind. 486, 14 L. R. A. 518, 527, 528; Schlichter v. Keiter, 156 Pa. 119; Philomath College v. Wyatt, 27 Ore. 390; Bear v. Heasley, 98 Mich. 279; Taylor v. McFadden, 84 Iowa, 269; Rickett v. Russell, 42 Fla. 139, 12 So. 771, subdivision VI of opinion; Foy v. Water District, 98 Me. 84; Citizen v. Williams, 49 La. Ann. 422, 37 L. R. A. 769; Worthington v. Board, 71 S. W. 879; Walker v. Oswald, Md., 11 Atl. 712; Sanford v. Prentice, 28 Wis. 361, 362; Knox Co. v. Bank, 147 U. S. 99; Attorney General v. Shepard, 62 N. H. 383.

The enactment of the Statute of 1907 by the Legislative Assembly was a rigthful exercise of legislative authority. Re County Seat, 15 Kan. 500; Vance v. Austell, 45 Ark. 407; College v. Wyatt, 27 Ore. 390; Pickett v. Russell, 42 Fla. 139.

B. F. ADAMS for Appellee.

The Acts of Congress have the same force and effect upon municipal corporations in a Territory as have constitutional or charter provisions in states.

A municipal bond is a contract—a contract to pay money.

Valid contracts can only be entered into by a municipality by strictly complying with the law. 20 A. & E. Enc. of Law 2 ed. 1161, 1162.

A taxpayer who seeks to prevent a bond issue may obtain relief when injunction would not be granted after the bonds have been issued and passed into the hands of bona fide holders. 21 Am. & Eng. Enc. of Law, 2 ed. 33; State v. Moore, 45 Neb. 12; McClure v. Oxford Township, 94 U. S. 429; Woodhull v. Beaver Co., Fed. Case 17,974; Humphreys v. Bayonne, 55 N. J. L. 241; Ritchie v. Franklin Co., 22 Wall. 89 U. S. 75.

The policy of the law is to restrict the contracting of debts by municipal corporations. Humphreys v. Bayonne,

55 N. J. L. 241; 21 A. & E. Enc. of Law, 2 ed. 1171 and authorities cited.

A municipal corporation has no power to issue bonds unless such power be expressly granted. 21 A. & E. Enc. of Law, 2 ed. 32, and authorities cited

The Act of Congress requires the affirmative vote of two thirds majority of all who are qualified to vote. The assent of the voter must be given, not by remaining at home, but the voter must "vote affirmatively for the issuance of said bonds." Cronly v. City of Tucson, 56 Pac. 877, 878, not binding; 19 A. & E. Enc. of Law 506; 614 and 615, and authorities cited; 21 A. & E. Enc. of Law, 2 ed. 33, 48; In re Denny, Ind. 1901, 59 N. E. Rep. 361; State v. Francis, 95 Mo. 51; State v. Winkelmeier, 35 Mo. 103; State v. Stutterfield, 54 Mo. 392; State v. Brassfield, 67 Mo. 331; State v. St. Louis, 73 Mo. 435; Cleveland Cotton Mills v. Cleveland County, 108 N. Car. 684, 13 S. E. 271; Lake County v. Rollins, 130 U. S. 662; Sedg. St. & Const. Law 325; Shellenberger v. Ramsom, 59 N. W. 939; Hurford v. City of Omaha, 4 Neb. 352; State v. Moore, 45 Neb. 12; McClure v. Oxford Township, 94 U. S. 429; Woodhull v. Beaver Co., Fed. Case 17,974; Gavin v. City of Atlanta, 12 S. E. 264; U. S. v. Bellingham Bay Boom Co., 176 U. S. 217; Kansas City M. & B. R. Co. v. J. T. Wiygul, 33 Southern 965; State v. Ruhe, 52 Pac. 276; McCrary on Elections, 3 ed. par. 173; Duke v. Brown, N. C., 1 S. E. 873, 875; Lynchburg & D. R. R. Co. v. Bd. Co. Comrs. Person Co., N. Ca., 13 S. E. 783; 26 A. & E. Enc. Law 668.

STATEMENT OF FACTS.

This was an action brought by plaintiff, as a taxpayer and voter, against the Town of Gallup to restrain the town from issuing water bonds to the amount of $20,000.00 under the provisions of the act of Congress of March 4, 1898, (30 Stat. at Large, 252), and an act of the Legislative Assembly of New Mexico of March 16, 1907, (Session Laws of 1907, 38). The complaint alleges that an election was held October 22, 1907, for the purpose of voting on the question of the issuance of said bonds; that at

that time there were two hundred persons in the town who were qualified electors and owners of property subject to taxation therein: that at the election fifty-two votes were cast of which forty-one votes were for the issuance of the said bonds; that at that time and at present, the indebtedness of the town exceeds four per centum of the value of the taxable property in the town; and that therefore the proposed issue of bonds is illegal.

To this complaint defendant interposed a demurrer, the principal question raised being that two-thirds of the qualified voters who voted at the election, having voted in favor of the bonds, the issue was duly authorized notwithstanding the fact that the number so voting was less than two-thirds of all who might have voted. The court overruled the demurrer and defendant declining to plead further, a final decree was entered enjoining defendant as prayed by the complaint.

OPINION OF THE COURT.

McFIE, J.—The Act of Congress authorizes the issuance of such bonds, notwithstanding the limitations of the act of July 30, 1886, with the following proviso:

"PROVIDED, That before any bonds shall be issued the mayor and common council of said chartered municipal corporations shall cause an election to be held in such city or town, and the mayor and common council of such municipal corporation shall cause to be published, in a newspaper of general circulation published in such city or town, a notice of the time and place or places of holding such election. Such notice shall be given at least thirty days before such election. On the question of the issuance of said bonds no person shall be qualified to vote except he be in all respects a qualified elector and owner of real or personal property subject to taxation within the municipality. In case two-thirds of the qualified voters, as above described, shall vote affirmatively for the issuance of said bonds, then the mayor and common council shall issue the same, and not otherwise."

The Act of the Legislative Assembly of New Mexico,

so far as it is brought in question in this case, is as follows:

Sec. 3. On the question of the issuance of said bonds no person shall be qualified to vote except he be in all respects a qualified elector of such city, town or village, and the owner of real or personal property subject to taxation within such city, town or village. The ballots at such election shall read "For the issuance of Bonds," or "Against the issuance of Bonds". In case two-thirds of the qualified voters as above described voting at such election shall vote affirmatively for the issuance of said bonds, then the city council or board of town or village trustees shall issue the same and not otherwise. Such question shall be submitted at either a general or special election."

It is obvious that if the requirements of the above act of Congress and of the Legislative Assembly are met in the election held to authorize the issuance of bonds, the same may be legally issued, notwithstanding the limitations of the act of Congress of July 30th, 1886. The regularity of the election is not questioned, the only point raised being that, the following requirements of the act of Congress were not complied with; namely, "Two-thirds of the qualified voters as above described shall vote affirmatively for the issuance of said bonds."

The complaint alleging that at the time the election was held, there were two hundred qualified voters in the town of Gallup, and that only forty-one voters had actually voted affirmatively for the issuance of the bonds and eleven voted against the bond issue, the appellee contends that the bonds were unauthorized inasmuch as the act of Congress, in its proviso, and also the statute of the Territory require that two-thirds of all the qualified voters of the town of Gallup shall actually vote in favor of issuing the bonds, regardless of whether the election returns show that they participated in the election or not, while on the other hand the appellant insists that two-thirds of the voters as shown by the returns is all the law requires to authorize the issuance of the bonds, and as the

returns show that two-thirds of those voting voted in favor of issuing the bonds, the issuance was authorized and the injunction should not have been granted.

In this jurisdiction the law as declared by the Supreme Court of the United States is the highest authority, and especially true in this case, where an act of Congress is involved.

There is, evidently, but one question to be determined by this court, and that is, whether or not the provision of the Act of Congress above referred to, requiring that "two-thirds of the qualified voters, as above described, shall vote affirmatively for the issuance of said bonds," to authorize the issuance of bonds involved, is complied with, and must be determined, by the returns of an election held for that purpose, showing that two-thirds of the qualified voters voting at that election, voted in favor of issuing the bonds.

As the record does not show that registration of voters was either required or had for the election or that any other method by which the total number of the qualified voters of the town of Gallup should be ascertained, it would seem to follow, that if the returns of the election are not to be accepted to establish the number of qualified voters, oral proof must be resorted to to ascertain the number of such voters. That resort should be had to oral evidence to establish such fact seems, at once, repugnant to several well settled principles of law, and would certainly tend to impair the value of public negotiable securities, concerning which the law is well settled.

The Supreme Court of the United States has had this question under consideration, and on several occasions, in deciding cases in which this question was raised, under statutes practically identical, pointed out the necessity of adhering to the result of the election, as shown by the
1 returns, as the only safe and reliable way of determining the number of qualified voters, notwithstanding the fact that in many cases the returns did not show, "that a majority" or "two-thirds of the qualified voters" did participate in the election, according to the claims of those

relying upon that fact as a defense against the bonds. St. Joseph Township v. Rogers, 16 Wall. 646; County of Cass v. Johnson, 95 U. S. 368; Carrol County v. Smith, 111 U. S. 563; Pacific Imp. Co. v. City of Clarksdale, 74 Fed. 528; Madison Co. v. Priestly, 42 Fed. 818; Lamb v. Cain, 129 Ind. 516; South Bend v. Lewis, 138 Ind. 516; Taylor v. McFadden, 84 Iowa 270; Montgomery County etc. v. Trimble, 104 Ky. 638; Shearer v. Bay County Supervisors, 128 Mich. 556; Tinkle v. Griffin, 26 Mont. 432; Davis v. Brown, 46 West Va. 719.

In the case of St. Joseph Township v. Rogers, supra, the act of Feby. 28th, 1867, of the Missouri Legislature, provided that bonds were authorized to be issued, "when it shall appear that a majority of all the legal voters of such township voting at such election," have voted therefor, etc. It appears that an election had been held for the issuing of bonds prior to the enactment of this statute, and in a proviso to section 13 it was provided substantially, that where an election had already been held, "and a majority of the legal voters of any township were in favor of a subscription," no other election should be held, etc. The question, therefore, arose as to how this majority of legal voters should be ascertained, as counsel for the plaintiff in error, contended: "A statute which authorizes township officers to issue bonds only when an election "may have already been held, and a majority of the legal voters of the township were in favor" thereof, does not authorize the issue of bonds when less than a "majority of the legal voters" were in favor thereof, although there were "a majority of all the legal voters voting at such election."

The facts proven were, that there were three hundred legal voters in St. Joseph Township at the time of the election, of whom only seventy-five voted, but a majority of the seventy-five voted in favor of issuing the bonds.

In deciding the case the court said: "Responsive to the first objection, it is insisted by the plaintiff that the legislature in adopting the phrase "a majority of the legal voters of the township" intended to require only a majority

of the legal voters of the township voting at the election notified and held to ascertain whether the proposition to subscribe for the stock of the company should be adopted or rejected, and the court is of the opinion that such is the true meaning of the enactment, as the question would necessarily be determined by a count of the ballots."

"Tested by these considerations, it is clear that an election was held within the meaning of the act of the legislature, and that a majority of the legal voters of the township did vote in favor of the subscription, as the proofs show that a meeting was called and held, and that the majority of the legal voters voting at the meeting, voted in favor of the proposition." St. Joseph v. Rogers, 16 Wall. 646, 649, 664."

In the case of Harshman v. Bates County, 92 U. S. 569, the court construed a clause in the Missouri Constitution, which prohibited the legislature of that state from enacting legislation authorizing counties, cities or towns from becoming stockholders or loaning their credit to corporations "unless two-thirds of the qualified voters of such county, city or town, at a regular or special election to be held therein, shall assent thereto." This language seems to be practically identical with that used in the act of congress in the case at bar. The words, *assent thereto* would seem to mean the same thing as *affirmatively vote for,* as both would be established by voting in favor of the issuance of the bonds. But the real question, lies back of that proposition, namely, that the only way of determining who are qualified to vote affirmatively or give their consent, is by the result of the election as shown by the returns thereof.

The Supreme Court of the United States in deciding that case affirmed the decision of the Supreme Court of Missouri against the validity of bonds subscribed.

In the case of Cass Co. v. Johnston, 95 U. S. 365, the case of Harshman v. Bates and other Missouri cases were reviewed at length in the following language:

"In Harshman v. Bates Co., 92 U. S. 569 (XXIII,

747), we incidentally decided the act to be unconstitutional; but the point then especially in controversy was as to the applicability of this constitutional prohibition to township organizations. It was impliedly conceded upon the argument that, if the Constitution did apply, the law could not be sustained; and we accepted this concession as truly stating the law of Missouri. Now, however, the question is direcly presented, whether the provisions of the Constitution and the statute are not substantially the same. On the one hand, it is contended that the Consitution requires the actual vote of two-thirds of the qualified voters of the township in favor of the subscription; and, on the other, that the requisite assent is obtained if two-thirds of those voting at the prescribed election shall vote to that effect." Chas. Co. v. Johnston, 95 U. S. 365.

"In State v. Winkelmeier, 35 Mo. 103, decided in 1864 just previous to the adoption of the constitution, under a law which empowered the city authorities of St. Louis, to grant permission for the opening of establishments for the sale of refreshments on any day in the week, "whenever a majority of the legal voters of the city" authorized them to do so, it was held that there must be a majority of the voters participating in the election at which the vote was taken, and not merely a majority of those voting upon that particular question. The judge who delivered the opinion of the court did, indeed, say, "the act expressly requires a majority of the legal voters; that is, of all the legal voters of the city, and not merely all those who at a particular time choose to vote upon the question." But this must be read in connection with what follows, where it is said that "It appeared that more than thirteen thousand voters participated in that election and that only five thousand and thirty-five persons voted in favor of giving to the city authority and two thousand and one persons voted against it. x x x It is evident that the vote of five thousand out of thirteen thousand is not the vote of a majority." Taking the opinion as a whole it is apparent that there

was no intention of deciding that resort must be had elsewhere than to the records of the election at which the vote was taken to ascertain whether the requisite majority had been obtained. But, however this may be, in 1866 a similar question was presented to the same court in the case of State v. Mayor of St. Joseph, 37 Mo. 270. There it was provided that the mayor and council of St. Joseph should cause all propositions "to create a debt by borrowing money," to be submitted "to a vote of the qualified voters of the city," and that in all such cases it should require "two-thirds of such qualified voters to sanction the same." A proposition to borrow money for the improvement of streets was submitted to a vote of the voters at an election called for that purpose, and resulted in a majority in favor of the measure, the mayor declined signing the necessary bonds, because "he was in doubt whether the matter was to be determined by two-thirds of all the votes polled at the special election, or by two-thirds of all the voters resident in the city, absolutely, whether voting or not." Thereupon a suit was instituted to settle this question, and to compel the mayor, by mandamus, to issue the bonds. In giving its decision the court said: "We think it was sufficient that two-thirds of all the qualified voters who voted at the special election, authorized for the express purpose of determining that question, on public notice duly given, voted in favor of the proposition. This was the mode provided by law for ascertaining the sense of the qualified voters of the city upon that question. There would appear to be no other practicable way in which the matter could be determined." The writ of mandamus was accordingly issued.

In the case of Hawkins v. Carroll Co., 50 Miss. 735, the Supreme Court of Mississippi had under consideration a statute of that state which authorized municipalities to subscribe to the capital stock of a railroad company, but the municipal authorities, before doing so, were required, "to submit the question of subscription or no subscription to the decision of the qualified voters of said county, city or incorporated town, at a special or regular

election to be held therein and if two-thirds of the qualified voters be in favor of said subscription, then the authorities were required and authorized to make the subscription."

It appears that under this statute an election was held in Carroll County, at which time there were 3,129 voters on the registration lists of the county, and it was alleged that there were that number of qualified voters in the county; this being admitted in the demurrer to the complaint. There were only 1280 voted at the election, of whom 918 voted in favor of the proposition. It was contended in the trial of the case the registration lists determined the number of the qualified voters of the county and that it required two-thirds of the registered voters to carry the proposition and not two-thirds of those actually voting as shown by the result of the election. The Supreme Court of Mississippi held that the registration books were competent as evidence of the number of qualified voters in the county, and as less than two-thirds of the registered voters had voted in favor of the proposition, it had failed, and the decision of the Chancellor who dismissed the bill for injunction was reversed.

The case of Hawkins v. Carroll County was reviewed by the Supreme Court of the United States, in the case of Carrol County v. Smith, 111 U. S. 556, and as will be seen was distinctly disapproved. The court says:

"We have, however, considered the reasoning of the Supreme Court of Mississippi, in its opinion in the case of Hawkins v. Carrol Co., with the respect which is due to the highest judicial tribunal of a state, speaking upon a topic as to which it is presumed to have peculiar fitness for correct decision, and, while we are bound to admit the carefulness and fulness of its examination of the question, we are not able to adopt its conclusions. On the contrary, we are constrained to follow the decision in St. Joseph v. Rogers, 16 Wall. 664 (83 U. S. XXI, 338), and adhere to the views expressed by this court in Cass Co. v. Johnston, 95 U. S. 360 (XXIV, 416), in deciding the same question upon the construction of a provision of

the constitution of Missouri, which is identical with that of the constitution of Mississippi under consideration. It was there declared and decided, that "'All qualified voters, who absent themselves from an election duly called, are presumed to assent to the expresssed will of the majority of those voting, unless the law providing for the election otherwise declares. Any other rule would be productive of the greatest inconvenience and ought not to be adopted, unless the legislative will to that effect is clearly expressed." In Missouri, as in Mississippi, there was a constitutional provision requiring a registration of all qualified voters. State v. Sutterfield, 54 Mo. 391."

"But this reasoning, as it seems, to us, does not meet, much less overcome, the difficulty of the argument. The constitution of Mississippi, although it does not recognize any voters as qualified, except such as are registered, does not make all persons, registered as such, qualified. And yet, if it is to be construed, in the clause in question, as referring to the registration as conclusive of the number of qualified voters, then no proof is competent to purge the list of those who never were qualified or have died, removed or become otherwise disqualified thus obliterating the distinction between registered and qualified voters; and if, on the other hand, it is to be construed as meaning voters qualified, in fact and in law, without reference to the sole circumstance of registration, then the body of electors is as indefinite as though there were no registration, and the determination of the whole number, if an actual enumeration is required to determine how many are two-thirds thereof, is completely a matter in pais, and must be inquired of and ascertained in each case by witnesses. The difficulty, if not the impossibility, of reaching results, by such methods, amounts almost to demonstration, that such could not have been the legislative intent, or the meaning of the constitution. The number and qualification of voters at such an election, is determinable by its result as canvassed, ascertained and declared by the officers appointed to that duty, or as subsequently corrected by a contest or scrutiny in a direct proceeding,

authorized and instituted for that purpose; it cannot be contested in any collateral proceeding, either by inquiry as to the truth of the return or by proof of votes not cast, to be counted as cast against the proposition, unless the law clearly so requires. In our opinion, the constitution of Mississippi did not mean, in the clause under consideration, to introduce any new rule. The assent of two-thirds of the qualified voters of the county, at an election lawfully held for that purpose, to a proposed issue of municipal bonds, intended by that instrument, meant two-thirds of the qualified voters present and voting at such an election in its favor, as determined by the official return of the result. The words 'qualified voters', as used in the constitution, must be taken to mean not those qualified and entitled to vote, but those qualified and actually voting. In that connection, a voter is one who votes, not one who, although qualified to vote, does not vote. Carrol County v. Smith, 111 U. S. 557, 563, 564-5."

This case seems to be directly in point in this case and to be conclusive of the method of determining the number of qualified voters under such constitutional or statutory provisions to the effect that where the legislature has failed to provide a method by which the number of qualified voters shall be determined, it must be determined by the result of the election and not by the testimony of witnesses.

Counsel for appellee, in a brief disclosing very considerable research, refers the court to the case of Cleveland Cotton Mills v. Commissioners of Cleveland County, 108 N. C. 684. This case I think may be said to sustain the position of the appellee, and so far as that state is concerned, it would be conclusive; but it cannot be held to change or overrule the construction placed upon similar language by the Supreme Court of the United States in the cases to which we have referred at length.

The Mississippi case held substantially to the same effect, but the holding was disapproved in Carrrol County v. Smith supra, a case of conclusive force in this jurisdic-

tion. We are also referred to the case of Gavin v. City of Atlanta, 12 S. E. 262. This case does not appear to be in point for the reason that, the charter of the city authorizes the mayor and council to provide a special method of registration of voters prior to any municipal election in that city, and the court held, that where a special registration was required prior to a special election for the issuance of bonds in that city, the question whether two-thirds of the qualified voters thereof, voted in favor of the issuance of the bonds, was to be determined by such registration. This case is unlike the case at bar, therefore, because a method of determining the number of qualified voters was provided for in the city charter, whereas no registration of voters, was either required or had for the election in the town of Gallup. The case from Mississippi is different from the Georgia case also in this, no special registration was required for the election in Mississippi, and a registration made for a prior election was used, but the court said it was not proper to use it for the purpose of determining the number of qualified voters; that the result of the election must be resorted to for that purpose.

The Supreme Court of Arizona in a very recent case, construed the identical provision of the act of Congress of March 4th, 1898, now under consideration. The case arose in this way; a few years ago the city of Tucson acting under the same act of Congress, held an election to determine whether or not bonds to the amount of one hundred thousand dollars should be issued, and at that election two-thirds of the votes cast were in favor of the bonds. A taxpayer of the city brought suit to restrain the mayor and common council from issuing the bonds, and alleged that there were in the city at the time of the election over 800 electors qualified to vote, but that of these only 230 voted, 196 for and 28 against the issuing of the bonds. This case seems to be on all fours with the case under consideration.

A demurrer was interposed to the complaint, which was sustained by the court and the taxpayer appealed.

In deciding the case the Supreme Court of Arizona said:

"The question whether at the election the issuance of the bonds was assented to by a sufficient number of voters to authorize the issuance of the bonds under the requirements of the Congressional act referred to turns upon the construction of the term 'two-thirds of the qualified voters as above described,' as this language was used in said act. There is a clear distinction between an elector and a voter. The former is one who legally has the right to vote, and the latter is one who not only possesses the right, but who does actually vote. Sanford v. Prentice, 28 Wis. 362. In Carrol Co. v. Smith, 111 U. S. 556, 4 Sup. Ct. 539, the Supreme Court in construing the term 'qualified voters', as used in the Mississippi constitution, said that these words 'must be taken to mean, not those qualified and entitled to vote, but those qualified and actually voting. In that connection a voter is one who votes, not one who, although qualified to vote, does not vote.' That Congress recognized in the act the distinction between the words 'elector' and 'voter' we think is apparent from the fact that, in the preceding sentence to the one containing the phrase under consideration, the former word is used in its precise sense. It is contended by counsel for appellant that the phrase 'as above described' enlarges the meaning of the words "two-thirds of the qualified voters' so as to give them the meaning of two-thirds of those qualified to vote. We think a simpler and more grammatical method of arriving at the meaning of the phrase would be to transpose the word 'qualified' so as make the sentence read, 'In case two-thirds of the voters, qualified as above described, vote affirmatively,' etc. In this way we do no violence to the structural arrangement of the words, and yet adhere to the exact meaning of the language used. Applying this construction of the congressional act to the facts as stated in the complaint, and we find that the issuance of the bonds in question was authorized by the affirmative words of more than 'two-thirds of the qualified

voters, as above described,' of the city of Tucson. Cronly v. City of Tucson, 56 Pac. 877-8."

The Supreme Court of Indiana in the case of Lamb v. Cain, had under consideration the following provision of the constitution of a church society:

"There shall be no alteration of the foregoing constitution, unless by request of two-thirds of the whole society." In deciding the case the court said:

"But we are of the opinion that the number of votes cast at the election is to be considered for the purposes of this case, as constituting the number of legal voters belonging to the church. Any other rule would be impracticable, and would lead to endless confusion and contention." Lamb et al v. Cain et al, 129 Ind. 486." In support of this case, see Schlichter v. Keiter, 156 Pa. 119; Philmoath College v. Wyatt, 27 Ore. 390.

In Taylor v. McFadden, 84 Iowa, 269, the Supreme Court of Iowa said:

"It is contended that the proposition to authorize waterworks did not receive the required number of votes. It did receive a majority of the votes cast, but not a majority of all the votes which, it is alleged, were of the town. The approval must be by a 'majority of the voters of the city or town' but how is that to be determined. There is no provision for ascertaining the number of persons in the town who were qualified to vote at that election, except as they appeared and voted. It is only by the vote cast that the result of such elections can be determined. That those not voting are to be counted is at variance with our system of elections. Ample notice is provided to electors, and the result must necessarily be determined by the vote cast. The voters of the city or town, contemplated in the statute, are those who, after the required notice, come to the polls and deposit their ballots."

It does not seem necessary to pursue the matter further, as the authorities referred to seem to be conclusive of the case and of the only issue raised and urged in the brief of appellee. Considerable stress is laid upon the

word "affirmatively" and it certainly is important, but its full force is just as applicable to the votes cast as otherwise. As we have concluded that, in the absence of any other provision for the ascertainment of the number of qualified voters, resort must be had to votes cast at the election, it then becomes necessary to ascertain whether two-thirds of those voting upon the question voted affirmatively or not. In this case 41 voters voted for the issuance of the bonds, while only 11 voted against the issuance, a total vote of 52.

As more than two-thirds of those voted affirmatively or in favor of the issuance of the bonds, it follows that authority was given the proper officers of the town of Gallup to issue the bonds voted for at the election.

We are of the opinion that the court below, should have sustained the demurrer to the complaint and dismissed the cause, and that in overruling the demurrer and granting the injunction prayed for, error intervened for which the cause must be reversed.

The cause is reversed and remanded with directions that the demurrer be sustained, that the injunction heretofore granted be dissolved and the cause dismissed at the costs of the appellee. It is so ordered.

(No. 1239. July 1, 1909.)

UNITED STATES OF AMERICA, Appellee, v. M. E. COOK, Appellant.

SYLLABUS.

1. No alleged errors, unless they are jurisdictional, will be considered, except those which are set out in the motion for a new trial.

2. A motion for a new trial will not be granted on the unsupported affidavit of a defendant, made on information and belief, that the jury while separated listened to discussions of the case by citizens and witnesses.

3. There was no error in the court having allowed the jury to separate, before the case was submitted to them, in the absence of a showing that accused was prejudiced thereby.

4. A motion for new trial is properly denied where motion is on the ground supported only by affidavit of accused made on information and belief, that the jury found accused guilty of adultery, on the evidence of a witness that he had stolen a hen on the night of the alleged offense, and that a juror had stated after the verdict that, if accused had not stolen, he would not have been convicted.

5. None of the evidence at the trial having been brought up by the record on appeal, the court cannot review the denial of the motion for new trial made on the ground that the conviction was based on the false testimony of a witness.

6. In view of the Act of March 3, 1887, c. 397, sec. 3, 24 Stat. 635, U. S. Comp. St. 1901, p. 3636, which provides that when the "act is committed between a married woman and a man who is unmarried, both parties to such act shall be deemed guilty of adultery," a single man committing the act with a married woman may be convicted, though the indictment charges that he is a married man.

7. The correctness of instructions given by the trial court will not be reviewed on appeal, unless exceptions are saved, and an opportunity for correction given.

Appeal from the Fifth Judicial District Court, before W. H. POPE, Associate Justice. Affirmed.

GATEWOOD & GRAVES for Appellant.

The separation of the jury in such a way as to expose them to tampering may be reason for a new trial, variously held as absolute, or prima facie. Lester v. Stanley, 15 Fed. case No. 8277; Wharton Crim. Pl. & Pr. sec. 821; Early v. State, 1 Tex. App. 248; The People v. Backus, 5 Cal. 275; Commonwealth v. Roley, 12 Pick. 519, Mass.; Organ v. The State, 26 Miss, 78; Madden v. The State of Kansas, 1 Kas., sec. ed. 321; The State of Kansas v. Mulkins, 18 Kas., 2 ed. 17; Mattox v. U. S.,

36 U. S., L. ed. 917; People v. Knopp, 42 Mich. 267; State v. Snyder, 20 Kas. 316; State v. Harris, 60 Pac. 58, (Cal.); State v. Place, 32 Pac. 736, Wash.; Com. v. Roby, 2 Pick. 486.

In order to warrant a conviction the proof must have been in line with the allegation contained in the indictment. Miner v. People, 58 Ill. 60; Tucker v. State, 35 Tex. 113; Territory v. Whitcomb, 1 Mont. 358; Hughes Crim. L. & P., sec. 1959, 3084; Dixon v. State, 44 Ga. 344; Owens v. State, 94 Ala. 97, s. c. 10 So. 669; White v. State, 74 Ala. 31; Gaunt v. State, 14 At. 600; State v. McDuffie, 12 S. E. 83; Coffin v. U. S., 39 L. ed., U. S. 481; U. S. v. Griego, 12 N. M. 84; Hickory v. U. S., 40 L. ed., U. S. 474.

A new trial should be granted if the presiding judge expresses himself, or instructs, as to inference of fact so that the jury believes him to be stating principles of law, and cannot be cured or corrected by other instructions. Warren v. State, 22 Tex. App. 392; Skidmore v. State, 43 Tex. 96; Wharton Cr. P. & P., secs. 709, 710, 794; U. S. v. Griego, 12 N. M. 84.

D. J. LEAHY, U. S. Attorney; STEPHEN B. DAVIS, Jr., Assistant U. S. Attorney, for Appellee.

No bill of exceptions being filed, no errors assigned, the testimony on which the conviction was had not brought before the appellate court, that court in determining the appeal, is confined to a consideration of the record proper. Territory v. McDonald, 12 N. M. 423.

It will be presumed that there was sufficient proof on which to base the verdict of the jury. Durland v. U. S., 161 U. S. 312; U. S. v. Biena, 8 N. M. 99.

Separation of the jury does not justify a reversal where no prejudice to defendant is shown. Territory v. Nichols, 3 N. M. 103; People v. Douglas, 4 Cowen 26; Com. v. McCaul, 1 Va. Cas. 271; Territory v. Chenowith, 3 N. M. 318; Territory v. Edie, 6 N. M. 554, 7 N. M. 183; Mattox v. U. S., 146 U. S. 140; U. S. v. Davis, 103 Fed. 467; U. S. v. Swan, 7 N. M. 306; U. S. v. Spencer, 8 N. M. 667.

An appellate court will generally not review the action

of the trial court in granting or refusing a new trial. Insurance Co. v. Perrin & Co., 10 N. M. 90.

Errors not included in the motion for a new trial will not be reviewed in the appellate court. Territory v. Chavez y Chavez, 9 N. M. 282; Territory v. Archibeque, 9 N. M. 403; Coleman v. Bell, et al, 4 N. M. 21; Sierra County v. Dona Ana County, 5 N. M. 190; Spiegelberg v. Mink, 1 N. M. 308.

The correctness of instructions given by the trial court will not be reviewed by the appellate court unless an exception was saved and an opportunity for correction given. C. L. 1897, sec. 3145; Territory v. O'Donnell, 4 N. M. 208; Padilla v. Territory, 8 N. M. 562 and cases cited; Laird v. Upton, 8 N. M. 409; Territory v. Baker, 4 N. M. 238; Lund v. Ozanne, 13 N. M. 293; Territory v. Watson, 12 N. M. 419.

OPINION OF THE COURT.

MILLS, C. J.—Appellant herein, M. E. Cook, was found guilty by a jury, on the 25th day of April, A. D. 1908, of having committed the crime of adultery. Motion for a new trial was subsequently filed, argued and overruled by the trial court, and an appeal was taken to this court.

The case is brought to this court on a skeleton record. None of the evidence introduced at the trial is before us, and consequently it will not be considered by us in arriving at our decision.

The court has often held that no alleged errors, unless they are jurisdictional, will be considered, except those which are set out in the motion for a new trial. Terri-
1 tory v. Chaves, 9 N. M. 282, Territory v. Archibeque, et al, 9 N. M. 403, and as the motion for a new trial filed in this case, does not include any exceptions to the instructions given by the court to the jury, the issues in the cause are reduced to a narrow compass.

The first two grounds set up in the motion for a new trial, are that the court erred in allowing the jury to separate without the consent of the defendant, for the

night of April 24th, 1908, and in the error assigned marked 2-A, the appellant charges on information and belief, that while separated, some of the jury heard the case and the facts and merits of the case discussed by citizens and witnesses, whereby the minds of the jurymen were influenced and prejudiced against the defendant, and that by reason thereof he was deprived of a fair and impartial trial.

The United States does not deny that the jury separated for the night of April 24th, but contends that such separation is not error unless the appellant shows that he was prejudiced thereby, and in the entire record before us there is not one word except the affidavit of M. E. Cook, the appellant herein, which affidavit is made on information and belief that the jury while separated "mingled freely with the citizens of Roswell and the witnesses for and on behalf of the United States, and heard the case and facts and the merits thereof discussed freely by said citizens and witnesses; whereby the minds of said jury were influenced and prejudiced against the defendant," and he was thereby deprived of a fair trial. The statement, as to what the jury did during their separation rests on nothing more substantial than the allegations made on information and belief by the appellant in his motion for a new trial. The name of no person with whom any of the jury conversed during their separation, is given, nor is the substance of their conversation set out, or the hour or place of such conversation, if any. The error assigned, numbered 2-A, is too general and rests on no solid foundation, and will not be further considered by us. If a verdict could be set aside on the unsupported affidavit of a defendant made on information and belief, our penitentiaries would soon be without occupants, and might as well be torn down, or put to other uses.

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The elimination of this part of the motion for a new trial brings us to the simple proposition as to whether or not it is reversible error for the court to allow a jury to separate during the progress of a criminal trial, but before the case is submitted to them; nothing prejudicial

to the defendant being shown. This point has already been passed upon by this court, so it will be unnecessary to go outside of the Territory for authorities. The first case in which this point was presented to our Supreme Court was in the case of Territory v. Nichols, 3 N. M. 76, 2 Pac. 78. This case is not exactly parallel with the one at bar, for in the Nichols case the jury separated without the consent of the court after they had agreed upon a verdict, but before they had returned it into court. In that case the court says: "The second alleged error is upon the refusal of the court below to set aside the verdict of the jury for the reason that, after being sent out to deliberate upon their verdict, the jury, without the permission of the court, separated, and mingled with the people, and afterwards returned a sealed verdict. This was a grave irregularity, and merited severe reprehension from the court. It is probable that the jurors themselves may not have been aware of the serious consequences which might flow from the act of separation, but it would seem almost impossible that the officers having them in charge could have furnished any good excuse for their neglect of duty. They were sworn to keep the jurors together, and should have been held to strict responsibility for their failure to do so. We do not think, however, that the court below erred in refusing to set the verdict aside in the case at bar for the reasons assigned." In this case a number of authorities are cited in support of the ruling of our court, but we do not think it necessary to quote from them. The case of Territory v. Chenoweth, 3 N. M. 318, 5 Pac. 533, is directly in point. In that case the court says: "It is further claimed as error in this case that, after the jury were impaneled, and during the day upon which the case was tried, they were permitted to separate during the noon recess, without being accompanied by a sworn officer. It appears that, after the evidence was in, and before the arguments of counsel and instructions of the court, the jurors were permitted, by leave of the court, and after being carefully admonished to permit no one to address them on the subject of the trial, to separate during the dinner hour. This was not error. It is a rule of practice

universally adopted, both in this country and in England. In capital cases there is, in some of the states, either a statute or a rule of practice requiring the jury to be kept together. But the well-satisfied doctrine in substantially all the states of the Union, as well as in England, now is that, even in felony, it is in the sound discretion of the court as to whether the jury, during the trial, may be permitted to separate. It would have been different had the jury been permitted to separate without leave of the court, after the case had been given to them in charge, and before the rendition of their verdict. But, even in such case, before a verdict will be set aside, it must be shown that the prisoner was in some way prejudiced by the separation." These cases are controlling upon us and so far as we are aware there are no decisions by our Supreme Court holding the contrary doctrine. It is true that in the case of U. S. v. Swan, 7 N. M. 306, and in the case of U. S. v. Spencer, 8 N. M. 667, reversals were granted on appeal, but in the Swan case, the separation was after the case had been argued and submitted, and it was shown that some of the jurors associated and conversed with citizens and were exposed to unfair influence, and that prejudice to the defendant might have resulted, while in the Spencer case, certain jurors separated from the others, without permission of the court, and spent some time in saloons, drinking, and took a bottle of whiskey back with them to the jury room. In these cases the reversals were not on the mere ground of separation of the jurors, but rather on their misconduct while separated.

There was no error in the court having allowed the jury to separate, before the case was submitted to
3 them, it not being shown that the appellant was prejudiced by such separation.

The alleged error marked in the motion for a new trial, 2-B, is only sworn to by the appellant on information and belief. This alleged error is in substance that the jury found Cook guilty on the evidence of one, Mrs. Mary J. Estes, that he (Cook), stole a pet hen of hers on the night of the alleged adultery, and that one of the

jurymen who tried the case said after the verdict had been returned and the jury discharged, in the presence of one Fred Hunt, that if Cook had not stolen the chicken, the jury would not have convicted him of adultery. Appellant asked for time to get the affidavit of Hunt. The motion for a new trial was filed April 30th, 1908, while the same was not overruled until May 8th, 1908.

It does not appear from the record before us that any affidavit of Hunt was ever filed in support of the alleged error marked 2-B, or that he appeared in
4 court and testified concerning the same, consequently the court was perfectly justified in overruling this part of the motion for a new trial. In passing we will say that we do not believe that the sturdy farmers of the Fifth Judicial District would convict any one of adultery, simply because he stole a hen.

The other grounds set up in the motion for a new trial are that the conviction was based on the testimony of Mrs. Mary J. Estes, and that her testimony was false.

None of the evidence heard at the trial has been brought before us, consequently we do not know what this witness, or any other swore to. In considering
5 this, or any other case, we are bound by the record presented by the respective parties, and as there is nothing to show what Mrs. Mary J. Estes swore to on the trial, we, of course, cannot find any error in the refusal of the court to grant a new trial.

The above cover all of the alleged errors set out in the motion for a new trial, but in their briefs both the appellant and appellee refer to instruction No. 6 given by the court. This instruction in substance is, that it was not necessary for both parties to the alleged adultery, to be married, and that while the indictment charges the appellant Cook, to be a married man, that it was not necessary for the United States to prove that fact, provided that it has proved that the woman Minnie G. Estes, was at the time of the alleged act, a married woman, and that her husband was some other person than the defendant, Cook.

This instruction was, we think, perfectly correct in

view of the United States Statute which provides that when the "act is committed between a married woman
6 and a man who is unmarried, both parties to such act shall be deemed guilty of adultery."

We need not, however, consider whether or not this instruction is correct, for the record before us nowhere shows that this instruction was excepted to, and it is
7 well settled that the correctness of instructions given by the trial court will not be reviewed by this court, unless exceptions are saved and an opportunity for correction given. Compiled Laws of 1897, sec. 3145; Territory v. O'Donel, 4 N. M. 208; Padilla v. Territory, 8 N. M. 562; Laird v. Upton, 8 N. M. 409; Territory v. Baker, 4 N. M. 238; Lund v. Ozanne, 13 N. M. 293; Territory v. Watson, 12 N. M. 419.

There being no error apparent in the record, the judgment of the court below is affirmed; and it is so ordered.

[No. 1259, July 1, 1909.]

W. L. SEARS, Appellee, v. JOHN FEWSON, Appellant.

SYLLABUS (BY THE COURT.)

The Territorial Statute, Chapter 96, Laws of 1884, as amended by Chapter 42, Laws of 1887, requiring the owners of cultivated lands in Lincoln County to protect them with fences of a prescribed kind and making the right to recover damages from the owners of animals injuring the crops on such lands depend on the maintenance of fences required by the law, is not invalid as a special law in contravention of the Act of Congress of July 30, 1886, known as the "Springer Act," nor has it been repealed or rendered void by section 144 of the Compiled Laws of 1897, or Chapter 73 of the Laws of 1903.

Appeal from the District Court for Chaves County, before W. H. Pope, Associate Justice. Reversed.

W. C. Reid and W. A. Dunn for Appellant.

Mere similarity in the provisions of two statutes is not enough to effect a repeal. 26 A. & E. Enc. of Law 732; Chapter 73, Laws of 1903; Sections 144-151, C. L. 1897; Chapter 92, Laws of 1901; Cooley Const. Lim., 6th ed. 182; Suth. St. Const., secs. 138, 160; U. S. v. Clafin, 97 U. S. 546; Hudson Furniture Co. v. Freed Furniture and Carpet Co., Utah, 36 Pac. 132; People v. McAllister, Utah, 37 Pac. 578.

Chapter 73, Laws of 1903, was not intended to, and did not repeal Chapter 96, Laws of 1884, as amended by Chapter 42, Laws of 1887, and Chapter 35, Laws 1897. Cooley Const. Lim., 6th ed. 182; Wilburn v. Territory, N. M., 62 Pac. 968.

The running at large of livestock and provisions for protection against their trespasses, varying in different localities, are police regulations which the territorial legislature has a right to adopt. Johnson v. Mocabee, Okla., 32 Pac. 336; Haigh v. Bell, W. Va., 31 L. R. A. 131.

Where crops are planted distant from settlements, and in common pasture grounds, the failure to protect such crops, by fence or otherwise, precludes any relief to the owner of such crops for damages committed by trespassing animals. Sections 98, 104, C. L. 1897; P. V. & N. E. Ry. Co. v. Cazier, N. M., 79 Pac. 714; Buford v. Houtz, 133 U. S. 320; Gerhardt v. Lusman, et al, in District Court for Guadalupe County, Civil Case No. 151.

A herd or fence law is not one of the subjects of special legislation, specifically mentioned or prohibited in the "Springer Act." Guthrie National Bank v. Guthrie, 173 U. S. 528; State v. County Court, 11 Am. Rep. 415, 50 Mo. 317; State v. Hitchcock, 1 Kans. 184, 81 Am. Dec. 503; Johnson v. Mocabee, Okla., 32 Pac. 336; 1 Sutherland Stat. Con., 2 ed., sec. 190.

Constitutional provisions against special legislation are prospective and do not apply to or affect the validity of existing statutes. 1 Sutherland's Statutory Construction, 2 ed., sec. 190; Nevada School District v. Shoecraft, 88 Cal. 372, 26 Pac. 211; Smith v. McDermott, 93 Cal. 421, 29 Pac. 34; Piper v. Gunther, 95 Ky. 115, 23 S. W. 872; Pearce v. Mason Co., 99 Ky. 357, 35 S. W. 1112;

Black River Imp. Co. v. Holman, 87 Wis. 584, 59 N. W. 126; King v. McAndrews, 104 Fed. 430.

H. M. Dow and NISBET & NISBET, for Appellee.

Chapter 73, Laws of 1903, supersedes and repeals Section 144, C. L. 1897; 26 A. & E. Enc. Law 731; District of Columbia v. Hutton, 143 U. S. 18; Tracy v. Tuffly, 134 U. S. 206; Cook County Natonal Bank v. U. S., 107 U. S. 451; U. S. v. Tynen, 11 Wal. 88, 89; Fish v. Henarie, 142 U. S. 459, 467; King v. Cornell, 106 U. S. 395, 396; Murphy v. Utter, 186 U. S. 95.

Chapter 96, Laws of 1884, as amended by Chapter 42, Laws of 1887, and Chapter 35, Laws of 1897, is not now in force in New Mexico. State v. Supervisors, 25 Wis. 339; Pasadena v. Stimson, 91 Cal. 238; Crabb v. State, 88 Ga. 584; Henderson v. Koenig, 168 Mo. 356; Suth. Stat. Const., sec. 191.

Where the Constitution requires uniformity in respect to any matter or thing, a law passed to carry out the provision will repeal all inconsistent local and special laws on the subject. Suth. Stat. Const., sec. 279; McTigue v. Commonwealth, Ky., 35 S. W. 121; Commonwealth v. Wunch, Pa., 31 Atl. 551; Chalfant v. Edwards, Pa., 34 Atl. 922; Haynes v. Cape May, N. J., 19 Atl. 176; Chidsey v. Scranton, 70 Miss. 449; Howard v. Hulbert, 63 Kan. 793.

STATEMENT OF THE CASE.

This suit was filed in the District Court of Chaves County on the 7th day of December, 1908, and was at once brought to issue and an agreed statement of facts filed. It appears from the complaint and from such agreed statement, that the plaintiff, here the appellee, is the owner and in possession of certain described land, a portion of which he has sown in grain and domestic grasses, there being about twenty acres in cultivation; that said land is unprotected by any fence sufficient to ordinarily turn stock, such as cattle and horses, and defendant's cattle have heretofore trespassed upon and destroyed a portion of the grain and grasses growing thereon; that said tract of land is not situated within or near any irrigated dis-

trict, and the lands surrounding it are composed largely of the public domain of the United States, on which cattle, horses and other stock are running at large; that defendant is the owner of a large number of cattle running at large in the neighborhood of said land which are trespassing thereon, eating up and destroying said crops, and will continue to do so unless defendant is restrained; that such trespasses are of a continuous nature and in order for plaintiff to obtain redress at law he would be forced to maintain a multiplicity of suits. It was agreed that if plaintiff was not required to protect his crops by fence, that he was entitled to relief by injunction; but, otherwise, that his complaint stated no cause of action and the suit should be dismissed at his cost. Defendant, here the appellant, specially pleaded that the relief sought by plaintiff was in contravention of certain local statutes requiring all persons to fence against trespassing animals in Lincoln, Chaves and Eddy Counties; the local statutes pleaded being chapter 96, Session Laws 1884, amended by chapter 42, Laws of 1887, and chapter 35, Laws of 1897. To this special defense the plaintiff demurred, and the cause was submitted to the trial court on the sole question of whether or not the crops should have been protected by a lawful fence in order to render the action maintainable. The court ruled that the demurrer to the answer should be sustained, and the prayer of the complaint be granted. A decree was accordingly entered perpetually enjoining the defendant from permitting his cattle to wander and trespass on the said crops and grasses of the plaintiff. The case is before this court on appeal from that decree and the only question to be determined is that raised by the demurrer as above stated.

OPINION OF THE COURT.

ABBOTT, J.—That the rule of the common law of England which required every man to keep his beasts in his own close, under penalty of answering in damages for all injuries resulting from their being permitted to range at large, "has nowhere prevailed in the settlement of the newer parts of this country," was affirmed by the Supreme

Court of the United States in Buford v. Houtz, 133 U. S., 320, where what may be termed the common law of the west, on the subject, is set forth. As recited in the opinion in that case, "we are of opinion that there is an implied license, growing out of the custom of nearly a hundred years, that the public lands of the United States, especially those in which the native grasses are adapted to the growth and fattening of domestic animals, shall be free to the people who seek to use them where they are left open and unenclosed, and no act of government forbids this use. * * The government of the United States, in all its branches, has known of this use, has never forbidden it, nor taken any steps to arrest it. No doubt, it may be safely stated that this has been done with the consent of all branches of the government." "Nearly all the states in early days had what was called the fence law, a law by which a kind of fence, sufficient in a general way to protect the cultivated ground from cattle and other domestic animals which were permitted to run at large, was prescribed. The character of this fence in most of the statutes was laid down with great particularity, and unless it was in strict conformity to the statute there was no liability on the part of the owner of cattle if they invaded the enclosure of a party and inflicted injury on him. If the owner of the enclosed ground had his fence constructed in accordance with the requirements of the statute, the law presumed then that an animal which invaded this enclosure was what was called a *breachy* animal, was not such animal as should be permitted to go at large, and the owner was liable for the damages done by him. Otherwise the right of the owner of all domestic animals, to permit them to run at large, without responsibility for their getting upon the lands of his neighbor, was conceded. * * * It is now a matter of occasional legislation in the States which have been created out of this public domain, to permit certain counties, or parts of the State, or the whole of the State, by a vote of the people within such subdivision, to determine whether cattle shall longer be permitted to run at large and the owners of the soil compelled to rely upon their fences for protection, or whether the

cattle owner shall keep them confined, and in that manner protect his neighbor without the necessity on the part of the latter of relying upon fences which he may make for such protection." The same rule was laid down by this court in P. V. & N. E. Ry. v. Cazier, 13 N. M., 131, 79 Pac. 714.

It is, however, claimed in behalf of the appellee, that this rule has been abrogated, or so far modified by statute in this Territory that he is entitled to relief under the circumstances of this case. The statute on which this contention is directly based is chapter 73, Laws of 1903, which provides that "all damage or injury done to any cultivated field sown with grain, corn, vineyard, orchards, alfalfa or other sown domestic grasses, and to all lands fenced as now required by laws in this Territory, shall be paid for by the owners of the animals committing such damage or injury," etc. It is claimed on one side and denied on the other that this statute repealed section 144 of the Compiled Laws of 1897, which provides that persons owning or having possession of animals which shall "break into the lawful enclosure of another, or shall trespass upon the cultivated fields, or land or lands sown in domestic grasses or clovers for hay or pasture, or upon the orchards or vineyard lands of another when no enclosure of such cultivated fields or land so planted is required by law," shall be liable in damages. In our view of the case, however, that is not a question of essential importance. Section 144, which, with the following sections to 152 inclusive, was enacted in 1873, recognized the prior existence of two classes of cases in which the owners of domestic animals had been made liable in damages for injuries done by them on the lands of others; one, through the breach by them of a "lawful enclosure" of such land, and the other by trespass on cultivated fields, orchard or vineyard lands, when no inclosure of such lands is required by law. Section 152 declared what should be a "lawful fence," and made it essential to the recovery of damages that "it must be proved that the enclosure was a legal fence; that is, it must be so proved in those cases in which an inclosure, is required by law, as recited in sec-

tion 144. The "irrepressible conflict" between the farming and the grazing interests had begun years before, while New Mexico included the greater part of what is now Colorado and Arizona. In 1856 it was declared by law in substance that damage to a "cultivated field" by animals should be recoverable, provided that those planting "in places distant from the settlements, at watering places or in common pasture grounds and neglecting their fields, * * * upon proof of neglect shall not obtain damages." In 1859 it was provided that those who fenced their "gardens and orchards," but no others, might recover for damages done to them by domestic animals "from the fall to the spring," but that in the summer local regulations should govern. In 1882, the right to recover such damages caused by domestic animals within their enclosures was given to any one who should inclose their lands without "crossing any public road * * * following his inclosure along both sides of said road or roads." Other statutes bearing on the subject were, from time to time, enacted and repealed, apparently as the forces of one side or the other might prevail in the Assembly; but, as we have seen, the Laws of 1873, Sec. 144, C. L. 1897, clearly recognized the principle that in some classes of cases it was necessary to fence lands in order to recover for injuries done on them by animals, and in others not necessary. With the law in that condition, the Assembly in 1884, enacted what is termed, in the discussion of the case at bar, the "Lincoln County Fence Law," Chap. 96, 1884. It was one of several statutes enacted at the same session clearly intended to protect the grazing interests in the portions of the Territory to which they were severally made applicable, and to prevent the owners of cultivated or improved lands from recovering damages for injuries to the crops or other cultivated growths on such lands, unless they were inclosed by lawful fences. By most of these statutes penalties were imposed on the owners of cultivated lands for failure to erect lawful fences. In the Lincoln County Law it was provided that the owners of fences not proving sufficient to stop "the neighbors' animals, shall suffer the consequences of such destruction

and injuries caused in their fields." In a later section of the act it was declared that those who should fail to erect lawful fences by the first Monday of January, 1886, should "suffer the consequences" according to the intent of the act. Apparently, the statute was enacted in Spanish and its phraseology in the English translation is not such as would naturally have been used if it had been originally put in English. Still there can be no doubt it was the intention of the Legislature to exempt the owners of domestic animals from liability for damages caused by them in cultivated fields, at first, whether the fields were fenced or not, but by amendment, Chapter 42, 1887, the exemption was limited to fields not enclosed by lawful fences. The law introduced no new principle into the legislation of the Territory but added largely to the lands in the first class we have referred to.

Unless, then, the statute now in question, Chap. 96, 1884, was invalid at the outset, or has since been repealed or made of no effect, such must be the condition of the law for Chaves County, which has been formed from what was then a part of Lincoln County, the statute having undoubtedly been meant to apply to the Territory included by the county boundaries adopted as a matter of convenience in description and not to the counties themselves as such.

It is claimed by the appellee that the statute was invalid, when enacted, because it contravened the "Springer Act," so called. Act of Congress, July 30, 1886, C. L. 1897, pp. 45, 46. But it was in existence before the Springer act, which cannot be given a retroactive effect, there being nothing in it to indicate that such was the intention of Congress. Cooley Con. Lim. 7th ed., 97; Black Con. Law 70; Smith v. McDermott, 93 Cal. 421, 29 Pac. 34; Black River Imp. Co. v. Holman, 87 Wis. 584, 59 N. W. 126. Besides, the Springer act does not in terms or under the accepted canons of statutory construction forbid such legislation. It is claimed for the appellee that the clause forbidding special legislation by Territorial legislatures in cases where general legislation is applicable was violated by the legislation in question. This court

will take judicial notice that in 1884, by far the greater part of this Territory was devoted to grazing purposes and was supposed to be fit for little else. There were, however, portions of the Territory, as, for instance, the Rio Grande Valley, adapted and largely devoted to the production of cultivated crops. It was in the power of the legislature to make special laws appropriate to those differing conditions, and its judgment is final. Guthrie Nat. Bank v. Guthrie, 173 U. S. 528; State v. County Court, 50 Mo. 317, 11 Am. Rep. 415; State v. Hitchcock, 1 Kan. 184, 81 Am. Dec. 503. Although it may have been customary, as intimated in Buford v. Houtz, *supra,* for legislatures to submit the question of fencing to the voters of the several counties, that course cannot be obligatory, in the absence of a constitutional provision requiring it. In the instance now in question, such a submission could have been of no practical use, it being a matter of common knowledge, as suggested in the brief for the appellee, that Lincoln County was then controlled by cattlemen. It is however, contended for the appellee that although chapter 96, of 1884, may not have been directly repealed or annulled by the Springer Act, yet, as a general law on the subject, that of 1873, had been made and was in force, when chapter 96, 1884, was enacted, the latter was in violation of the principle of the provision in the Springer Act, already referred to, that in all other cases where a general law can be made applicable no special law shall be enacted in any of the Territories of the United States," and that in consequence it was rendered void by the prior general law, or, if not by that, then by the general law, Chap. 73, 1903, with both of which, the argument is, it is inconsistent. But as we have already pointed out, the law of 1873 recognized and adopted the pre-existing division of lands into those which the law did and those which it did not require to be fenced, in order to establish liability in damages; and the same is true of the law of 1903, on which the contention of the appellee is especially based.

We find no inconsistency between Chapter 96, 1884, and it, but rather that the earlier law, with others of its kind, is recognized as still existing by the latter law. Again,

by Chapter 55, 1905, the Assembly recognized the two divisions of lands we have pointed out, and by amending the Lincoln County Fence Law by Chapter 35, 1897, declared it to be still in force.

It may be true, as counsel for the appellee state in their brief, that the farming as opposed to the grazing interests have become so great in Chaves County, that the law in question, made in 1884, is now unjust and works a hardship to the farming class. But, if that is the case, it is for the legislature and not for the courts to make such changes in the law as changed conditions may require.

The judgment of the District Court is reversed.

[No. 1233, August 25, 1909.]

TERRITORY OF NEW MEXICO, Appellant, v. CHARLES K. NEWHALL, et als, Appellees.

SYLLABUS (BY THE COURT.)

When the treasurer of a county in this Territory retained a commission for the amounts collected by and paid to him by the sheriff of the county for gaming and liquor licenses, under the law of 1901, and the Board of County Commissioners, audited and approved the accounts of the treasurer, knowing all of the facts in the case, and allowed him to retain the commission, under a mistake of law, there being no fraud or improper conduct on the part of the treasurer, the money so retained cannot be recovered back, as the same was a voluntary payment made under a mistake or in ignorance of the law.

Appeal from the District Court for the County of Bernalillo before IRA A. ABBOTT, Associate Justice. Affirmed.

JAMES M. HERVEY, Attorney General for Appellant.

The county treasurer was not entitled to commission on the liquor or gaming licenses. Hubbell v. County, 13 N. M. 546.

When a public officer has obtained possession of public money to which he is not entitled, he cannot honestly and in good conscience retain that money, and therefore, although he may have received it under a mistake of law, can be compelled to refund it. Northrop v. Graves, 19 Conn. 553-560; Culbreath v. Culbreath, 7 Ga. 64; 2 Pom. Eq. Jur., secs. 849, 851; Badeau v. U. S., 130 U. S. 439, 9 Sup. Ct. 579; Ada Co. v. Gess, 4 Idaho 616, 43 Pac. 72; Supervisors v. Knipfer, 37 Wis. 502; County v. Webster, 111 Wis. 273; Story Ag., pars. 398, 435; Stevenson v. Mortimer, Cowp. 806; Allen v. Com., Va. Law J., Sep. 1887, 1 S. E. Rep. 607; Commonwealth v. Field, 3 S. E. 884, 885; Code Civile 1377; Toullier, Code Civile Francais, vol. 6, No. 75, vol. 11, No. 63; 1 Story Eq. 121, note 2; Elliott v. Swartout, 10 Pet., 35 U. S. 153; U. S. v. Bartlett, 24 Fed. Cas. 14, 532, p. 1024; 18 A. & E. Enc. Law, pp. 223-225, note and cases cited; Ellis v. Board, 107 Mich. 532, 536; State v. Roderick, 41 N. W. 404; Hazlet v. Holt Co., 71 N. W. 717; Heald v. Polk Co., 64 N. W. 376; Morrow v. Surber, 11 S. W. 49; Palo Alto Co. v. Burlingame, 71 Iowa, 213, 214; Quaw v. Paff, 98 Wis. 589; Mansfield v. Lynch, 59 Conn. 321, 326; Park v. Blodgett, 65 Conn. 28, 33, 34; Stevens v. Goodell, 3 Metc. 34, 36-38; Stedwell v. Anderson, 21 Conn. 144; Kane v. Morehouse, 46 Conn. 305.

Statutes of limitation never apply to the sovereignty, whether state or territorial, unless the intention of the legislature so to do is clear and unmistakable. Wood on Limitations, sec. 52; C. L. 1897, secs. 1548, 2624, 2753, 2917, 2609, 780, 721, 773, 785, 787, 801; C. L. 1884, sec. 129; 2 Freeman on Executions, pp. 804, 805; Commonwealth v. Johnson, 6 Pa. St. 136; 2 Dill. on Mun. Corp., sec. 675; 25 Cyc. 1009; Des Moines v. Harker, 34 Iowa 85; Logan County v. Lincoln, 81 Ill. 156-159; Laws 1901, chap. 90, sec. 12, chap. 19, sec. 6; Rush County v. State, 13 Ind. 498; State v. St. Joseph County, 90 Ind. 359, 362; County v. Goodell, 97 Ill. 84; Greenwood v. LaSalle, 137 Ill. 228, 229; Alton v. Ill. Transp. Co., 12 Ill. 38, 60; Catlett v. People, 151 Ill. 23; McCartney v. People, 202 Ill. 51, 53; Russell v. Lincoln, 200 Ill. 511, 522; Pew

v. Litchfield, 115 Ill. App. 13, 18; Trustees of Schools v. Arnold, 58 Ill. App. 103, 107, 110; Trustees v. Campbell, 16 O. St. 11, 15, 16; Hogan v. Ingle, 2 Cranch. C. C. 352; Cross v. Mayor, 18 N. J. Eq. 311, et seq.; Simplot v. Railway Co., 16 Fed. 360, 361.

ALONZO B. MCMILLEN and HERBERT F. RAYNOLDS for Appellees.

No action will lie to recover back money paid under a mutual mistake of law. Eliott v. Swartout, 10 Peters 153; Lockhart v. Leeds, 76 Pac. 312; Kraft v. City of Keokuk, 14 Ia. 86; Norton v. Marden, 15 Me. 45, 32 Am. Dec. 132; Mowatt v. Wright, 1 Wend. 355, 31 Am. Dec. 508; Chaplin v. Laytin, 18 Wend. 407, 31 Am. Dec. 382; Mayer v. Lefferman, 4 Gill. 145, 45 Am. Dec. 145; Pomeroy's Equity Jurisprudence, sec. 842; Estis v. Jackson, 111 N. C. 145, 32 Am. S. Rep. 784; Gjerstadengen v. Van Dusen, 7 N. D. 612, 66 A. S. R. 679.

The decision of the Board of County Commissioners becomes an adjudication of the rights of the parties unless appealed from. Boone Co. v. Dils, 5 Ky. Law Reports 686; Sioux County v. Jameson, 43 Neb. 265, 61 N. M. W. 596; Heald v. Polk Co., 46 Neb. 28, 64 N. W. 376; State v. Vincent, 46 Neb. 408, 65 N. W. 50; Onadaga Co. Supervisors v. Briggs, 2 Denio 26; Scioto Co. Commissioners v. Gherky, Wright 493; Randall v. Lyons Co., Nev., 14 Pac. 583; Painter v. Polk Co., 81 Ia. 242; Board of Com. of Garfield Co. v. Leonard, Colo., 34 Pac. 583; Bartlett v. N. Y. Cent. & H. R. Co., Mass., 81 N. E. 204; Lincoln Tp. v. Kearney Co., Neb., 112 N. W. 608; Placer Co. v. Campbell, Cal., 11 Pac. 602.

The rule excepting the state from the provisions of general statutes of limitation "has no application in cases where, although a nominal party to the record, it has no real interest in the litigation, but its name is used to enforce a right which inures solely to the benefit of an individual or corporation, municipal or otherwise." Wood on Limitations, secs. 52, 53, p. 113; C. L. 1897, secs. 2913, 2917, 1534, 1538, 1564; Gibson v. Choteau, 13 Wall. 99; 25 Cys. 1906; Miller v. State, 38 Ala. 600; U. S.

v. Nashville C. & St. Louis R. R. Co. 118 U. S. 125; Opinion of Solicitor General E. L. Bartlett, May 2, 1901; 1 Dillon on Municipal Corporations, 4 ed., sec. 548; Clark v. City of Washington, 12 Wheat. 40; School Directors v. Georges, 50 Mo. 194; City of Cincinnati v. Evans, 5 Ohio St. 194; 2 Dillon on Municipal Corporations, secs. 668, 674, 675; Cincinnati v. First Presbyterian Church, 8 Ohio 298; Dundee Harbour Trustees v. Dougall, 1 Macqueen H. I. Cas. 317; Washington & Georgetown Railroad Co. v. District of Columbia, 136 U. S. 653; U. S. v. Beebe, 127 U. S. 338-347; Curtner v. U. S. 149 U. S. 662-671; U. S. v. Des Moines Nav. Co., 142 U. S. 510; Moody v. Fleming, 4 Ga. 115; New Hampshire v. Louisiana, 108 U. S. 76; U. S. v. Bell Telephone Co., 167 U. S. 222, 265; Moran v. Horsky, 178 U. S. 205-213; U. S. Bank v. McKenzie, 2 Brock U. S. 393; Metropolitan Road v. Dist. of Col., 132 U. S. 111; Lover v. Wilson, 6 Pa. State 290; Boone Co. v. Burlington, etc. Ry., 139 U. S. 684-693; Arapahoe Village v. Albee, Neb., 8 A. S. R. 202-206; New Hampshire v. Louisiana, 108 U. S. 76; In re Ayres, 123 U. S. 492; May v. School District, 22 Neb. 205, 34 N. W. 377, 3 A. S. R. 266; Lane v. Kennedy, 13 O. S. 42; Kennebunkport v. Smith, 21 Me. 445; Alton v. Ill. Trans. etc. Co., 12 Ill. 38; County of St. Charles v. Powell, 22 Mo. 525, 66 Am. Dec. 637 and note; Oxford Tp. v. Columbia, 38 O. S. 87; Evans v. Erie Co., 66 Pa. State 222; Baker v. Johnson Co., 33 Ia. 151; Armstrong v. Dalton, 4 Dev., N. C., 568; County of Lancaster v. Brinthall, 29 Pa. St. 38; Commissioners v. Buckner, 48 Fed. 533; City of Ft. Smith v. McKibben, 41 Ark. 45, 48 A. R. 19; City of Helena v. Horner, 58 Ark. 151, 23 S. W. 966; City of Burlington v. Burlington, etc. R. R. Co., 41 Ia. 134; City of Ft. Scott v. Schulenberg, 22 Kas. 452; Callaway County v. Nolle, 31 Mo. 393; City of Jefferson v. Whipple, 71 Mo. 519; Foxworthy v. City of Hastings, 23 Neb. 772, 37 N. W. 657; City of Galveston v. Menard, 23 Tex. 349; Mellinger v. City of Houston, 68 Tex. 36, 3 S. W. 249; Forsyth v. City of Wheeling, 19 W. Va. 318; Teass v. City of St. Albans, 38 W. Va. 1, 17 S. E. 400, 19 L. R. A. 802; Pimental v. City of San Francisco, 21

Calif. 351; City of Pella v. Scholte, 24 Ia. 283, 95 Am. Dec. 729, note at p. 740; Clark v. Iowa City, 20 Wallace 583; Bannock County v. Bell, 8 Idaho 1, 65 Pac. 710, 101 A. S. R. 140, note 144, 145; Hagerman v. Territory, 11 N. M. 156, 161; City and County of San Francisco v. Jones, 20 Fed. 190.

STATEMENT OF FACTS

The defendant, Charles K. Newhall, was the duly elected, qualified and acting treasurer and ex-officio collector of the County of Bernalillo, in this Territory, for the years 1901 and 1902, and the defendants Flournoy and Hesseldon, and four others, who were not made parties to this suit, were his bondsmen.

This suit was commenced on May 24th, 1906, more than three years after Newhall's term of office had expired.

Newhall, the principal on the bond, while a formal party to the suit, was never served with process, and did not enter his appearance in the case. The complaint alleges the election and qualification of Newhall as treasurer and ex-officico collector of Bernalillo County, and the giving of the bond by him and his sureties on which this suit is brought. These allegations were admitted in the answer, but all of the other allegations set forth in the complaint were denied, including the breaches of the bond.

After the evidence was in, the District Attorney voluntarily dismissed paragraphs 4 and 5 of the complaint and continued the action, only claiming under paragraph 3 of the complaint, which alleges that Newhall, after March 9th, 1901, by virtue of his office received from the sheriff of Bernalillo County, at divers times the sum of $56,630, on account of money collected by the sheriff from liquor and gaming licenses, all of which money it was the duty of the defendant Newhall to distribute, two-thirds to the credit of the school districts wherein such licenses were respectively paid, and one-third to the credit of the general school fund, but that in violation of his duty he converted to his own use the sum of $2,265.20 thereof.

In addition to the denial of the allegations contained

in paragraph three of the complaint, the defendants also plead the statute of limitations, to-wit: that the cause of action did not accrue to the plaintiff at any time within two years next before the commencement of the suit.

To that portion of the answer setting up the statute of limitations, plaintiff demurred upon the theory that the statute of limitations could not run against the plaintiff, the Territory of New Mexico, and the court sustained the demurrer and gave the defendants leave to amend their answer, which they did by setting up that the sum of $2,265.20 retained by Newhall, was kept by him as commission for collecting said gaming and liquor license, that the claim of said Newhall for said commissions was duly made to and approved by the Board of County Commissioners of Bernalillo County as a valid claim and charge of Newhall out of the funds so collected by him; that the accounts of Newhall showing in detail the claim for and retention of the commissions were duly filed with and approved by the said Board of County Commissioners, who then and there authorized and approved the retention of said commissions as a part of the legal fees and charges of the said Newhall, and that if Newhall was not legally entitled to said commissions, the allowance of the same to him was the result of a mistake of law and not of fact.

The defendants also allege that the orders approving Newhall's accounts were never appealed from or otherwise reversed, modified or set aside, but are still in full force and effect.

After hearing all of the evidence, the court directed the jury to return a verdict in favor of the defendants, on the ground that the commission could not be recovered, because it was paid under a mistake of law. From this judgment the plaintiff appeals.

OPINION OF THE COURT.

MILLS, C. J.—In the decision of this case but a single point is involved, viz.: Can the Territory recover the commissions paid to Newhall, he not being entitled to them, when the payments to him were made under a mis-

take of law, both plaintiff and defendants knowing all of the facts in the case.

There are only three grounds on which a suit can be maintained to recover back money paid; to-wit: Fraud, mistake or duress. Lamborn v. County Commissioners, 97 U. S. 191.

In the case at bar fraud or duress are not charged.

Mistake, in order to be a ground of recovery, must be a mistake of fact, and not of law. Such at least is the general rule. Hunt v. Rousaminere, 1 Pet. 1; Bilbie v. Lumley, 2 East 183; 2 Smith Lead Cases, 398 (6th ed. 458), notes to Marriot v. Hampton. A voluntary payment, made with a full knowledge of all the facts and circumstances of the case, though made under a mistaken view of the law, cannot be revoked, and the money so paid cannot be recovered back. Clarke v. Dutsch, 9 Cow. 674; Eage v. Koontz, 8 Pa. St. 109; Boston and Sandwich Glass Co. v. City of Boston, 4 Met. 181; Benson v. Monroe, 7 Cush. 125; Milnes v. Duncan, 6 Barn. & Cres. 671; Lamborn v. County Commissioners, 97 U. S. 181; Elliott v. Swartout, 10 Pet. 150.

In a recent case in Missouri, decided as late as the year 1905, the supreme court of that state holds the law to be: "That money paid through a mistake of fact may be recovered in an action for that purpose. * * * But in all such cases the mistake must be one of fact and not of law, for all persons are deemed to have notice of the law. * * * The rule stated has been uniformly followed in this state in reference to all kinds of payments, including taxes, licenses and claims, and the doctrine is firmly established that payments made with a full knowledge of all the facts constitute voluntary payments and cannot be recovered, and that mistake or ignorance of law gives no right to recover." American Brewing Company v. St. Louis, 187 Mo. 367. This case has been annotated in 2 Am. & Eng. Annotated Cases 822, and in it a number of Missouri cases are cited in support of this legal proposition, which in fact seems to be the acknowledged law of the land. The rule as set out in 30 Cyc. 1313, is that "except when it is otherwise provided by statute, the gen-

eral rule is that a voluntary payment made under a mistake or in ignorance of the law, but with full knowledge of all the facts, and not induced by any fraud or improper conduct on the part of the payee, cannot be recovered back, and in so far as this rule is concerned, there is no difference between ignorance and mistake of law. It applies to a corporation as well as to a natural person, and in equity as well as in law." A long line of authorities are quoted in support of this rule.

To determine this case, we will have to ascertain just how the payments in controversy were made. The legislature of this Territory passed an act prescribing the duties of sheriffs in regard to liquor and gaming licenses, which Act was approved March 9th, 1901, and became a law on that date. The Act was somewhat obscure, and the several counties in the Territory did not act uniformly in paying their officers for the collection of this tax, some of them paying both the sheriff and treasurer four per cent of the amounts collected for such licenses, while other counties only paid the sheriff four per cent for such collections and paid the treasurer nothing. As shown on page 18 of the brief of the appellees, filed on August 31, 1908, the Solicitor General, then the highest law officer of the Territory, on May 2, 1901, gave a written opinion, which was generally circulated through the Territory, in which he held that both the sheriff and the collector were entitled to retain a commission of four per cent on licenses collected for the sale of liquors and the running of games of chance.

A case involving the question as to who was entitled to receive the commission for the collection of these licenses was brought before us, and this court decided unanimously on June 29th, 1906, in the case of Hubbell v. Board of County Commissioners of Bernalillo County, 13 N. M. 546, that a county treasurer was not entitled to a commission upon moneys collected for gaming and liquor licenses during the period between March 9, 1901, and March 14, 1905, when a new law regarding compensation of certain county officers was passed. This decision of our Supreme Court set at rest all doubts as to who was entitled to the

commission for the collection of gaming and liquor licenses.

An examination of the record before us shows that the defendant, Newhall, made regular reports to the Board of County Commissioners, in which he reported the several amounts collected by him, and the County Commissioners certify that they have checked the accounts submitted to them with the books of the said Newhall, as treasurer, and that said accounts are correct.

The books of the treasurer show that he had deducted the four per cent from the license money paid to him by the sheriff, who originally collected the same. It appears in fact from the certificates in the transcript that a regular audit was made before the account of the treasurer was approved by the Board of County Commissioners.

The Board of County Commissioners is the body which approves or disapproves the reports of the treasurers in their several counties, and by Section 671, Compiled Laws of 1897, an appeal lies to the District Court, and may be taken by any person whose claim may be disallowed in whole or in part by that Board.

In the case at bar we can come to no other conclusion but that the four per cent commission on the gaming and liquor licenses, were paid to Newhall under a mistake of law. In truth it is not contended that the payments were made on account of any fraud, duress or mistake of fact, and under the law, as above set out, such payments having been made under a mistake of law, we are of the opinion that the court below very properly instructed the jury to return a verdict in favor of the defendants, appellees herein.

There being no error in the judgment of the court below, the same is therefore affirmed; and it is so ordered.

Cooley and Mechem, A. J., did not hear the argument in the case and took no part in this decision.

[No. 1234, August 25, 1909.]

In the Matter of the Voluntary Assignment of CHARLES ZEIGER.

SYLLABUS (BY THE COURT.)

The acts regulating both voluntary and involuntary assignments in this Territory, which were passed by the legislature of 1889, were designed to form a complete code of procedure for parties wishing to abandon their estates to their creditors, and in disposing of property conveyed to them by such assignments, assignees must follow the procedure laid down in said acts.

Appeal from the District Court for Bernalillo County before IRA A. ABBOTT, Associate Justice. Affirmed.

E. W. DOBSON and KLOCK & OWEN, for Appellant.

"The assignee has in general a discretion to sell at public or private sale, as may appear to be most advantageous for the interest of the creditors." North River Bank v. Shumann, 63 How. Pr. R. 476; Halstead v. Gordon, et al. 34 Barb. Sup. Ct. R. 422; Matter of Leventrett, 40 App. Div. N. Y. Sup. Ct. 429; Hart el al. v. Crane, et al., 7 Paige Ch. R. 37; Sackett v. Mansfied, 26 Ill. 21; Burrill on Assignments, 5 ed., sec. 410, p. 651, and cases cited; pp. 331, sec. 220; Work v. Ellis et al., 50 Bar. Sup. Ct. R. 512. No written authority was required. Borel v. Mead, 3 N. M. 39; Worrall v. Munn, 5 N. Y. 229, 245; Newton v. Bronson, 13 N. Y. 587. The assignee ratified the act of his agent and attorney. Newton v. Bronson, 13 N. Y. 587; Burrill on Assignments, 5 ed., p. 661, sec. 415. It was legal for the assignee to covenant against his own acts. Perry on Trusts, 4 ed., sec. 786, p. 427, vol. 2.

Section 2857, C. L. 1897, is not exclusive and does not prohibit a sale of either real or personal property by an assignee without an order of the court. Chapter 9, Vol. 1, Wagner's Mo. Statutes, 1872, p. 150 et seq.; Jeffries, et al. v. Bleckman, et al. 86 Mo. 350; Goodrich v. Proctor, 1 Gray, Mass. 567; Reymond v. Newcomb, 10 N. M. 151; Bullard v. Lopez, 7 N. M. 561.

If in granting or refusing an injunction, errors of law are committed by the chancellor, the judgment will be reversed and that, too, although he may be right on the facts. Campbell v. Seaman, 63 N. Y. 569; Rowley v. Van Benthuysen, 16 Wend. 373; Birge v. Berlin Iron B. Co., 133 N. Y. 447.

When all is fair and the parties deal on equal terms it is a universal rule in equity to enforce contracts for the sale of lands specifically at the demand of either the vendor or vendee, and in such case, it is as much the duty of the court to decree specific performance as to give damage for a breach. Losee v. Moray, 57 Barb. N. Y. 564; Willard's Equity, p. 280; Story's Equity, secs. 746, 751; 9 Ves. 608; 12 Ves. 395, 400; Seymour v. Delancy, 3 Cow. N. Y. 445; 6 Bosworth 245; Brown v. Half, 5 Paige 235; Phyfe v. Wardell, 5 Paige 268; Crary v. Smith, 2 Comstock, N. Y. Ct. Ap. 60.

A sale by an assignee when not impeached for fraud should not be readily set aside. Rider v. McGowen, 23 Hun. N. Y. 91.

ALONZO B. MCMILLEN for Appellee.

A valid contract of sale could have been made only by order of court. Laws 1889, Chapter 71; Schofield v. Folsom, 7 N. M. 608; Minn. Co. v. St. Paul Co., 11 Wall. 640; Camden v. Mayhew, 129 U. S. 82; Colclough v. Sterum, 3 Bligh. 181; Lutwiche v. Winford, 2 Bro. C. C. 251; Williamson v. Berry, 8 Howard 548.

A court of equity will not interfere to aid one guilty of fraud or inequitable acts of any kind. Hennessey v. Woolworth, 128 U. S. 438-442; Marble Company v. Ripley, 10 Wall. 339-359; Holgate v. Eaton, 116 U. S. 33-40; Willard v. Taylor, 8 Wall. 557, 566, 567; McCabe v. Matthews, 155 U. S. 550-553; Cathcart v. Robinson, 5 Pet. 264, 276; 10 Ves. 292, 2 Coxe's Cases in Chancery 77; Pope Mfg. Co. v. Gormully, 144 U. S. 224-236.

STATEMENT OF FACTS.

This is an appeal taken by George L. Brooks, from a decree of the District Court of Bernalillo County, dis-

solving a temporary writ of injunction issued by the court, restraining F. H. Moore, as assignee of Charles Zeiger, from selling or attempting to sell the south half of lots 13 and 14, Block 8, New Mexico Town Company's Addition to the City of Albquerque.

It appears that on the 6th day of April, A. D., 1895, Charles Zeiger, executed a deed of assignment for the benefit of his creditors to Wiley M. Weaver, as assignee. Among other things the deed of assignment sets out that the estate and property of the said Zeiger shall be vested in the assignee "in trust, to be administered under and in accordance with the laws of the Territory of New Mexico, regulating voluntary assignments, and not otherwise." Weaver at once accepted the trust, and entered upon the discharge of his duties as assignee. The petition filed by Brooks alleges that on September 1, 1903, Weaver as assignee, sold to Brooks for the Blanchard Meat & Supply Company, the south half of lots 13, and 14, block 8, New Mexico Townsite Addition to Albuquerque, together with some personal property on said lots, for the sum of $2,267.00, and that he paid the sum of $267.00, at the time of the purchase for the personal property, and tendered the remainder of the alleged purchase price, to-wit: $2,000.00 to Weaver, assignee, but that he refused to accept it, giving as a reason that the lots had been sold for delinquent taxes, and that a suit was pending to redeem the same and that the balance of the money remaining due could be paid as soon as the suit was settled. Brooks also alleges that on several occasions he offered to pay the $2,000—if he was given a deed for the property, but that the assignee would not receive the money because the tax suit was not settled. The assignee Weaver, never gave a deed to Brooks for the property in controversy.

The Blanchard Meat & Supply Company entered into the possession of the property at the time of the alleged purchase by Brooks, and it, and its successors, the Western Meat Company, have since occupied a part of the premises and rented the remainder and collected rents therefor. The Blanchard Meat & Supply Company, and the Western Meat Company, also paid taxes on the prop-

erty for the years 1903 to 1907, inclusive, amounting to $338.17, in the aggregate, and repaired the property. It appears on pages 60 and 61 of the record that that part of the property not used by the Blanchard Meat & Supply Company, and its successors, the Western Meat Company, (about one-half of the property), which it rented to a Mr. Tophan, brought in rents up to December 1, 1907, of about $1,275.00.

The judgment settling and adjusting the delinquent taxes, for the non-payment of which the property was sold, was finally determined and entered on November 9, 1905.

On April 21, 1906, the court granted a temporary injunction on the petition of the First National Bank of Albuquerque, and Bessie R. Lesquereus, restraining Weaver from delivering a deed to certain real estate to the Santa Fe Pacific R. R. Co., or from selling or conveying to the Blanchard Meat & Supply Company, the lots in controversy in this suit. What was finally done with this restraining order does not appear in the record now before us.

On March 16, 1907, Weaver resigned as assignee of the Zeiger estate, and on the same day the judge of the District Court of Bernalillo County, appointed Frank H. Moore, as assignee of said estate and said Moore accepted said trust and duly qualified as such assignee.

On September 28, 1907, Moore filed a petition in the District Court of Bernalillo County, in which he prayed for leave to sell at public auction the real estate belonging to the estate of said Zeiger, situated in the County of Bernalillo, and also any personal property belonging to said estate which might come into his hands. Among the real property described in said petition was the south half of lots 13 and 14, block 8, original townsite of Albuquerque, being the lots in controversy in this suit.

On October 1, 1907, the court signed an order allowing Moore as assignee, to sell the real estate and personal property coming into his hands as assignee, at public auction, after first giving public notice of the sale by advertisement.

Publication of the sale seems to have been duly made for on the 4th day of November, 1907, George L. Brooks,

filed a petition, claiming that he had bought the lots in question as above set out, and asked for a restraining order, enjoining Moore, as assignee, from selling said lots, and that he be directed to execute and deliver to the petitioner (Brooks), a deed to said real estate, and that in the meantime the said Moore as assignee, be enjoined and restrained from selling or attempting to sell said real estate until the further order of the court.

The court granted a temporary restraining order, and evidence was taken before an examiner, who reported the same to the court, together with all the exhibits offered in evidence.

On February 1, 1908, the cause having been heard, the court signed an order dissolving the temporary injunction, and dismissing the petition filed by Brooks. Motion was made to re-open the case, which was denied, and Brooks appealed to this court.

OPINION OF THE COURT.

MILLS, C. J.—While numerous errors are assigned in this case, we need only consider the point as to whether or not the assignee Weaver, on September 1, 1903, made a valid and binding sale of the lots in question to Brooks for the Blanchard Meat and Supply Company. If he did, then the District Court of Bernalillo County should have continued the injunction against Frank H. Moore, assignee, and should have ordered him to give a deed to the property to the Western Meat Company, the successor in interest of the Blanchard Meat and Supply Company, on that company paying the consideration agreed upon therefor, while on the other hand, if the alleged purchase and sale of the lots was not a valid one, then the court very properly dissolved the injunction and dismissed the petition.

An examination of the deed of assignment executed by Zeiger to Weaver, shows that it contains a provision that: "It is hereby declared the purpose of this assignment that the said estate and property of the said party of the first part shall be vested in the party of the second part in trust to be administered under and in accordance

with the laws of the Territory of New Mexico, regulating assignments and not otherwise."

Previous to the session of our legislature held in 1889, there were no laws in this Territory regulating assignments of the property of a debtor for the benefit of his creditors, but that legislature passed quite exhaustive acts regulating both voluntary and involuntary assignments. These laws are Chapters 67 and 71, Laws of 1889, and it is under these acts which have been compiled as Sections 2,818 to 2,870, inclusive of the Compiled Laws of 1897, that the assignee was acting.

It is held in Schofield v. Folsom, 7 N. M. 608, that the voluntary assignment act, "was evidently designed by the legislature to form a complete code of procedure for parties wishing to abandon their estates to their creditors."

Section 2857, Compiled Laws of 1897, (which is a part of the voluntary assignment act), provides, that the District Court, or the judge thereof, in vacation, shall make an order for the sale of all the real and personal estate conveyed by any deed of assignment either for cash or upon reasonable credit, and upon such other terms and notice as shall appear to the court or judge to be most advantageous to all the parties in interest, and shall by order direct the nature of the security to be taken at sales made by assignees. The law also required that before any sale of such real estate should be made, the assignee should give bond with at least two good securities to be approved by the court, or the judge thereof, in vacation, in an amount equal to the value of the real estate to be sold, conditioned that the said assignee will faithfully make the sale under such order and duly account for the proceeds thereof.

An examination of the transcript before us, nowhere discloses that the assignee, Weaver, before attempting to sell the real estate in controversy ever applied to the District Court or to the judge thereof in vacation, for an order authorizing him to sell such real estate, nor does it appear that he ever gave the bond required by law to be given before such sale was made. The facts, as nearly as we can gather from the transcript, seem to be, that the

assignee Weaver, sold and delivered some of the personal property belonging to the estate to Brooks, for the Blanchard Meat and Supply Company, and that he also agreed to convey the real property in question when the title to it was cleared. That an actual sale was not made seems to be proved by the answers of Brooks to certain questions propounded to him on cross examination. They can be found on page 40 of the printed transcript and are as follows:

Q. Would you have paid the $2,000, and taken a deed for the property at the time you say the purchase was made without having the tax sale against the property cleared up?

A. Yes, if we could have been protected by a good and sufficient bond.

Q. You wouldn't have been willing to pay it though without a bond?

A. No, because it would have been just like accepting the property with an incumbrance against it."

Doubtless both Weaver, as assignee, and Brooks, intended after the title to the property in controversy was cleared, to apply to the court for an order allowing it to be sold, but from the above questions and answers it cannot well be contended that an actual bona fide sale was made by the assignee on September 1, 1903, of the real estate, especially as no money was paid to bind the bargain. It will be noted that although the judgment removing the cloud caused by the sale of the property for taxes was finally determined and entered of record on November 9, 1905, and Weaver did not resign as assignee for more than a year after the entry of the judgment removing the cloud, still no application was ever made to the court for an order allowing the sale to be made, or for the confirmation thereof, if a sale had been previously made.

If we had no statutes regarding voluntary assignments, possibly the alleged sale by the assignee to Brooks would be upheld, but as this assignment is under the statutes of this Territory and as the important provisions of the act regulating sales, as above set out, have not been complied

with, we are of the opinion that the trial court very properly dissolved the temporary injunction and denied the relief asked for.

There being no error in the judgment of the court below, the same is affirmed; and it is so ordered.

Cooley and Mechem, J. J., did not hear the argument and took no part in this decision.

[No. 1244, August 25, 1909.]

TERRITORY OF NEW MEXICO, Appellee, v. JOSEPH DIGNEO, Appellant.

SYLLABUS (BY THE COURT.)

1. Repeals of a statute by implication are not favored, but if two statutes are in part positively repugnant to each other, the older statute is repealed by implication to the extent of the repugnancy.

2. Section 1235, Compiled Laws of 1897, making it illegal to sell or give intoxicating liquors to minors, is still in force as to minors between the ages of eighteen and twenty-one years, and to that extent is not repealed by implication by Section 1270, Compiled Laws of 1897, and Section 1, Chapter 3, Laws of 1901, as those laws only legislate as to minors under the age of eighteen years, and not as to minors between the ages of eighteen and twenty-one years.

Appeal from the District Court for Santa Fe County before JOHN R. MCFIE, Associate Justice. Affirmed.

A. B. RENEHAN for Appellant.

It is not unlawful to sell or give intoxicating liquor to a person over the age of eighteen years who is not a pupil at a school or college. C. L. 1897, sec. 1235, repealed by C. L. sec. 1270 and Laws 1901, chap. 3, sec. 1; 1 Fed. Stats. Ann. p. 110; Frost v. Wenie, 157 U. S. 58; Beals v. Hale, 4 How. 53; 1 Fed. Stats. Ann., p. 111; U. S. v. Greathouse, 166 U. S. 601.

JAMES M. HERVEY, Attorney General, for Appellee.

The Act of 1901 cannot be construed to repeal by implication section 1245 of C. L. 1897. Lewis Sutherland Stat. Const., 2 ed., secs. 247, 267, 252; U. S. v. Healey, 160 U. S. 136; Frost v. Wenie, 157 U. S. 58; Beals v. Hale, 4 Howard 53; U. S. v. Greathouse, 166 U. S. 601.

OPINION OF THE COURT.

MILLS, C. J.—The single point involved in this case is whether or not it is unlawful under the laws of this Territory to sell or give intoxicating liquors to minors over the age of eighteen years without the consent of the parent or guardian of such minor.

Three laws have been passed by the Territorial Legislature in regard to the selling or giving of intoxicating liquors to minors, to-wit:

Sec. 1235 C. L. 1897, passed February 15, 1854, provides:

"If any person, by himself, or by his agent, shall sell or give any intoxicating liquor to any minor, without the consent of his parent or guardian * * * he shall be fined in a sum not less than $5.00 nor more than $50.00 *"

Section 1270, C. L. 1897, passed April 1, 1876, provides:

"Every person who shall sell, give or deliver to any minor under the age of eighteen years (such person not being the father, mother or guardian of such minor), any spirituous or fermented liquor * * * shall be punished by a fine not more than fifty nor less than five dollars, or by imprisonment not exceeding sixty days, at the discretion of the court."

Sec. 1, Ch. 3, L. 1901, provides:

"It shall be unlawful for any person to sell or give to any minor under the age of eighteen years, or to any pupil of any school or educational institution within this Territory, any intoxicating liquor or any cigars, cigarettes, or tobacco in any form, except upon the written consent of the parent of such minor or pupil."

The contention of the appellant is that Section 1270, Compiled Laws of 1897, and Section 1, Chap. 3, Laws of 1901, repeal by implication Section 1235, Compiled Laws

of 1897, not because they contain direct words of repeal, but because they are repugnant to it; while the contention of the appellee is that the several sections of our laws are not repugnant to each other, and that therefore there is no implied repeal of the earlier statute under which the appellant admits on page three of his brief the conviction could be sustained.

It is the rule that the repeal of any law by implication is not favored by the courts, but that it nevertheless results if the later enactment is repugnant to and absolutely irreconcilable with the provisions of the earlier law. In Frost v. Wenie, 157 U. S. 46, (which case is quoted approvingly in U. S. v. Healey, 160 U. S. 147), the court says: "It is well settled that repeals by implication are not to be favored. And where two statutes cover, in whole or in part, the same matter, and are not absolutely irreconcilable, the duty of the court—no purpose to repeal being clearly expressed or indicated—is, if possible, to give effect to both. In other words, it must not be supposed that the legislature intended by a statute to repeal a prior one on the same subject, unless the last statute is so broad in its terms and so clear and explicit in its words as to show that it was intended to cover the whole subject, and, therefore, to displace the prior statute."

An eminent authority on statutory construction says:

"If the two statutes can be read together without contradiction, or repugnancy, or absurdity, or unreasonableness, they should be read together, and both will have effect. It is not enough to justify the inference of repeal that the latter law is different; it must be contrary to the prior law. It is not sufficient that the subsequent statute covers some or even all the cases provided for by the former, for it may be merely affirmative, accumulative or auxiliary; there must be positive repugnance; and even then the old law is repealed by implication only to the extent of the repugnancy." Lewis Sutherland on Statutory Construction, 2 ed., Section 267.

Bearing in mind the rule as enunciated by the highest court of our land, and by the learned author jurist quoted,

we will now consider whether or not effect can be given, either in whole or in part, to the three statutes which we refer to above.

The first law, that is the one approved February 15th, 1854, and which is compiled as Sec. 1235, Compiled Laws of 1897, makes it an offense for any person to sell or give any intoxicating liquor to a minor without the consent of his parent or guardian. This act does not state how such consent should be given.

The second act, approved April 1, 1876, and which is compiled as Sec. 1270, Compiled Laws of 1897, makes it an offence for any person, except their father, mother or guardian, to sell, give or deliver to any minor under the age of eighteen years, any spirituous or fermented liquor. Clearly this act is not in conflict with the whole of the Act of 1854. What it does is to take away the privilege which was in the old law, of allowing a parent or guardian to give consent to intoxicating liquors being given or sold to a minor under the age of eighteen years by any other person other than themselves. The parent or guardian could still give their consent to intoxicating liquors being given or sold to a minor between the ages of eighteen and twenty-one years, but they could not give their consent so that any other person could give or sell spirituous or fermented liquors to a minor, under the age of eighteen.

The third Act, Sec. 1, Chap. 3, Laws of 1901, does not change the law as it then stood, except by adding to it pupils of schools and educational institutions within the Territory, and also by including cigars, cigarettes and tobacco, as well as intoxicating liquors to the list of prohibited articles; and it also again re-enacts the provision which was the law of 1854, allowing the parent or guardian to consent to liquor being given or sold to a minor under the age of eighteen years; provided, that such consent was given in writing.

Neither the Act of 1876 or that of 1901, permits intoxicating liquors to be sold or given to minors over eighteen years of age, without the consent of their parents or guardians; nor do those Acts by implication repeal that

part of the Act of 1854, (Sec. 1235, Compiled Laws of 1897), relative to minors of the age of eighteen years or over. All of the provisions of the Acts of 1876 and 1901, are directed to minors under eighteen years of age, and not to those between eighteen and twenty-one years old.

We therefore hold that the Act of 1854 (Compiled as Sec. 1235, Compiled Laws of 1897), is still in force in this Territory, so far as it applied to minors over
2 eighteen years old, and that it has not been repealed by implication; and as it is admitted by both parties to this proceeding that at the time the liquor was sold by appellant to Florencio Gonzales, the said Gonzales was a minor nineteen years old, and that he had not the consent of his parent or guardian to make the purchase, that the sale to him was an illegal act, and the judgment of the court below is therefore affirmed; and it is so ordered.

Cooley, A. J., and Mechem, A. J., not having heard the arguments took no part in this decision.

[No. 1211, August 28, 1909.]

TERRITORY OF NEW MEXICO, Appellant, v. GEORGE B. WOODWARD, et al, Appellees.

SYLLABUS.

Where there is no undertaking on the part of the sureties in an appearance bond that the defendant should appear elsewhere than in the county named or that the defendant should obey the further orders of the court, there could be no forfeiture of the bond if the defendant defaulted after having obtained a change of venue to another county.

Appeal from the District Court for Bernalillo County before IRA A. ABBOTT, Associate Justice. Affirmed.

JAMES M. HERVEY, Attorney General, for Appellant.

Admitting a defendant to bail and fixing the amount thereof, are acts judicial in their nature. Gregory v. State, 94 Ind. 384; Hunt v. U. S. 63 Fed. 568, 11 C. C. A. 340; Callahan v. State, 60 Ala. 65; Pinson v. State, 28 Ark.

397; Moore v. State, 28 Ark. 480; Dickinson v. Kingsbury, 2 Day. 1; Simpson v. Robert, 35 Ga. 180; Wallenweber v. Comm., 3 Bush. 68; Wilson v. Commonwealth, 99 Ky. 167; State v. Jones, 3 La. Ann. 9; State v. Gilbert, 10 La. Ann. 524; State v. Wyatt, 6 La. Ann. 701; State v. McKeown, 12 La. Ann. 596; State v. Ansley, 13 La. Ann. 298; State v. Badon, 14 La. Ann. 783; State v. Hendricks, 5 So. 177; State v. Jenkins, 24 Mo. App. 433; State v. Houston, 74 N. C. 549; Hodges v. State, 20 Tex. 493.

If the condition of the bond had used merely the words of the statute, the obligation would still be the same as that which is plainly expressed in the bond as given. C. L. 1897, sec. 3386; Norfolk v. People, 43 Ill. 10; Gallagher v. People, 88 Ill. 337; State v. Ryan, 23 Iowa 406; People v. Hanow, 106 Mich. 421; State v. Brown, 16 Iowa 314; State v. Benzion, 79 Iowa 467; People v. Gordon, 39 Mich. 261; Crawford v. Vinton, 102 Mich. 85-6; Reese v. U. S. Wall. 18.

An order of change of venue must be considered as within the contemplation of the sureties executing a bail bond and entering into and forming part of their contract. Davis v. South Carolina, 107 U. S. 600-1; Beasley v. State, 53 Ark. 67; State v. Brown, 16 Ia. 314; Ramey v. Comm., 83 Ky. 534; State v. Stout, 11 N. J. L. 124; Baker v. State, 22 S. W. 1039.

Proceedings by *scire facias* are proper upon a forfeited bail bond. U. S. v. Insley, 54 Fed. 221, 4 C. C. A. 298-9; State v. Glass, 9 Ia. 325; State v. Heed, 62 Mo. 559; Saunders' Pleading 750; Tidd's Practice 1091; Sans v. People, 3 Gilm 330; Comm. v. Green, 12 Mass. 2.

W. B. Childers for Appellees.

Action on an appearance bond is a civil action for the enforcement of a private right. C. L. 1897, sec. 2685, sub-secs. 17, 19; 19 Enc. P. & P. 307; Com. v. McNeill, 19 Pac. 136; 3 Enc. P. & P. 340, and cases cited; People v. Love, 19 Cal. 676; Brooks v. U. S. 6. N. M. 72; Himiston v. Smith, 21 Cal. 134; De Baca v. Wilcox, 11 N. M. 346; Browne & Manzanares Co. v. Chaves, 9 N. M. 316;

Cameron v. Young, 6 How. Pr. 372; Alden v. Clark, 11 How Pr. 209.

The bond must follow the provisions of the Statute. C. L. 1897, secs. 3385, 3386, 3387, 3394; 5 Cyc. 16, 85, note 30, 110, 124, note 10; Com. v. Thompson, 33 S. W. 1103; 16 Enc. P. & P. 837; People v. Cohen, 118 Cal. 74, 50 Pac. 20; State v. Pratt, 50 S. W. 113; U. S. v. Hudson, 65 Fed. 68.

The conditions of the bond cannot be varied or changed. U. S. v. Rundlett, 27 Fed. Cases, No. 16,208; U. S. v. Brooks, 6 N. M. 72; State v. Jones, 29 Ark. 127; Reese v. U. S., 9 Wall. 13; Davis v. S. C., 107 U. S. 601; State v. Huston, 74 N. C. 175; U. S. v. Evans, 2 Federal 147; State v. Walker, 1 Mo. 389, 546; State v. Miles, 13 N. C. 555; State v. Miller, 31 Texas 564; 5 Century Digest, sec. 184; State v. Colwell, 28 S. W. 4; State v. Randolph, 26 Mo. 213; State v. Nelson, 28 Mo. 13; State v. Fergusson, 50 Mo. 409; State v. Murdock, 81 N. W. 447.

The crime charged in the bond is not sufficiently described. Heilman v. State, 25 S. W. 1120; Bonner v. Com., 85 S. W. 1185; Com. v. Thompson, 33 S. W. 113; State v. McGuire, 43 N. W. 688; Griffin v. State, 48 Ind. 258.

Where bail is taken contrary to the provisions of some express statute the obligation is rendered void. State v. Satterwhite, 20 S. C. 536; Luckett v. State, 51 Miss. 799.

OPINION OF THE COURT.

PARKER, J.—This was a proceeding to recover the penalty upon an appearance bond. Several questions are presented by the record but we do not deem it necessary to consider more than the one fundamental question which, if decided correctly, shows no cause of action which can be maintained. The condition of the bond is as follows:

"Now, if the said C. B. Woodward shall well and truly appear at the next ensuing term of the District Court of the Second Judicial District of New Mexico to be begun and held in and for the said County of Valencia on the first Monday in March, A. D., 1903, on the first day

of said term, then and there to answer any indictment that may be found against him, in said court, for said alleged crime, and shall remain in attendance upon said court from day to day, and from term to term, until discharged by authority of law, then this obligation to be void, otherwise to remain in full force and effect."

It appears that the defendant was examined by the District Judge of the Second Judicial District, sitting as Committing Magistrate, and committed to await the action of the grand jury at the next term of the District Court in Valencia County. At that term the defendant was indicted on the charge. At the succeeding term he applied for and obtained a change of venue of the cause to Bernalillo County. At the next ensuing term of the District Court for that county the cause was continued. At the next term the defendant defaulted and his bond was forfeited. This proceeding was then instituted against his sureties on the bond to recover the penalty.

The court below held there was no right to recover and this was correct. There was no undertaking on the part of the sureties that the defendant should appear elsewhere than in Valencia County nor was there provision in the condition of the bond that defendant should obey the further orders of the court. Had this been the case the defendant might have been ordered to give a new bond on change of venue, and, in default thereof, have been committed. Or, perhaps, he might have been ordered by the court, on change of venue, to appear in Bernalillo County and remain in attendance on that court until discharged, and the sureties would still be liable upon their undertaking. But this bond contained no such condition and the obligation was solely to appear in Valencia County until discharged. There could be no forfeiture of the bond for failure to appear elsewhere and his appearance there was discharged by the order changing the venue.

For the reason stated the judgment of the court below will be affirmed and it is so ordered.

Abbott, Mechem and Cooley, Associate Justices, did not participate in this decision.

[No. 1224, August 28, 1909.]

TERRITORY OF NEW MEXICO, Appellee, v. RICARDO ALARID, Appellant.

SYLLABUS (BY THE COURT.)

1. On an indictment which charges that the defendant made an assault upon a person named, with a gun loaded with gunpowder and a leaden ball and discharged the loaded gun at and against such person with the premeditated intent of killing him, there may properly be a conviction of assault with a deadly weapon, as all the essential elements of that crime are alleged.

2. An erroneous instruction as to assault with intent to kill does not vitiate a conviction of assault with a deadly weapon on the same indictment, unless it is made to apply to that crime as well as the other, and if it is made so applicable by request of the defendant, without calling the attention of the court to the erroneous feature of the instruction, the defendant is not entitled to a new trial on account of the error so induced.

3. Under the circumstances disclosed in the record it was properly left to the jury to determine whether a threat made by the defendant, according to evidence for the Territory, related to the man on whom it was alleged the defendant shortly after made the assault charged.

Appeal from the District Court for Santa Fe County, before JOHN R. MCFIE, Associate Justice. Affirmed.

A. B. RENEHAN and CHARLES A. SPIESS for Appellant.

Under the plea of self-defense, the jury must believe beyond a reasonable doubt that the defendant stood in no real or apparent danger, judging from his standpoint before it could lawfully convict. Coffin v. U. S. 156 U. S. 461; Potter v. U. S., 155 U. S. 448; Davis v. U. S., 160 U. S. 484 et seq.; New Orleans, etc., R. Co. v. Jones, 142 U S. 24; Bank v. Bank, 6 How. 226, 227; 11 Enc. P. & P., 145-147; Acers v. U. S., 164 U. S. 391-393.

An assault is an attempt to strike a blow which does not fall. A blow resulting, a different offense from that denounced in the statute ensues. U. S. v. Hand, 26 Fed. Cas. 103, 104; Goodram v. State, 60 Ga. 509; Sweeder v. State, 19 Ark. 205, 213; State v. Horrigan, 55 Atl. 5; State v. Meyerfield, 61 N. C. 108; State v. Wyatt, 41 N. W. 31; s. c. 76 Ia. 328; Hays v. People, 1 Hill 351; State v. Godfrey, 20 Pac. 625, s. c. 17 N. 300; Prince v. Ridge, 66 N. Y. Sup. 454; Lane v. State, 65 Ala. 11; McKay v. State, 44 Tex. 43; Fox v. State, 34 Oh. St. 377; Farrow v. State, 29 Tex. App. 250; People v. Islas, 27 Cal. 630; Bishop v. Ranney, 59 Vt. 316; Norris v. White, 158 Mo. 20; Kline v. Kline, 158 Ind. 602, 58 L. R. A. 397; Perkins v. Stein, 94 Ky. 433, 20 L. R. A. 861; 1 Words & Phrases 535, 536; Acers v. U. S., 164 U. S. L. ed. 482, note; ex parte Brown, 40 Fed. 81.

Irrelevant testimony should have been excluded. Heffenton v. State, 41 Tex. Crim. 315; People v. Farley, 124 Cal. 594; Henson v. State, 120 Ala. 316; People v. Kennedy, 67 Hun. 652, 22 N. Y. S. 267; Com. v. Hoskins, 35 S. W. 284; King v. State, 89 Ala. 146; State v. Guy 69 Mo. 430; Carr v. State, 23 Neb. 740; Hall v. Territory, N. M., 62 Pac. 1085; Com. v. Madan, 102 Mass. 1.

Where the signing and bringing into court of an indictment upon which the trial rested, was clearly the result of a mistake, such mistake may be shown. State v. Horton, 63 N. C. 595; ex parte Bain, 121 U. S. 12; U. S. v. Harmon, 34 Fed. 872.

The jury should have had an opportunity under proper instructions to assess or recommend a penalty. C. L. 1897, secs. 1379, 1189, 3405; 1 Fed. Stats. Ann., p. 114.

Upon an indictment charging assault with intent to kill, a verdict for assault with a deadly weapon will be supported, where the elements of both offenses are stated. 12 Cyc., p. 474, notes 16, 17; Cal. Penal Code, sec. 1159; Beckwith v. People, 26 Ill. 500; Com. v. Clarke, 162 Mass. 495; State v. Collier, 17 Nev. 275; State v. Kelly, 41 Ore. 20; West v. Territory, 36 Pac. 202, 209; C. L., secs. 1083, 1379.

JAMES M. HERVEY, Attorney General, for Appellee.

Error in instructions as to a higher degree of the crime is harmless where accused is convicted of the lower degree. State v. Fritterer, 65 Mo. 424; State v. Kelly, 85 Mo. 144; State v. Snell, 78 Mo. 243; State v. Wilson, 98 Mo. 445; State v. Stockwell, 106 Mo. 40; State v. Gates, 130 Mo. 357; Blackwell v. State, 32 Tex. Cr. 280, 32 S. W. 128; Stephenson v. State, 24 S. W. 645; Rutledge v. State, 33 S. W. 347; McCarty v. State, 58 S. W. 77; State v. Richardson, 47 S. C. 23; State v. Hairston, 121 N. C. 583; Williams v. State, 60 Neb. 528; Henderson v. Com., 7 Ky. Law Rep. 745; State v. Winter, 72 Ia. 636; Rollins v. State, 62 Ind. 46; Long v. State, 95 Ind. 489; Crawford v. State, 92 Ga. 481; State v. Dickson, 6 Kan. 220; Mackey v. People, 2 Colo. 17; People v. Riley, 65 Cal. 109; People v. Swift, 66 Cal. 349; People v. O'Neal, 67 Cal. 378; People v. Boling, 83 Cal. 380; People v. Gordon, 88 Cal. 422.

Erroneous instructions given cannot be made available as error in the reviewing court by a party on whose motion they were given. Even error assigned to the giving of instructions, to which no exception appears, cannot be considered. Collins v. State, 5 Tex. Ct. of App. 40; State v. Reddick, 7 Kan. 152; Blashfield on Instructions to Juries, p. 379; Noble v. People, 23 Colo. 9; Chipman v. People, 24 Colo. 523; Halland v. People, 30 Colo. 94; Phillips v. State, 28 Fla. 81; Steffey v. People, 130 Ill. 98; Vanderkarr v. State, 51 Ind. 91; State v. Williams, 115 Ia. 97; Scott v. State, 31 Miss. 473; Territory v. Perea, 1 N. M. 625; State v. Sprague, 149 Mo. 409; State v. Gregory, 158 Mo. 139; State v. Vinso, 171 Mo. 576; Bush v. State, 47 Neb. 642; Barber v. State, 69 S. W. 515; Padilla v. Territory, 8 N. M. 562; Territory v. Watson, 78 Pac. 504.

Under an indictment charging an assault with a gun loaded with gunpowder and a leaden ball, with intent to kill and murder, there may properly be a conviction for assault with a deadly weapon, the intent not being proven, and the weapon alleged in the indictment being defined by Section 1383 of the Compiled Laws of 1897, as a deadly weapon. People v. English, 30 Cal. 215; ex parte Dona-

hue, 65 Cal. 474; People v. Pape, 66 Cal. 366; People v. Bentley, 75 Cal. 407; People v. Gordon, 99 Cal. 227; People v. Gordon, 103 Cal. 568; Smith v. State, 35 Tex. 500; Chacon v. Territory, 7 N. M. 246; State v. Shepard, 10 Ia. 126; White v. State, 13 Ohio St. 569; Prindeville v. People, 42 Ill. 217; State v. Butman, 42 N. H. 480.

Admission of testimony objected to by defendant. State v. Hymer, 15 Nev. 49; Hopkins v. Com., 50 Pa. St. 9; Muscoe v. Com. 87 Va. 460; Snodgrass v. Com. 89 Va. 679; Ford v. State, 71 Ala. 396; Starr v. State, 160 Ind. 669; State v. Cochran, 147 Mo. 517; Moore v. People, 57 Pac. 858; State v. Vance, 70 Pac. 34.

The facts sufficiently appear in the opinion.

OPINION OF THE COURT.

ABBOTT, A. J.—Ricardo Alarid was tried September 19, 1907, in the First District Court for Santa Fe County, on an indictment charging him with assaulting Camilo Martinez with a loaded gun, with the premeditated intention of killing him. The court instructed the jury that under the indictment the defendant might be convicted of assault with intent to kill, as charged, or of assault with a deadly weapon; and he was found guilty of the latter offense. To this the defendant excepted, and it is here claimed in his behalf that the latter crime was not so covered by and included in the indictment, as to warrant a conviction of it.

The acts of the defendant, as alleged in the indictment, constituted one crime or the other, according to the intention with which they were done. If they were done with intent to kill, they constituted the crime specifically named and charged in the indictment; if without that intent, the same acts constituted an assault with a deadly weapon. No element of the latter offense is lacking from the statement of the indictment. It is urged that the defendant was not apprised by the indictment that he had to make defense against a charge of assault with a deadly weapon. He was apprised that he was charged with everything which goes to make up that offense and with more, namely, with the intent to

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kill, in doing what it was alleged he did. The indictment lacked no information which could have enabled him any better to prepare for trial. The two offenses, in question are of the same grade, although a heavier penalty may be imposed for an assault with intent to murder than for assault with a deadly weapon; and it is well settled that under an indictment for the greater which includes every element of the less, a conviction of the latter should be allowed to stand. Chacon v. Territory, 7 N. M. 241, 246; Prindeville v. The People, 42 Ill. 217; People v. English, 30 Cal. 215; ex parte Donahue, 65 Cal. 474; People v. Gordon, 103 Cal. 568.

Another error assigned is that by an instruction given to the jury, the burden of proof was improperly imposed on the defendant in relation to his claim that he acted in self-defense. The material portion of what is complained of is this: "If you believe from the evidence in this case and beyond a reasonable doubt that immediately prior to the firing of the shot by the defendant, Camilo Martinez put his hand under his coat under such circumstances as to lead the defendant to honestly believe that the said Martinez was in the act of drawing a deadly weapon upon him, the defendant," etc., "then I charge you," etc. It was given on the charge of assault with intent to kill, and if a conviction on that charge had resulted it might, no doubt, have furnished ground for reversal. As there was not such a conviction, it was, so far, harmless error. State v. Kelly, 85 Mo. 114; State v. Fritterer, 65 Mo. 424; Blackwell v. State, 32 Tex. Cr. Ap. 280; 32 S. W. 128; McCarty v. State, 58 S. W. 77; People v. Gordon, 88 Cal. 422; 26 Pac. 503; State v. Dickson, 6 Kan. 220.

But after the charge to the jury and an exception on the part of the defendant to every instruction given, on the ground that they were severally contrary to the law and the evidence, the defendant's attorney requested the court to direct the jury that the instructions given to them, as to the right of self defense, on the charge of assault with intent to kill, were equally applicable on the charge of assault with a deadly weapon; and that was done. But for that request, apparently, the court would

have given no instruction on the subject of self defense as related to the offence of assault with a deadly weapon. of which the jury had been told they had the right to find the defendant guilty on the indictment. That, if error, would have been the error of the court. But, when, at the request of the defendant's attorney, an error was committed, it is one of which he should not be allowed to take advantage. The instruction is so obviously erroneous that it must have been given inadvertantly in the first instance. If the attention of the court had been called to it, unquestionably it would have been corrected, but, instead, there was the request to tell the jury, without it being read to them so far as the record shows, that it was applicable on the question whether the defendant was guilty of assault with a deadly weapon. The
2 defendant cannot have the advantage of error so caused, even though, as we assume the case was, his attorney did not intend to mislead the court. Collins v. State, 5 Tex., Ct. of App. 40; Blashfield on Instructions to Juries, p. 379.

Besides, as already stated, it appears on page 155 of the bill of exceptions, that immediately after the charge to the jury, and before making the request referred to, the defendant excepted generally to each of the instructions given. The erroneous direction in question forms but a small part of the fifth instruction in which it is found, and which contains other directions to the jury that are correct. A general exception to an instruction which though in part erroneous, is, in part, correct, cannot be sustained. Cooper et al., v. Schlesinger et al., 111 U. S. 148.

One of the errors assigned by the defendant is that the evidence of a threat made by him to shoot a person whom he did not name, was admitted. There was besides the language of the threat itself, evidence that the defendant had been warned against Camilo Martinez not long before he made the threat, and the undisputed fact

that he soon after he made it began a controversy with Martinez on a matter in dispute between them, and
3 did shoot him. It was for the jury to determine from the evidence whether he had reference to Martinez when he made the threat, if they believed he made it. State v. Cochran, 147 Mo. 517; Moore v. People, 57 Pac. 858 (Colo.); State v. Vance, 70 Pac. 34 (Wash.)

The other questions raised by the appellant's assignment of errors are too well settled in this jurisdiction to require separate consideration.

The judgment of the District Court is affirmed.

Pope, A. J., concurs in the result.

[No. 1251, August 28, 1909.]

TERRITORY OF NEW MEXICO, Appellee, v. JOSE ABAN SAIS, Appellant.

SYLLABUS.

1. Where the indictment alleges that the animal unlawfully killed was the property of co-partners, the ownership as laid in the indictment must be proved beyond a reasonable doubt.

2. Evidence held to warrant finding that animal unlawfully, knowingly, etc., killed, belonged to certain persons as co-partners, as charged in the indictment.

3. The judgment of a court should not be set aside upon the testimony of a witness, when it is apparent that such testimony was given in a rather bungling and inaccurate manner and where the jury hearing the witnesses and understanding the circumstances under which the offense charged was committed, would have a much better opportunity of arriving at a correct conclusion, than would the appellate court upon the record alone.

4. Evidence held to warrant conclusion that killing was knowingly done.

5. The jury may consider manner of witness in which testimony is given in determining its weight.

6. Ordinarily, neither the verdict of a jury nor the finding of fact of a trial court will be disturbed by the Supreme Court when they are supported by any substantial evidence.

Appeal from the District Court for Socorro County before EDWARD A. MANN, Associate Justice. Affirmed.

BACA & LOUGHARY for Appellant.

Ownership alleged in an indictment is one of the material allegations and must be proven as alleged beyond a reasonable doubt. 2 Bishop Crim. Proc., sec. 723, 3 ed.; State v. McCoy, 14 N. H. 364; Commonwealth v. Trimmer, 1 Mass. 476; Brown v. The State, 35 Tex. 691; Underhill on Crim. Ev., sec. 294, p. 353; Palmer v. The State, 41 Ala. 416; 25 Cyc. 92, notes 37, 41, 43; Widner v. State, 25 Ind. 234; Blankenship v. State, 55 Ark. 244, 18 S. W. 54; Hawkins v. State, 20 S. E. 217, Ga.; Underhill Crim. Ev. 353, sec. 294; McDowell v. State, 68 Miss. 348, 8 So. Rep. 508; Clark v. State, 29 Tex. App. 437, 16 S. W. 171; Thurmond v. State, 35 S. W. 965, Tex.; State v. Burgess, 74 N. Car. 272; C. L. 1897, sec. 2685, sub-sec. 80.

It is not proper to throw the burden of proof as to any element of the crime upon the defendant. 1 McClain on Crim. Law, sec. 315; Davis v. U. S., 160 U. S. 469-488.

J. M. HERVEY, Attorney General, for Appellee.

Contention that property belonged to partnership is amply sustained by the testimony. Territory v. Netherland, 13 N. M. 491.

No exception being taken in the court below, the ruling is not properly reviewable in the appellate court Territory v. Watson, 12 N. M. 419.

OPINION OF THE COURT.

McFIE, A. J.—The appellant, Jose Aban Sais, was convicted in the District Court of Socorro County, of killing a calf, and was sentenced to serve a term of one

year in the New Mexico Penitentiary and to pay a fine of five hundred dollars. Appeal was prayed and granted as was also supersedeas.

The indictment in its charging clause is in substance as follows:

"That Jose Aban Sais, on the 7th day of April, 1907, at the County of Socorro, in the Territory of New Mexico, did, then and there unlawfully, feloniously, wilfully, maliciously and knowingly kill one head of neat cattle, of the goods, chattels and property of Eugene Guy Hills and Max Montoya, co-partners, doing business under the firm name and style of Montoya and Hills."

The law of this case is perfectly clear and is substantially as contended for in the brief of the appellant's counsel. The sole question to be examined here is one of fact, and as to that question, the appellant's counsel contend, that the evidence is insufficient to support the verdict of the jury, as to the ownership and guilty knowledge alleged in the indictment.

The indictment, as we have seen, alleged that the animal killed was the property of Montoya and Hills as co-partners and it became necessary to prove the own-
1 ership as laid in the indictment, beyond a reasonable doubt. The jury found the defendant guilty as charged in the indictment and that verdict necessarily means, that the jury were satisfied beyond a reasonable doubt that the animal killed was the property of Montoya and Hills.

The defendant's counsel insist, that the proof was to the effect that the animal killed belonged to Eugene Guy Hills alone and was not the property of Montoya and Hills. We have examined the evidence of all the witnesses who testified and find that it is true that
2 Eugene Guy Hills, who testified as the prosecuting witness, spoke of the animal as his property, his testimony being substantially as follows:

"Well, while I was in there I looked over into another side into a calf pen and there I seen an animal covered with an old coat and I walked over there to see what it was and by this time why Jose was in this corral.

was in the corral where the cattle was, and I walked over to the corral where his calf was down and I looked over at it and saw that it was one of mine and then I told Jose that you have killed one of my calves and he says yes."

The witness further says in referring to the calf killed:

"I knew it was mine by the color and brand."

Another witness who was with Mr. Hills when they went to the corral, referring to the cattle in the corral, answered that,

"Most of it (meaning the cattle) belonged to Mr. Hills but there was some of his there also and there were some belonging to Victor Sais." The witness further referring to this transaction, testified that Mr. Hills said to the appellant upon the discovery that this calf had been killed, "You have killed a calf of mine."

This substantially covers the evidence in the case which the defendant contends shows that the animal killed was the property of Hills alone and not the property of Montoya and Hills as alleged in the indictment, and upon this basis urges that there was a failure of proof to show the ownership as alleged in the indictment. But an examination of the testimony shows that there was other evidence in the case to which reference will now be made.

Montoya did not testify but Mr. Hills, his partner, did testify. At the beginning of his testimony he states that he was engaged in stock raising. Then the following questions were propounded to him and answered, on pag 39 of the record:

"Q. State whether or not you have any partner anybody engaged with you in that business?

A. Yes.

Q. Who is he?

A. Max H. Montoya.

Q. State whether or not you own any cattle together?

A. Yes, we do."

On page 44 of the record Mr. Hills, testified to having loaned a cow to the defendant some time previous to the killing of this calf, and Mr. Hills was asked the following question:

"Q. And you claim that the calf belonging to that cow is the calf that was killed?

A. Yes."

In the testimony of Mr. Vallejos, another witness who was present at the corral when the discovery of the killing of this calf was made, and on page 49 of the record appear the following questions and his answers thereto:

"Q. Now, how many cattle were there there and whose were they?

A. Most of them belonged to Mr. Hills, but there were some of his also, (meaning appellant), and some belonged to Victor Sais.

Q. When you speak about the cattle of Guy Hills do you mean his individual cattle or the cattle of Montoya and Hills?

A. The cattle belonging to those two."

This witness further on testified as follows:

"The calf had been skinned on the side where I was so I did not see the color of the hide, but I noticed part of the head that was to the side where I was where the mark of the company was noticed on the face of the calf."

Upon this testimony counsel for the Territory insists that it was sufficient to warrant the jury in returning a verdict of guilty as charged in the indictment in this case. It seems that the contention of the Attorney General is warranted by this evidence. There is no evidence in the record that Mr. Hills owned any individual cattle and when he states that he was engaged in stock raising, and that Mr. Montoya was his partner, it seems that the jury was warranted in taking the view that the animals of which he spoke, especially the one killed, was partnership property notwithstanding the fact that he spoke of it as his own.

The judgment of a court, should not be set aside upon the testimony of a witness, when it is apparent that such testimony was given in a rather bungling and inaccurate manner and where the jury hearing the witnesses and understanding the circumstances under which the offense charged was committed, would have a

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much better opportunity of arriving at a correct conclusion, than would this court upon the record alone. It seems clear that this witness was referring alone to the property of the company of which he was a partner, and it certainly was not necessary, although proper, for him to speak of the property as partnership property. By referring to the property and at the same time testifying to the fact of a partnership, seems sufficient to warrant the finding that the property was partnership property.

The conclusion of the jury seems to be more fully warranted by the testimony of the witness Vallejos, who was with Mr. Hills at the time the crime was discovered. The witness Vallejos speaks of the cattle in the corral as belonging to Mr. Hills also, but it is very clear that the witness did not mean that they were Mr. Hills' individual property, because when the question was asked him:

"When you speak about the cattle of Guy Hills do you mean his individual cattle or the cattle of Montoya & Hills?" he answered, "The cattle belonging to those two," undoubtedly referring to partnership property.

But suppose this testimony alone was not sufficient; there is another portion of Mr. Vallejos testimony which seems to be conclusive. At page 49 of the record he testified that he noticed part of the head of the calf that had been killed and that the mark of the company was on the face of he calf. The reference to the company here undoubtedly is to the co-partnership of Montoya and Hills, and the effect of this testimony is, not only to show that both the witness Hills and Vallejos were referring to company property and not to individual property throughout their testimony, but it establishes the further fact that this calf which had been killed belonged to the co-partnership.

It seems pertinent, also, upon this point, to observe, that during the trial, counsel for the defendant interrogated the witness Hills as to whether or not he had branded some of the defendant's cattle with the company's brand, and further, asked the witness, on page 45 of the record, the following question: "And you and Max Montoya have your cattle around his place simply because you

thought he would have no defense?" These interrogations indicate that defendant's counsel understood the testimony of Hills to relate to the cattle of Montoya and Hills.

A second question is suggested by counsel for appellant, but is not seriously contended for in their brief, namely, that the animal was killed by accident and not knowingly. The testimony of the defendant is the only testimony in the record which can be referred to as sustaining this contention, but we find from another portion of the record, in the testimony of Mr. Hills, that he charged the defendant with killing a calf belonging to him, and the defendant not only admitted that he had killed the animal, but further stated, that he did not have any meat and had to have some, thus giving this as a reason why he killed the animal, which he admitted did not belong to him.

In our opinion, the jury were warranted in the conclusion that the killing was knowingly done, especially when it is further considered that the animal ap-
4 pears to have been hidden and when discovered, the killing was promptly admitted by the defendant, who offered to pay for the same.

There is another matter appearing upon the record which may have been quite important in the estimation of the jury as a circumstance tending to discredit the testimony of the appellant. While the defendant was giving his testimony, his counsel in conducting his examination said: "Just tell the jury how did you come to kill the calf. Turn around and speak loud."

It may have been very apparent from the manner of the witness upon the stand, that his testimony was of a doubtful nature, a circumstance which the jury had
5 a perfect right to consider in determining the weight to be given to his testimony.

The instructions given by the court, properly placed the case before the jury for their consideration and they were fully instructed to give the defendant the benefit of a reasonable doubt. It has been repeatedly held by
6 this court, that, ordinarily neither the verdict of a jury nor the finding of fact of a trial court will be

disturbed in this court when they are supported by any substantial evidence. Waldo v. Beckwith, 1 N. M. 97; Archibeque v. Miera, 1 N. M. 160; Ruhe v. Abreu, 1 N. M. 247; Bedeau v. Baca, 2 N. M. 124; Crollot v. Malloy, 2 N. M. 198; Territory v. Maxwell, 2 N. M. 250; Rodey v. Ins. Co., 3 N. M. 543; Cerf v. Badaraco, 6 N. M. 214; Territory v. Hicks, 6 N. M. 596; Ortiz v. The Bank, 78 Pac. 529; Candelario v. Miera, 13 N. M. 360.

The case now under consideration seems to be within the law as above declared by this court. The evidence referred to was, in our opinion, of so substantial a character that the jury were warranted in returning the verdict found by them in this case. It was not error, therefore, for the lower court to overrule the motion for new trial and to render judgment upon the verdict of the jury. The judgment of the court below will be affirmed. It is so ordered.

Justices Cooley and Mechem not being present when this cause was submitted, took no part in this decision.

[No. 1194 and 1198, August 30, 1910.]

TERRITORY OF NEW MEXICO, Appellee and Defendant in Error, v. JESSIE KIMMICK, Appellant and Plaintiff in Error.

SYLLABUS (BY THE COURT)

1. If instructions given cover and correctly state the law of the case, it is not error to refuse to give other instructions on the same points, although they may be correct statements of the law applicable thereto.

2. It was properly left to the jury to determine from the evidence whether the defendant was a deputy sheriff at the time of the murder with which he was charged.

3. Instructions are to be construed together and the fact that any one taken by itself, apart from the others, may appear to be incomplete or incorrect, does not warrant

reversal of judgment if they correctly state the law, as a whole.

4. The instructions on the right of self-defense were such as the evidence in the case required, and were sufficiently favorable to the defendant.

5. There was evidence which made necessary an instruction that the jury had the right to find the defendant guilty of murder in the second degree, but none that would have justified a like instruction as to murder in the third degree.

Appeal from the District Court for Sierra County before FRANK W. PARKER, Associate Justice. Affirmed.

CHARLES G. BELL, PERCY WILSON and W. B. CHILDERS for Appellant.

An officer may lawfully arrest, without a warrant one whom he has reasonable grounds to suspect of having committed a felony, even though in point of fact, the one arrested is altogether innocent and no felony has been committed by any one. 2 Enc. A. & E. L., 2 ed., p. 870 and authorities cited; C. L. 1897, secs. 734, 1068, 1069, sub-sec. 3; 1 Bishop Crim. Proc., 3 ed., sec. 183, p. 102; Territory v. Gutierrez, 79 Pac. 716-718; State v. McNally, 87 Mo. 644; State v. Dierberger, 10 S. W. Rep. 168-171; 2 Bish. Crim. Law, secs. 644, 647, 650; Fost 272; 7 Bac. Abr. 209; 4 Steph. Comm, 98; Barb. Crim. Law 35; State v. Fueller, 9 S. W. Rep. 583; 1 Russ. on Crimes, sec. 3, pp. 447, 448; 9 Am. ed., 892, citing Hale, Hawkins, East and Foster; Whart. Cr. L., sec. 415 and cases cited; Starr v. U. S., 153 U. S. 614, 620, 621; State v. Gosnell, 74 Fed. 734, 738, 739; Territory v. McGinnis, 10 N. M. 280, 61 Pac. 208; Davis v. U. S., 160 U. S. 469; Chafee v. U. S., 18 Wall. 516; Territory v. Lucero, 8 N. M. 543, 46 Pac. 18; Lindle v. Com., Ky., 64 S. W. Rep. 986, 990; Cockrell v. Com., 23 S. W. Rep. Ky., 659, 660; Lynn v. People, 48 N. E. Rep. 964, 967; People v. Pool, 7 Cal. 572, 576.

Instruction as to self-defense. Dodson v. State, 78

S. W. Rep. Tex. 940; Smith v. Com., 92 S. W. Rep., Ky., 610, 611; Lara v. State, 89 S. W. Rep., Tex. 840-842; Cockrell v Com., 23 S. W., Ky., 659, 660; Patillo v. State, 3 S. W. Rep. 768; Brumley v. State, 17 S. W. Rep. 140, 142, citing Whart. Hom. 2 ed., sec. 4931; Whart. Crim. Law, sec. 488; Tillery v. State, 5 Am. St. Rep. 882, 885; State v. Taylor, 50 S. E. Rep. 247, 253; Vann v. State, 2 S. W. 882; 5 Current Law 1723 and authorities cited in note 24; Parksburg Ind. Co. v. Shultz, 27 S. E., W. Va., 255, 259; Beasley v. State, 8 So. Rep. 234, 235; 2 Thomp. on Trials, sec. 2326; Harrison v. Gold Co., 65 Cal. 376; Wood v. Fleetwood, 19 Mo. 529, 531; State v. Donohoe, 78 Iowa 486, 43 N. W. 299; People v. Hill, 49 Hun. 432, 3 N. Y. Supp. 564; People v. Coughlin, 32 N. E., Mich., 905; 1 McClain on Criminal Law, sec. 316; State v. Wingo, 66 Mo. 181-192; State v. McCluer, 5 Nev. 132; Davis v. U. S., 160 U. S. 469, 487-488; Territory v. Lucero, 8 N. M. 543, 46 Pac. 18; Hensen v. State, Ala., 21 Southern 79-81; State v. Dunn, 18 Mo. 419-423.

Instructions as to second degree murder. C. L. 1897, sec. 1065, 1069; State v. Alexander, 66 Mo. 148-160; Territory v. Fewel, 5 N. M. 34-43; Sandoval v. Territory, 8 N. M. 573, 579; Territory v. Pridemore, 4 N. M. 275; Territory v. Friday, 8 N. M. 204, 210; 1 Wag. Stat. 447, sec. 11; Territory v. Nichols, 3 N. M. 103; Territory v. Baca, 11 N. M. 559, 563; Aquilar v. Territory, 8 N. M. 496, 503; State v. Dierberger, 10 S. W. Rep. 168-171; Territory v. Gutierrez, 79 Pac. 716-718; Rev. Statutes of Mo., 1879, secs. 1243, 1244, 1250; State v. Edwards, 70 Mo. 480-484; State v. Curtis, 70 Mo. 600; State v. Dunn, 80 Mo. 689; State v. Umfried, 76 Mo. 407; State v. Watson, 95 Mo. 411, 415, 8 S. W. 383, 384; Casey v. State, 90 S. W. 1018, 1019, Tex.

James M. Hervey, Attorney General, for Appellee.

An officer has a right to arrest a person guilty of an affray without a warrant, only when the affray, which is a misdemeanor, is committed in his presence. Franklin v. Amerson, 118 Ga. 860; State v. Liendecker, Minn. 1904. 97 N. W. 972; State v. Dierker, 101 Mo. App. 643; People

v. Johnson, 13 L. R. A. 163; State v. Dietz, Kan. 1898, 53 Pac. 870; 1 Bishop Crim. Proc. 3 ed., sec. 183

An officer cannot take life in making an arrest unless the same is necessary. Dover v. State, Ga. 1900, 34 S. E. 1030; Com. v. Mack, Penn. 1870, 8 Phila. 422, Brightley's Pa. Digest p. 522; State v. Hickey, N. J., 1904, 57 At. 264; State v. Gosnell, 74 Fed. 738.

Instructions must be construed together. U. S. v. Densmore, 12 N. M. 99; Territory v. Livingston, 84 Pac. 1021; Territory v. Price, 91 Pac. 733; People v. Flynn, 73 Cal. 511; Van v. State, 85 Ga. 44; McCulley v. State, 62 Ind. 428; Territory v. Lucero, 8 N. M. 543.

A party has no right to complain of nor can he base error upon instructions which are given at his own request. Collins v. State, 50 Tex. Ct. Appeals 40; State v. Reddick, 7 Kan. 152; Blashfield on Instructions to Juries, p. 379; Territory v. Gutierrez, 79 Pac. 717; C. L. 1897, secs. 1068, 1069; State v. Dierberger, 10 S. W. 168; Clements v. State, 50 Ala. 119.

When an officer undertakes to arrest for felony and is met with resistance, he may repel force with force but he must not exceed the necessities of the case. Kelly's Crim. Law, secs. 73, 491; 1 Hill, S. C. 327; Com. v. Mack, Pa. 1870, 8 Phila. 422; Dover v. States, 34 S. E. 1030; Conrady v. People, 5 Parkers Report, N. Y. Criminal Report; State v. Hickey, 57 Atl. 264; State v. Gosnell, 74 Fed. 738; Bishop Crim. Proc., vol. 1, sec. 160; Morton v. Bradley, 30 Ala. 683; Clements v. State, 50 Ala. 119; State v. Anderson, 1 Hill, S. C. 327; Com. v. Rhoades, 23 Pa. Sup. Ct. 517; Territory v. Friday, 8 N. M. 204, 210; Sandoval v. Territory, 8 N. M. 573, 579; Territory v. Chamberlain, 8 N. M. 538.

Omission of the court to instruct as to the law of the case cannot be taken advantage of unless excepted to at the time the jury was instructed. Territory v. Watson, 12 N. M. 419.

There was no evidence to sustain instruction on murder in third degree. Territory v. Baker, 4 N. M. 236; Faulkner v. Territory, 6 N. M. 464; Territory v. Fewell, 5 N. M. 34; Territory v. Hendricks, 13 N. M. 300.

STATEMENT OF THE CASE.

The defendant was found guilty at the November, 1906, term of the Third Judicial District Court for Sierra County, of murder in the second degree, for the killing of Roy Clift, at Hanover, in Grant County, on August 25th, 1906. The defendant and Clift were present at a dance at a school house in Hanover in the evening of August 25th. The defendant was, with others, outside of the school house, near a window, through which they were watching the dancing, when they chose, and talking among themselves. Clift and his wife, with a party of friends, were dancing until late in the evening, when they started to leave the room by the only door which was not on the side of the house where the defendant was standing. A negro, named Gray, was standing just outside the door, and as Clift and his wife were passing him, he, according to the evidence for the Territory, made an insulting remark to Mrs. Clift, and, as she expressed it, "punched" her in the side, and a short fight between Clift and Gray ensued in which a pistol was discharged and Gray received a wound in the face. He testified that Clift struck him in the face with a pistol which was at the same instant discharged, and that at the moment he thought he was shot. The appearance of the wound indicated, however, that it was caused by a blow rather than a bullet. At that juncture, the defendant and two or more who were with him came running around the corner of the school house, and almost immediately the defendant shot and killed Clift. The evidence for the Territory was that the defendant came around the corner, running, and without a word to or from Clift, shot him. For the defendant there was evidence that as he came around the corner, Gray said he had been shot, and pointed out Clift as the man who had shot him; that the defendant thereupon told Clift he arrested him; that Clift threatened the defendant, who was a few feet distant from him, with a pistol, snapped it at him and told him he would kill him, and the defendant then shot him.

OPINION OF THE COURT.

ABBOTT, A. J.—The errors alleged relate to the refusal of the court to give two instructions to the jury, on the subject of self-defense, requested by the defendant; and to giving certain instructions which were objected to in his behalf.

If the instructions actually given embodied the law of the case, which the defendant was entitled to have given, then the refusal to give other instructions, even if correct, does not furnish ground for reversal. United States v. Densmore, 12 N. M. 99.

1

Let us now consider whether the instructions given fell short of what the defendant was entitled to. His contention is that his rights as a deputy sheriff were not so fully or completely set forth as they should have been in the instructions, and that the instructions requested in his behalf already referred to would have enabled the jury rightly to understand that phase of the case, and should have been given. The right and duty of a peace officer to arrest those engaged in an affray in his presence, —and the affray in question practically was in the presence of the defendant,—is not open to doubt, nor his right to effect and maintain the arrest by such force as may be necessary. In the instructions they requested, however, the defendant's attorneys seem to have relied on the right of self-defense rather than that to kill in overcoming resistance to arrest, since after declaring the duty of the defendant to arrest under the circumstances shown by the evidence in his behalf, they concluded that if the defendant "acting upon such appearance as a reasonable man would act upon, believed that his life was in danger, he had the right then and there to shoot and kill the deceased in his own defense." Indeed, we find no evidence that the defendant was trying to perfect or enforce the arrest in what he did. According to the evidence most favorable to the defense, Clift, when he was told by the defendant to drop his gun, and that he was under arrest, made no effort to escape, said nothing about the arrest, but turned toward the defendant, who was not near enough to seize him, threatened and assaulted the defendant in a way to

menace his life and amply justify the defendant in shooting him, as a measure of self-defense, whether he, the defendant, was an officer or not.

Assuming that there was evidence which required the submission to the jury of the question whether the defendant was a deputy sheriff, we think the trial court could not properly have gone the further length requested by the defendant, and instructed that he was a deputy sheriff.

2 There was no direct evidence that such was the case.

One witness, in cross-examination, on a subject not touched upon in the direct examination, by the Territory, said that he "understood" the defendant was a deputy sheriff, had been "told" so, but had never seen his "deputy papers." A witness for the defense said that when he spoke of "the deputy", he meant the defendant, and that he "understood" he was a deputy sheriff. If the defendant was a deputy sheriff, direct evidence that he was one should have been easily obtainable. Session Laws, 1901, Ch. 5. No such evidence was offered. A jury is entitled to consider, not only the evidence which is produced, but the absence of evidence which should have been produced, and the inference to be drawn from its non-production, in coming to a conclusion on any question submitted to it. Wigmore on Evidence, Sec. 290, et seq. Cyc. Vol. 16, pp. 1062, et seq. Harriman v. Reading etc. Ry. Co., 173 Mass. 28. The question was properly left to the jury.

Having done that, the court was bound to go further and give instructions to guide the jury in case it should resolve that question in favor of the defendant.

The court instructed on that point that if the jury believed "the defendant was a deputy sheriff and attempted to arrest Clift for an assault which he had reason to believe and did believe Clift had just made on the witness Gray, and that the deceased refused to submit to such arrest and assaulted the defendant with a pistol and snapped said pistol at defendant and threatened to kill defendant, and that such assault was imminently perilous to the life of the defendant, or placed him in imminent peril of great bodily harm from the deceased, and that the defendant in order to save his own life or save himself

from great bodily harm, shot and killed the deceased, then you are instructed that such killing was justifiable and excusable, and you will in that event acquit the defendant." There was a further instruction to the effect that the defendant had the right to act on reasonable appearances of danger, and that the jury should judge of the appearances from his standpoint.

In its conclusion and general effect this instruction does not substantially differ from the instructions requested by the defendant and already referred to, except that it leaves the question to the jury, whether the defendant was a peace officer, and, on the question of self-defense, connects the particulars of the alleged assault by Clift on the defendant, as testified to by witnesses for the defendant in a way as the defendant contends, to require the jury to believe all the particulars in order to find the defendant not guilty on the ground of self-defense, whereas, less than all the particulars would, if found as facts, require such a verdict. If the necessary, or even the natural meaning, as a whole of the instruction given was that claimed by the defendant, error was undoubtedly committed. But we think such was not the case. The essential thing
3 to be found was the assault by Clift with a pistol on the defendant, and so the instruction stated. Then followed a description of the assault, substantially as it was given by the witness Gray, for the defendant. The word "and", it is true, is generally used in a conjunctive sense, but not invariably so. It is often used to indicate a connection of what follows with what has gone before, in the way of narration or description. We do not think the jury could have understood from all that was said by the court on the subject, that they must believe Clift snapped a pistol at the defendant and in terms threatened his life, or, indeed, find anything more than that he in whatever manner, assaulted the defendant with a pistol in a way to justify him as a reasonable man in believing he was in danger of being killed or suffering great bodily harm, unless he should defend himself by shooting Clift. Immediately before and after the connected recital of particulars, to which the appellant takes exception, and in

the instruction next preceding the one in which the recital occurs, the court spoke of the assault on the defend-
4 ant with a pistol, in a way to indicate clearly that the instructions were to be applied to it, and that the recital of particulars was merely the description of it given in the testimony.

The appellant contends, also, that the trial court erred by instructing the jury that it might convict of murder in the second degree, under the indictment and on the evidence in the case. The court instructed that if the jury believed the defendant killed Clift, but not in a way to make the killing murder in the first degree under the instructions given, yet if they believed the "killing was done unnecessarily either while resisting an attempt by the deceased to commit an offense against the person of the defendant, or after such attempt had failed, then such killing would constitute murder in the second degree." That unquestionably conformed to the statute law of the Territory at the time, as to what constituted murder in the second degree, C. L. N. M. Sec. 1064. On the evidence for the defense, the man who was killed was certainly committing an offense against the person of the defendant, and, according to the evidence for the Territory, he did not threaten the defendant by word or act. The jury was not bound to accept or reject the evidence on either side in its entirety, but could, and apparently did give credence to some on each side, in arriving at the verdict, which is consistent with the view that Clift did threaten or menace the defendant, but that the latter was not justified under the circumstances in going so far as to shoot him; that he killed him "unnecessarily" within the meaning of the law. It was incumbent on the court to instruct as to murder in the second degree. Territory v. Romero, 2 N. M. 474; Territory v. Salazar, 3 N. M. 321.

The appellant further contends that the question whether the killing of Clift was murder in the third degree, should have been submitted to the jury. Territory v. Hendricks, 13 N. M. 300 and cases cited.

It could have been murder in the third degree only

in case it was not murder in the first degree, or murder in the second degree, as the statute then in force
5 (Compiled Laws, 1897) declared. The instructions as to the first degree and second degree exhausted the possibilities of the evidence, we think, and left nothing on which a verdict of murder in the third degree could have been supported.

The judgment of the district court is affirmed.

Cooley and Mechem, J. J., who did not hear the argument, did not take part in this decision.

[No. 1045, August 31, 1909.]

UNITED STATES OF AMERICA, Appellee, v. MARIANO F. SENA, Appellant.

SYLLABUS (BY THE COURT.)

1. The bill of exceptions in a criminal case must under C. L. Sec. 896, be settled and signed by the trial judge not less than ten days before the term of this court at which said cause shall be first docketed, unless the judge shall by order extend the time for settling such bill of exceptions.

2. Such order extending the time must, to be effectual, be made during the time the court could act upon such bill of exceptions without such order, to-wit, not less than ten days before the first day of such term.

3. Where an appeal is docketed to one term of this court and is thereupon dismissed and a second appeal sued out to the succeeding term, the former is the term at which said cause is first docketed within the meaning of Section 896, and a bill of exceptions settled after ten days before such term will be stricken out unless an order made at least ten days before such term has enlarged the time for settling such bill of exceptions.

4. The Act of March 21, 1901, (L. 1901, Chap. 99), while extending the time for perfecting the record in certain cases, does not enlarge the time for settling bills of exception, which still remain governed by C. L. Sec. 896.

5. Requested instructions refused in a criminal case do not become a part of the record by virtue of C. L. Sec. 2997, providing that "all instructions demanded must be filed and shall become a part of the record." To become subject to review they must be made a part of the record by bill of exceptions.

6. The allocutus is not necessary in criminal cases not capital.

Appeal from the First Judicial District Court before JOHN R. MCFIE, Associate Justice. Affirmed.

JOHN H. KNAEBEL and F. W. CLANCY for Appellant.

The appeal was taken within one year from the date of the final judgment of the district court. Laws 1901, ch. 99.

Not being taken thirty days before the first day of January term 1903, the appeal was returnable at January term, 1904, C. L. 1897, secs. 896, 3140; Blyen v. U. S. 13 Wall. 595; E. & A. Enc., 2 ed. 750, and notes; Gurnee v. Patrick Co., 137 U. S. 141; Railroad v. Grant, 98 U. S. 398, 401, 403; Green v. Bush, 72 Fed. 299, 79 Fed. 349.

The indictment as to the alleged forgeries was much too narrow to justify the broad scope of the proofs and the charge. U. S. Rev. St., sec. 5421; Bishop on Statutory Crimes, secs. 244, 383; People v. General Session, 13 Hun. 394, at 400, 401; Reg. v. Garrett, 1 Deans C. C. 232; Russell on Crimes, 618, note B; Roscoe's Crim. Ev., 7 ed. 473; State v. Lewis, 26 Kans. 123, 129, 130; Kennedy v. State, 34 Ohio St. 310-315; 11 Neb. 313; 53 Kas. 324, 327; 108 N. C. 432.

It is competent to prove a system of fraud by showing the concoction by the accused of other instruments analogous of those in the indictment. Crandall v. White, 164 Mass. 54; Forole v. Child, 164 Mass. 210; Bollomley v. U. S., 1 Story 1350.

Acts connected with the act in question are frequently receivable to prove psychological facts, such as intent. K. v. Weeks, 1 Leigh, etc., 18; R. v. Wylie, 2 Leach 983; R. v. Garner, 3 F. & F. 681; R. v. Geering, 18 L. J. Mc.

218; R. v. Frances, L. Rep. 2 C. C. 128-131; Commonwealth v. Robinson, 146 Mass. 571-577; Wiggins v. Day, 9 Gray 97; Lynde v. McGregor, 13 Allen 172; Jordan v. Osgood, 109 Mass. 457; Haskins v. Warren, 115 Mass. 514; Horton v. Weiner, 124 Mass. 92; Com. v. White, 145 Mass. 392. But such evidence was not admissible to prove that the bills in issue were forged. Costelo v. Crowell, 139 Mass. 588. Other cases constituting exceptions to the general rule. Com. v. Stone, 14 Met. 43; Com. v. Bigelow, 8 Met. 235. And for the purpose of showing guilty knowledge. Regina v. Francis, L. R., 2 C. C. 128; Regina v. Roebuck, Dearsley & Bell 24. And to show criminal intent. Rec. v. Ellis, 6 B. & C. 145; Com. v. Tuckerman, 10 Gray 173; Com. v. Shepard, 1 Allen 575; Regina v. Richardson, 2 F. & F. 343; Com. v. Eastman, 1 Cush. 189; Rex. v. Roberts, 1 Camp. 399; Com. v. Bradford, 126 Mass. 42; Com. v. Abbott, 130 Mass. 472; Com. v. McCarty, 119 Mass. 354; Com. v. Merriam, 14 Peck 518; State v. Wallace, 9 N. H. 515; Thayer v. Thayer, 101 Mass. 111; Regina v. Oddy, 5 Cox C. C. 210; Barton v. State, 18 Ohio 221; Com. v. Wilson, 2 Cush. 590; State v. La Page, 57 N. H. 245; Regina v. Holt, 8 Co. C. C. 411. Evidence of other forgeries is inadmissible. People v. Corbin, 56 N. Y. 363; Coleman v. The People, 55 N. Y. 81.

In an indictment for forgery, the forgery charged must be proven directly. People v. Corbin, 56 N. Y. 363; 2 Bishop Crim. Proc., sec. 428, and vol. 1, sec. 1124. Not so in charging an uttering as a crime. Com v. Jackson, 132 Mass. 18; 1 Bishop, Crim. Proc., secs. 1120, 1124, 1126; and see Cross v. N. C., 132 U. S. 131, 138. As to expert testimony. Withamp v. U. S. C. C. of Ap. 8 C., Dec. 29, 1903.

W. B. Childers, U. S. Attorney, and W. C. Reid, Assistant U. S. Attorney, for Appellee.

The only statute fixing the time within which appeals in criminal cases must be taken is sec. 3406, C. L. 1897. Ex-parte McCardle, 7 Wallace; Railroad Co. v. Grant, 98 U. S.; U. S. v. Haynes, 9 N. M. 519; Terri-

tory v. Hall, 67 Pac. 732; Ferris v. Higley, 20 Wall. 375; Hornbuckle v. Tombs, 18 Wall. 648; Bent v. Thompson, 138 U. S. 114; Greeley v. Winson, 1 S. D. 618-631; U. S. v. Boisdores Heirs, 8 How. 113; McNulty v. Batty, 10 How. 72; Norris v. Crocker, 13 How. 429; Insurance Co. v. Ritchie, 5 Wall. 541; The Assessors v. Osbornes, 9 Wall. 567; U. S. v. Tynen, 11 Wall. 88; DeLernas v. U. S. 107 Fed. Rep. 121.

The indictment charged everything necessary to constitute a crime. Bishop's Directions and Forms, sec. 458; Bishop's Criminal Procedure, sec. 419; Com. v. Butterick, 100 Mass. 12-18; People v. Clements, 26 N. Y. 193; U. S. v. Bejando, 1 Wood 294; Gentry v. State, 6 Ga. 503; U. S. v. Staats, 8 Howard 41; U. S. v. Reese, 4 Sawyer 629; U. S. v. Albert, 45 Fed. Rep. 552; U. S. v. Kissell, 62 Fed. 59; U. S. v. Hansie, 79 Fed. 303; U. S. v. Moore, 60 Fed. 738. As to other indictments in similar cases. Stockladger v. U. S., 116 Fed. 569; U. S. v. Neal, 118 Fed. 706.

It is not necessary that the indictment should allege the person whom the accused intended to defraud in cases of this character. U. S. v. Jolly, 35 Fed. 497; U. S. v. Bejano, 1 Woods 294; Federal Cases No. 14,461, vol. 24.

It is immaterial whether the money to be obtained from the United States was to be obtained directly or indirectly, provided it was the purpose of the defendant unlawfully to procure the same. U. S. v. Lawrence, 13 Blatch. 211; U. S. v. Hartman, 65 Fed. 490.

The instructions must be looked at as a whole, and their bearing upon all the evidence introduced in the case considered. U. S. v. Densmore, 75 Pac. 31; Territory v. Garcia, 75 Pac. 34.

As to evidence of other forgeries, and similar acts on the part of defendant. Wharton's Crim. Ev., secs. 30-40, 45.

Where several crimes are intermixed or blended with each other or connected so that they form an indivisible criminal transaction. Underhill on Crim. Ev., sec. 38.

On forgery and uttering forged instruments where intent and motive are in issue. 62 L. R. A., No. 2 pam-

phlet, pp. 247-257; 1 Starkie on Ev. 220; 1 Phillips on Ev., Cowen, pp. 179, 180; 2 Phillips on Ev., p. 452; King v. Wiley, 4 Bof. and Pul. 92; U. S. v. Wood, 16 Peters 360; Castle v. Bullard, 23 Howard 172; U. S. v. Snyder, 14 Fed. 554; Claflin v. Lincoln, 7 Wallace 132; Insurance Co. v. Armstrong, 117 U. S. 591; Penn. Mutual Life Ins. Co. v. Mechanics Savings Bank, 72 Fed. 432; Mudsell Mining Co. v. Watrous, 61 Fed. 180; Black v. Assurance Soc., 4 C. P. Div. 94; Mason v. State, 42 Ala. 532; Lankford v. State, 33 Fla. 241; Stel v. People, 45 Ill. 132; State v. Folwell, 14 Kas. 88; Underhill Crim. Ev., secs. 422, 423, 442; State v. Myers, 82 Mo. 558; State v. Cooper, 85 Mo. 256; State v. Bayne, 88 Mo. 604; State v. Balk, 136 Mo. 103; Baynes v. Christian, 30 Mo. App. 198; State v. Wentworth, 37 N. H. 212; Trogden v. Commonwealth, 31 Gratton 862; Wharton's Criminal Law, sec. 649; State v. Kelley, 65 Vt. 63.

It is every day practice to admit proof of this character to show intent on the trial of persons charged with counterfeiting. Spurr v. U. S., 87 Fed. Rep. 710; Com. v. Hall, 21 Pick. 515; Com. v. White, 145 Mass. 392; Allis v. U. S., 155 U. S. 17; Clune v. U. S., 159 U. S. 590; Alexander v. U. S., 138 U. S. 353, 62 L. R. A., No. 2, pamphlet, p. 224; Holmes v. Goldsmith, 150 U. S. 57; People v. Bedleman, 104 Cal. 608; State v. Kelley, 65 Vt. 532; Lindsey v. State, 35 Ohio State 512; Guthrie v. State, 16 Neb. 668; Territory v. Myer, 24 Pac. 183; Underhill on Crim. Ev., sec. 88; Wharton on Crim. Ev., sec. 30; 1 Bishop on Crim. Proc., sec. 1125.

Unless papers and documents are included in the bill of exceptions before it is signed by the judge, they cannot be considered. Dunlap v. Monroe, 7 Cranch. 242; 1 Rose's Notes 512; Lewis v. Baca, 5 N. M. 294; Leftwich v. Lecann, 4 Wall. 187; Tuscoloom v. Logan, 50 Ala. 503; Parsons v. Woolward, 73 Ala. 348; Hatch v. Potter, 7 Ill. 725; 4 Am. Dec. 88; France v. Bank, 3 Wyo. 187; 18 Pac. 748; Byrne v. Clark, 31 Ill. App. 651; Niagara Fire Ins. Co. v. DeGroff, 12 Mich. 10.

As to the admissibility of false and contradictory statements. People v. McKenney, 10 Mich. 97. As to ex-

pert testimony. Jones on Evidence, secs. 564, 565; Holmes v. Goldsmith, 147 U. S. 150; Sire v. Echlhaire Air Brake Co., 137 U. S. 557; 3 Cyc. Law and Proc., p. 303; 62 L. R. A., No. 2, pamphlet, p. 357.

Authorities cited by appellee on motion to strike bill of exceptions from files and dismiss appeal. 3 Cyc. of Law and Proc., pp. 37, 38; Michigan Ins. Bank v. Eldred, 143 U. S. 293; Evans Bros. v. Baggs, 4 N. M. 67; U. S. v. Haynes, 9 N. M. 519; Thompson on Trials, sec. 2812; 102 Fed. 590; Nelson v. U. S., 30 Fed. 113; State v. Chastain, 104 N. C. 900; 10 S. E. 519, 520; U. S. v. Curry, 6 How. 606; Morgan's Louisiana, etc., Co. v. Texas Central Ry. Co., 32 Fed. 525; Generes v. Bonnemer, 7 Wall. 464; Avendano v. Gray, 8 Wall. 317; Ray v. Hixon, 62 N. W. 922; Evans v. Ins. Co., 54 Wis. 522; Sutherland on Statutory Construction, secs. 165-168; Sedgwick Con. St. and Com. Law, 109-111; Endlich Interpretation of Stat., secs. 478-480; Ex-parte McCardle, 7 Wall. 514; U. S. v. Boisdore's Heirs, 8 How. 113; McNulty v. Batty. 10 How. 72; Norris v. Crocker, 13 How. 429; Ins. Co. v. Richie, 5 Wall. 541; 6 Rose's Notes 1024; Manley v. Olney, 32 Fed. 708; Campbell v. Iron Silver Min. Co., 83 Fed. 645.

STATEMENT OF THE CASE AND OPINION OF THE COURT

POPE, J.—The appellant was indicted for forgery and altering two certain forged instruments in violation of Section 5421 of the United States Revised Statutes. He was found guilty on September 11, 1902, upon all four counts of the indictment. Sentence was imposed on September 15, 1902, upon which day he took an appeal, which by operation of law became returnable to the January, 1903, term of this court, which began on January 7, 1903. No bill of exceptions was presented to the trial judge or settled before that term. On January 5, 1903, Sena filed in this court a paper signed by his counsel reading as follows:

"In the Supreme Court of the Territory of New Mexico,

January Term, A. D., 1903.

The United States of America, Appellee,

vs. No. 1009.

Mariano F. Sena, Appellant.

Appeal from District Court, First Judicial District.

Now comes the above named appellant, Mariano F. Sena, and dockets this his appeal from the judgment and decree of the District Court of the First Judicial District of the Territory of New Mexico, in that certain cause numbered —— on the docket of said court, wherein the United States of America, was plaintiff, and the said Mariano F. Sena was defendant, rendered on the —— day of September, A. D., 1902, against the above named appellant, sentencing him to the territorial penitentiary for the period of one year and one day in each count for each of the four counts in the said cause."

On the same day he filed under the same caption as the foregoing the following motion:

"Dismissal of Appeal.

Now comes Mariano F. Sena, the appellant in the above entitled cause by his attorney, Catron & Gortner, and says that he will not further prosecute his said appeal, but dismisses the same, for the purpose of taking a new appeal, from the District Court of the First Judicial District, to review the judgment appealed from in said above entitled cause."

On December 24, 1903, he presented his bill of exceptions to the trial judge, by whom on the same day it was signed and settled. The order settling the bill of exceptions was as follows:

"Now on this 24th day of December, 1903, comes Mr. H. S. Clancy, attorney for the defendant, and submits to the court the above proposed bill of exceptions, and requests that the same be signed and settled as required by law. And now comes also the United States by

her Attorney W. B. Childers, Esq., and objects to the signing and settling of the above bill of exceptions, upon the ground that the statute under which the appeal in this case was docketed and dismissed and a second appeal sued out is silent as to the bill of exceptions, and does not extend the time within which the same may be signed. Which said objection is by the court overruled; to the overruling of which objection, the United States by her said District Attorney, duly excepts. And because the foregoing contains material matter not apparent upon the face of the record, the foregoing defendant's bill of exceptions is hereby allowed as a part of the record in this case, and is signed and settled as such record by the undersigned, presiding judge, before whom said cause was tried."

On December 26, 1903, the transcript of record was filed and the cause thereby became docketed as number 1045. Thereupon, a motion to suppress the bill of exceptions was filed and also a motion to dismiss the appeal. The latter was upon hearing sustained by a majority opinion of this court. Sena v. U. S., 12 N. M. 397.

Upon appeal by the defendant to the United States Circuit Court of Appeals for the Eighth Circuit this decision was reversed and the cause remanded to this court "with direction to proceed in the exercise of jurisdiction over the subject matter of the appeal." Sena v. U. S., 147 Fed. 485. In deciding the case the court expressly confined its holding to the determination of the propriety of the dismissal of the appeal and in terms reserved for the primary determination of this court all other questions raised by the record. We quote from the opinion as follows:

"Whether the bill of exceptions contained in the record was not timely made and approved by the proper judge, as suggested on behalf of the government, or whether there be any reversible error on the face of the record outside of the bill of exceptions, the Supreme Court of the Territory did not decide. Primarily, these questions should be considered and determined by that court, and until then we ought not to be asked to consider them."

We therefore deem all questions save the one above

named left open for the decision of this court, and shall accordingly proceed to determine them, dealing first with the motion of the government to strike out the bill of exceptions.

This last in brief is predicated upon an alleged lack of power in the trial judge to settle the bill of exceptions on December 25, 1903, and whether such existed, is of course to be decided by the terms of the statute then regulating the settling of bills of exception in criminal cases. At common law, exceptions were taken at the time of the alleged erroneous ruling or decision and the bill was presented, settled, signed and sealed before verdict or before the jury was discharged. 3 Cyc. 37. The modern federal practice has permitted such to be settled at any time during the trial term but not after, unless under extraordinary circumstances or within additional time fixed by express order made during the trial term. Michigan Bank v. Eldred, 143 U. S. 293, and cases cited. In this Territory the matter was at an early date liberalized by statute. By the Act of 1880 (Chap. 10, Sec. 6) appearing as Section 2198 of the Compiled Laws of 1884, it was provided that "bills of exception must be settled and signed within thirty days after the judgment is entered unless the court or judge shall enlarge the time." In connection with this statute was a rule of this court requiring the appellant to prepare and serve a copy of his bill of exceptions upon the appellee or his attorney within ten days after judgment, unless the time be extended by the court. These provisions, the latter requiring preparation and service of the bill of exceptions upon the opposite party within ten days, the former requiring its settling and signing within thirty days after judgment, remained the law until 1889, when the provisions compiled as Section 896 of the Compiled Laws of 1897, were enacted. While there has been other legislation relative to civil cases the section last cited was the only one in force regulating the matter of bills of exceptions in criminal cases at the dates material to this inquiry. We accordingly proceed to consider the terms of Section 896.

This first abrogates the rule of this court above re-

ferred to by providing that it shall no longer be necessary to prepare or serve the opposite party with a bill of exceptions within ten days after judgment. Proceeding to declare what shall be the practice it provides: (1) That the party appealing shall prepare and present the intended bill of exceptions to the trial judge "at any time *within* twenty days before the first day of the term of the Supreme Court in which the said cause shall be docketed." We agree with the appellant's counsel in his designation of the word, "within," above used, as "a legislative pleonasm," used by the legislature doubtless in repetition of the more intelligible language of the pre-existing statute of 1880, *supra,* requiring settling "*within* thirty days after the judgment." We agree further with the view of counsel for the government that the words "at any time within twenty days" are to be construed as meaning "at any time in not less than twenty days," and that this portion of the statute thus requires preparation and presentation of the bill of exceptions to the trial judge at least twenty days before the first day of the term of this court to which the case is returnable. Section 896 further provides: (2) That the party appealing shall give his opponent five days' notice of his intention to present the bill of exceptions to the judge, thus in effect requiring notice of such presentation to the opponent at least twenty-five days before the first day of the Supreme Court term. Section 896 further provides: (3) That after such notice the opposite party shall have five days to propose amendments to such bill of exceptions, giving notice to the opposite party of the time when such amendment will be proposed. The effect of this provision is thus to require all amendments to be proposed not less than twenty days before the first day of the term. The section further provides: (4) That the time i. e. five days—for proposing the bill, and the time—i. e. five days—for proposing the amendments may be at any time before or after its expiration enlarged by the judge. The scope of this discretion will be presently noticed. It further provides: (5) That the judge
1 shall settle and sign the bill of exceptions at least ten days before the term of the Supreme Court in

which the cause shall be first docketed, unless (6) for cause satisfactory to him he should delay the same, in which event he shall settle and sign the same as soon as possible. The limitations upon the exercise of this discretion will likewise be presently considered. The statute further provides: (7) That in case the bill of exceptions should not be settled by the time required for the filing of the record in the Supreme Court, i. e. "ten days before the first day" of the term (C. L. 3140), such record may be filed at any time within ten days after such bill of exceptions shall be settled. The remaining provisions of the section are not here material, one simply providing that one day's notice shall be given on hearing before the bill of exceptions is settled and signed, and the other providing that the act shall not apply to causes docketed prior to December 28, 1888.

We deem it clear from the language of this section
896 that the bill of exceptions must be settled and signed
not less than ten days before the Supreme Court term
2 and that the term which fixes the settling is the term
"in which the cause shall be *first* docketed." We so conclude because the statute so says. We must assume that the legislature advisedly used the word "first." It was evidently intended to cover cases where parties having sued out an appeal to one term of court dismissed such appeal and secured a writ of error returnable to a second term; or similarly sue out a second writ of error returnable to a later term on dismissal of the first returnable to the prior term; or similarly sue out a second appeal upon dismissal of an earlier one returnable to a previous term. Each of these was permissible at the time of the passage of the Act of 1889 and subsequent thereto, subject only to the condition that the second appeal or writ of error must be sued out within a year, and in the case of appeals before the expiration of the trial term. The purpose of this provision, as of the common law and of the federal practice was evidently to guard, in settling bills of exceptions, against unnecessary delay resulting from successive appeals and writs of error. While the act of 1889 made the terms of this court, instead of the date of the judg-

ment, the relative point from which settling bills of exceptions should run, we cannot assume that it lost sight of the importance in the interest of accuracy of an early settlement of such bills. We believe that by the use of the words "term in which said cause shall be *first* docketed" it intended to guard against the evils which would follow from the settling of the bill after the dismissal of one or more appeals or writs of error. If it be said that this could not have been the purpose of the act since an appellant might accomplish the same thing by a delay in suing out his appeal until approximately the end of the year for taking such, it need only be recalled that this contingency is rendered improbable by the desirability of supersedeas, which of course could only be obtained after taking of the appeal. The wisdom of this rule is emphasized in the present case by the criticisms of both parties upon the incompleteness of the belated bill of exceptions certified in the record before us.

Applying these views to the present case the appellant's cause was "first docketed" in this court in January 1903, when as we have seen, to avoid an affirmance
3 at the instance of the government under C. L. 3140, he docketed his appeal as case 1009, and thereupon dismissed it for the purpose of suing out a new appeal. His bill of exceptions was not settled until nearly twelve months later. It was therefore settled out of season.

We consider this view of the statute much more nearly in accord with the principles surrounding the settling of bills of exceptions than the construction urged by counsel to the effect that it refers to cases where a cause having been for any reason stricken from the docket is subsequently re-instated. In such cases as the last there is no first and second docketing, as in the case of successive appeals or writs of error, but simply a restoration to the docket under the same number.

It is urged, however, that even conceding the correctness of this view Section 896 gives the trial judge a wide discretion as to the matter of time and his settling the bill of exceptions in December, 1903, over objection is to be deemed by relation an enlargement of the time to the

extent necessary to validate his acts. The provisions of Section 896 above numbered for convenience as four, six and seven, are relied upon to sustain this contention. As to provision four, however, we consider that as permitting the enlargement of the time for *presenting* bills of exception or amendments thereto. It does not relate at all to the *settling* of such bills or the enlargement of the time therefor. That is fully covered by provision six. That the exercise of the discretion given by provision four is thoroughly consistent with the preservation in full vigor of provision five will be apparent from the reflection that even if the appellant delay until the last day, which as we have seen is the twenty-fifth, the giving of notice of presenting his bill five days later, there is still left a margin of ten days before the judge must settle the bill, for the exercise of the discretion given by provision five. Neither is the present case altered by provision six that the judge shall settle at least ten days before term "unless for cause satisfactory to him he should delay the same in which event he shall settle and sign the same as soon as possible." This permits the judge by an order made before the tenth day previous to the term has passed to "delay" the signing for such time as he may see fit. But that is not the present case. The trial judge here did not delay either by act or order settling the bill of exceptions; he never saw it until nearly a year later, when he settled it the same day it was presented. This act was prompted by the highest of motives, the desire to give the appellant the privilege of review of a highly penal sentence. It was none the less unauthorized by law. The only valid order which the judge could make enlarging the time for settling the bill of exceptions was one during the time which the law fixed for settling such bills. An order of settlement a year after cannot be held to relate back, but was simply ineffectual and void. Neither does provision seven have the effect contended for. That relates to the record and not to the bill of exceptions, and simply provides that when the signing of the bill of exceptions has been delayed under order as permitted by provision six to a time less than ten days be-

fore the term, the filing of the record may be similarly delayed. This is designed to harmonize with and to prevent default under Section 3140 which requires the record to be filed at least ten days before the term.

We may add that these are no new doctrines in this court. In Evans Bros. v. Baggs, 4 N. M. 69, this court, speaking through Associate Justice Brinker, construed Section 2198 of the Compiled Laws of 1884, *supra,* requiring bills of exceptions to be settled within thirty days after judgment, unless the court or judge should enlarge the same. It is there stated: "The proper practice is for the appellant to comply strictly with the letter of the law. If he ascertains that this will be impossible, he must make seasonable application to the judge for further time and if he shows satisfactory reasons why this indulgence should be granted, it will not be refused. But, in order to obtain this enlargement, he must apply for it *before the time limit prescribed has expired.* It is not in the power of the judge to enlarge the fixed periods unless asked to do so while the parties are presumed to be before him and the cause is under his control."

In Haynes v. United States, 9 N. M. 519, decided in 1899, and thus since section 896 became law, it was stated: "In appeals in criminal cases it is necessary to file in the office of the clerk of the Supreme Court at least ten days before the first day of the court to which such appeal is returnable a transcript of the record and proceedings. A district judge signing and sealing a bill of exceptions at a later date than authorized by statute exceeds his authority and on motion the bill of exceptions will be stricken from the record."

In Territory v. Hall, 11 N. M. 273, it was held that under section 896, bills of exceptions must be settled and signed ten days before the term of the Supreme Court in which the cause shall be first docketed unless for good and sufficient reasons the time therefor has been extended, and that such extension of time cannot be granted after ten days before the term in which the cause was first to be docketed.

These conclusions are also sustained by the decisions of the Supreme Court of the United States. As we have seen it is the practice of the federal courts that bills of exceptions shall be settled during the trial term unless the time be enlarged by express order. It is however, a settled rule of the federal Supreme Court that such extension must be by order made during the trial term and that an extension thereafter is ineffectual. Muller v. Ehlers, 91 U. S. 249; Michigan Bank v. Eldred, 143 U. S., 293-298; Moss v. Anderson, 150 U. S. 156 and cases cited.

It is further urged, however, that the practice created by Section 896 was changed by the Act of March 21, 1901, L. 1901, Chap. 99. We do not, however, con-
4 cur in that view. That Act provides as follows:

"Sec. 1. In all causes finally determined in any of the District Courts of this Territory, and an appeal or writ of error has been or may be sued out or taken to review said cause in the Supreme Court of the Territory, the appellant or plaintiff in error shall have the right to docket such appeal or writ of error at any time before a motion by appellee or defendant in error to docket and affirm judgment. When such cause shall be docketed by the appellant or plaintiff in error, the record may be perfected within thirty days thereafter, or the said appeal or writ of error may be dismissed by such appellant or plaintiff in error filing with the clerk of the Supreme Court a written dismissal, and thereafter at any time such appellant or plaintiff in error may take a new appeal or sue out a writ of error anew in said cause, provided the same be so taken or sued out within one year from the date of the judgment sought to be reviewed became final."

It is extremely doubtful if that Act conferred any additional rights upon an appellant. The right to docket his appeal in advance of a motion to dismiss a former by his adversary was already his under the decisions of this court and of the Federal Supreme Court. Armijo v. Abeytia, 5 N. M. 533; Evans v. State Bank, 134 U. S. 130. His pre-existing right to dismiss his appeal and sue out another appeal if taken during the trial term, or writ

of error if taken within a year, seems equally clear. The only possible efficacy of the act was in the fact that it gave him thirty days additional to perfect his record. There is nowhere in the act any reference to the bill of exceptions. Since an appeal may be prosecuted either with or without a bill of exceptions, the additional time to perfect simply the record left the matter of the bill of exceptions to be governed by Section 896, the pre-existing law.

We are of the opinion therefore that since this case was first docketed to the January, 1903, term, and since the bill of exceptions should have been settled ten days before that term, and since it was not settled until December 24, 1903, nearly a year later, the motion to strike out the bill of exceptions must be sustained.

This leaves for our consideration only errors apparent upon the record proper. It is urged that this shows three grounds for reversal. It is urged first that the court erred in refusing certain instructions requested by the defendant and in giving other instructions of its own motion. But instructions either refused or given are not according to ordinary rules a part of the record proper. This is not denied by counsel, but it is contended that the general rule as to refused instructions has been changed in this Territory by C. L. 2997, which provides that "all instructions demanded must be filed and shall *become a part of the record.*" It is contended that the concluding language of this section makes refused instructions a part of the record without a bill of exceptions, and thus a proper matter for cognizance in this case. A sufficient answer to this is the fact that this court has in terms decided otherwise. In Rogers v. Richards, 8 N. M. 666, it was held that the above quotation from Section 2997

meant simply that demanded instructions became a
5 part of the files of the case but cannot be considered
a part of the record proper until they come into a

bill of exceptions duly settled. We cannot therefore consider the requests to charge in the absence of a bill of exceptions, and this allegation of error must therefore be held untenable.

It is further urged that the instructions given by the

court—some of them alleged to be erroneous—are before us for review by virtue of the Act of 1907, (Chap. 57, Sec. 22) passed since the original hearing of the case. This Act provides that "all papers regularly filed in a cause with the clerk of the District Court shall be considered a part of the record proper." But even assuming the Act of 1907 to be applicable, we are unable to hold that the instructions are properly before us. What purport to be these are contained only in an irregularly settled bill of exceptions, one which we have held must be stricken out. These alleged instructions are not verified by the clerk in any proper manner and are not shown even to have been filed in the clerk's office below so as to bring them within the letter of the Act of 1907. Further, no certificate of the clerk or judge establishes that they were ever properly excepted to. For these reasons we cannot consider them.

It is urged in the second place that the record proper shows error in that it does not appear that the defendant was present at the time of sentence. A supplemental transcript certified to this court, however, pursuant to the practice sanctioned in Borrego v. Territory, 8 N. M. 488, shows that the defendant was present at time of sentence; so that this ground of appeal is not sustained by the record.

The third assignment of error is upon the ground that the record does not show that before sentence the defendant was interrogated as to whether he had anything to say in his behalf. The absence of the allocutus we
6 do not, however, consider error in a case of this character. While such is necessary in capital cases (Territory v. Herrera, 11 N. M. 129), it is not in other felonies, (Jones v. State, 51 Miss. 718; State v. Ball, 27 Mo. 324; Bressler v. People, 117 Ill. 444; Harris v. People, 130 Ill. 457; Dodge v. State, 24 N. J. L. 464; 1 Bish. New Cr. Pro. 1293; 19 En. P. & Pr. 455, 458).

Finding no error in the case so far as it is properly before us, the judgment is accordingly affirmed.

Associate Justices Cooley and Mechem not having heard the arguments took no part in this decision.

[No. 1195, August 31, 1909.]

THE UNITED STATES OF AMERICA, Appellee, v. JESUS MARIA MEDINA, Appellant.

SYLLABUS (BY THE COURT.)

1. An indictment framed in the terms of the statute is sufficient only whereby the statutory language the defendant is put upon fair notice of the charge against him.

2. Under U. S. Rev. St., sec. 4746, as amended by the Act of July 7th, 1898, which penalizes the making of a false or fraudulent affidavit, it is not sufficient simply to allege that the affidavit was false. There must be a clear averment of the respects in which it is false, equivalent to the assignment in perjury cases.

3. A name pleaded as Munnison and proved as Munnicon is idem sonans and there is no variance.

4. Under U. S. Rev. St., sec. 4746, as amended by the Act of July 7th, 1898, which subjects to punishment one who knowingly certifies, when not true, that a witness has been sworn to an affidavit to be used in a pension case, administering the oath immediately before the taking down of the statement thereunder, equally with administering it after taking down such such statement, is swearing the witness to such affidavit within the statute.

5. It was error, therefore, for the trial court to reject testimony for the defendant tending to show that he administered the oath to the witness and the latter thereupon having taken such oath immediately dictated his statement to defendant, such testimony being material as showing a compliance with the law and this even though the signing by the witness may have been postponed by illness to the next day.

Appeal from the First Judicial District Court before JOHN R. MCFIE, Associate Justice. Reversed.

A. B. RENEHAN and T. B. CATRON for Appellant.

Where a writing is of the gist of the offense, it must be given verbatim. Whitney v. State, 10 Ind. 404; 2 Bishop's New Cr. Proc. secs. 406-408, 789; 1 Bishop's New Cr. Proc. sec. 559, p. 342 et seq.; Pooler v. United States, 127 Fed. 518; McNair v. The People, 89 Ill. 442; U. S. v. Bennett, 16 Blatch. C. C. Rep. 338; 19 U. S. Stat. at Large 90; Rosen v. U. S., 161 U. S. 38, 39; U. S. v. Denicke, 35 Fed 408; People v. Reed, 70 Cal. 529; Wallace v. State, 11 Lea 542; State v. Owen, 73 Mo. 440; 19 Cyc. 1400, g; Commonwealth v. Harrison, 30 S. W. 1009; U. S. v. Mason, 12 Blatch. 497; Faust v. U. S., 163 U. S. 41 L. ed. 234; Potter v. U. S., 155 U. S. 445.

Doing or omitting to do a thing knowingly and willfully implies not only a knowledge of the thing but a determination with a bad intent to do it or omit doing it. Felton v. U. S., 96 U. S. 702; secs. 4746, 5208, Rev. St. U. S.; Potter v. U. S., 155 U. S., L. ed. 217; Evans v. U. S., 153 U. S. L. ed. 830; Spurr v. U. S., L. ed. 1153; 11 Enc. P. & P. 202, 205; U. S. v. Adler, 49 Fed. 733; U. S. v. Britton, 107 U. S. 661; State v. Brady, 100 Ia. 204; Wood v. State, 48 Ga. 297; Ratterman v. Ingalls, 48 Oh., St. 483; Railroad Co. v. Goetz, etc. Mfg. Co., 51 Ill. App. 151; United States v. Allen, 47 Fed. 698; United States v. Graves, 53 Fed. 634; Hix v. People, 159 Ill. 382.

The court erred in singling out circumstantial evidence as competent to establish guilt and in not charging that it had equal force to establish innocence. Adams v. Roberts, 2 How. 496; 11 Enc. P. & P.

D. J. LEAHY, U. S. Attorney, and S. B. DAVIS, Jr., Assistant U. S. Attorney, for Appellee.

A variance in the spelling where the sound is preserved will not vitiate the indictment. Vol 2, Bishop's New Criminal Proc., secs. 406-408; U. S. v. Mason, 12 Blatch. 497; Wharton's Criminal Law 222; Vol. 2, Enc. P. & P. 551; Franklin v. State, 52 Ala. 414; Aaron v. State, 37 Ala. 106; McLean on Crim. Law, secs. 798, 799.

In the trial of criminal cases where it is necessary to show guilty knowledge, motive or intent on the part

of the accused, evidence may be given of other similar offenses in proof of such guilty knowledge or intent. State v. Twitty, 9 N. C., 2 Hawks 248; Wharton Criminal Ev., sec. 38; Underhill Crim. Ev., sec. 38; Felton v. U. S., 96 U. S. 702; People v. Molineaux, 62 L. R. A. 357, note; vol. 1, Wigmore on Ev., sec. 300 et seq.

If a man intentionally adopts certain conduct in certain circumstances known to him, and the conduct is forbidden by law, under those circumstances he intentionally breaks the law in the only sense in which law considers intent. Ellis v. U. S., 206 U. S. 246.

Authority of notary public. In re Donnelly, 5 Fed. Rep. 783.

The indictment need not have pointed out the precise falsity or fraudulency of the affidavit. Secs. 1025, 4746, Rev. St. U. S.; Pooler v. U. S., 127 Fed. Rep. 509; U. S. v. Rhodes, 30 Fed. Rep. 431; U. S. v. Doherty, 25 Fed. Rep. 88; Hume v. U. S., 118 Fed. Rep. 689.

The facts are stated in the opinion.

OPINION OF THE COURT.

POPE, J.—Jesus M. Medina, the appellant, was indicted upon three counts for a violation of U. S. Rev. St., Sec. 4746, as amended by the Act of July 7th, 1898. All three counts were demurred to, the demurrer being sustained to the first count and overruled as to the remaining counts. A trial was had resulting in a verdict of guilty upon the second and third counts. After adverse ruling upon motion for a new trial the court imposed a sentence of eighteen months upon each of these counts, the terms to run successively. The case thereupon came into this court by appeal.

The controlling statute is as follows: "That every person who knowingly or wilfully makes or aids, or assists in the making, or in any wise procures the making or presentation of any false or fraudulent affidavit, declaration, certificate, voucher, or paper or writing purporting to be such, concerning any claim for pension or payment thereof, or pertaining to any other matter within the jurisdiction of the Commissioner of Pensions

or of the Secretary of the Interior, * * * and every person, before whom any declaration, affidavit, voucher, or other paper or writing to be used in aid of the prosecution of any claim for pension or bounty land or payment thereof purports to have been executed who shall knowingly certify that the declarant, affiant, or witness named in such declaration, affidavit, voucher, or other paper or writing personally appeared before him and was sworn, thereto, or acknowledged the execution thereof, when, in fact, such declarant, affiant, or witness did not personally appear before him or was not sworn thereto, or did not acknowledge the execution thereof, shall be punished by a fine not exceeding five hundred dollars, or by imprisonment for a term of not more than five years."

The second count charges the defendant with a violation of the last clause of the statute in that in a certain affidavit purporting to have been executed before him on August 5th, 1904, and being for use in aid of a certain pension claim, the defendant "unlawfully and knowingly did certify that the affiant named in said affidavit, to-wit, Rev. Ramon Medina, personally appeared before him the said Jesus M. Medina, and was sworn thereto, whereas in truth and in effect the said Rev. Ramon Medina did not so personally appear before him, the said Jesus M. Medina, and was not so sworn to the said affidavit as he, the said Jesus M. Medina, at the time of so certifying to said affidavit and writing then and there well knew."

The third count charges a violation of the first clause of the statute in that the defendant "did unlawfully, knowingly and wilfully make and aid and assist in the making of a certain false and fraudulent affidavit, the tenor of which is as follows: [then following in full the same affidavit involved in the second count], the said affidavit being then and there an affidavit concerning a claim for pension in the said affidavit mentioned and the said Jesus M. Medina at the time of making and aiding and assisting in the making of the said affidavit then and there well knowing the same to be false and fraudulent."

In dealing with the assignments of error we shall consider those urged against the third count first. It is

urged as against the conviction under the third count that the indictment fails to charge an offense in that it does not set forth the respect in which the affidavit was false. We are of opinion that this point is well taken. While the indictment follows the statute, it is, of course,
1 well settled that this is sufficient only where the terms of the statute as pleaded put the defendant upon fair notice of the charge against him. As was said in Evans v. United States, 153 U. S. 584:

"The rule that an indictment is sufficient if the offense be charged in the words of the statute is limited to cases where the words of the statute themselves fully, directly and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished."

To the same effect is Miller v. U. S., 136 Fed. 581, a prosecution under the statute here involved.

We cannot believe that an indictment charging the defendant simply with making a false affidavit is any more notice to him of what he is required to meet than an indictment charging him with having on the trial of a named cause simply sworn falsely. In the former case no less than in the latter, he is entitled to know what is the particular matter to which it is alleged he has sworn falsely. Lines of proof available to sustain one feature of his
2 affidavit might be totally irrelevant to uphold others. He is entitled to know definitely and specifically wherein his statement has been false. We find no authorities under the statute here involved directly ruling this point, but in all the indictments under the statute and appearing in the reports there seem without exception to be allegations specifying the particular false matter. Examples of these are found in United States v. Adler, 49 Fed. 733; United States v. Wood, 127 Fed. 172; Pooler v. United States, 127 Fed. 512. The third count of the indictment thus being in our judgment insufficient, we find it unnecessary to consider the remaining assignments of error so far as they affect only that count.

Coming now to the remaining assignments which affect both the second and third counts, it is alleged first,

that there was a variance between the affidavit pleaded and that tendered in evidence and that the court erred in receiving it in evidence. The indictment sets up a writing in which is contained language to the effect that "the priest who performed the ceremony was the Reverend P. I. *Munnison,* deceased." The affidavit tendered in evidence has the name *Munnicon* and this is the variance relied upon. We accept as correctly stating the law the contention of appellant that if the pleader sets out with unnecessary detail the instrument he purports to rely upon he is bound to prove it as laid, but that this duty is complied with when any variance which exists is merely literal, not making a word different in sense or grammar but being one in which sound and sense is in substance the same. A
3 variance in the spelling where the sound is preserved will not vitiate. 2 Bish. New Crim. Proc., Sec. 406-408. A variance is not fatal if the names as alleged and proved have the same sound without doing violence to the letters found in the variant orthography. Franklin v. State, 52 Ala. 414. The question thus becomes one of the application of the rule of *idem sonans.* This latter is less strict where proper names are involved and where, as is apparently the case here, the name is foreign. In Faust v. United States, 163 U. S. 452, "Foust' and "Faust" were held *idem sonans.* An examination of some of the state cases there cited will show an even greater divergence than in the present case, as for instance, "Bubb" and "Bopp" from a German speaking section of Pennsylvania and "Penryne" and "Pennyrine" from Maryland. The Circuit Court of Appeals for the Fifth Circuit has even held "Krowder" and "Krower" within the rule. Alexis v. United States, 129 Fed. 60. A very full statement of the cases illustrative of the rule will be found in the note of Thormly v. Prentice, 100 Am. St. Rep. 317. Tested by the authorities we believe that there was here no substantial variance and that the affidavit was properly admitted.

A further assignment of error is based upon the rejection of certain testimony offered for the defence. Ramon Medina, whose affidavit formed the basis of the prosecution, testified as a witness for the government that the

contents of the affidavit were untrue; that while he signed the paper upon the request of a messenger purporting to come from defendant, he signed it in ignorance of its contents, not being acquainted with English; that he never appeared before the defendant in connection with the matter and was never sworn to it either before or after it was filled out. The defendant testified that the priest's affidavit, after the contents thereof had been dictated to him by the priest, was not then and there signed by the latter for the reason that he, the priest, was too sick to sign it and that he, the defendant, thereupon took it home with him and sent it back to the priest for signature the day following. He further testified that he first swore the priest as to the matters to be stated in the said affidavit, and then filled out the affidavit as he (the said Ramon Medina) was telling him, but this last testimony was stricken out on motion. A further question asked by the defendant as follows was not allowed:

"State whether or not before the said affidavit was filled out you administered an oath in respect to the same to Father Medina."

Likewise, one Meliton Armijo called for the defense testified as follows:

"Jesus M. Medina said to Father Medina that he, Jesus M. Medina, could fill out the blank for him (Father Medina) if he (Father Medina) would authorize him to do it, but before doing so he (Jesus M. Medina) would have to swear him (Father Medina) to what he was going to put into it and then the priest raised his hand."

At this point, before the completion of the statement of the witness, the answer as above given was stricken out as was an answer of the witness to the effect that Father Medina was sworn to the paper. Likewise, Carmel Lopez, a witness for the defendant, testified that "the paper was sworn to by the priest before it was filled out," which answer was likewise stricken. All of the foregoing was over defendant's objections and exceptions were properly noted. The question raised by the several rulings is the same: Was proof that the defendant administered the oath to the priest immediately before the affidavit was

written out in the latter's presence competent either by way of complete defense or upon the question of motive, or was it necessary, as held by the court below, that the oath must have been administered after the paper was filled out, to escape the penalty of the statute? We
4 are of opinion that the former is the proper view. It will be noted that the statute penalizes one who shall on the making out of a paper before him, certify that the party was sworn thereto when he was not. It does not prescribe the order in which the oath shall be taken, whether before or after the writing out of the affidavit. True, the use of the word thereto in the latter part of Sec. 4746, (as amended by the Act of July 7, 1898), suggests the existence of a completed paper to which the oath is taken. We think, however, that it is not the paper that is the essence of the statute, but what the paper contains. An oath thereto means an oath to the substance, not the form. What the government seeks is a statement in pension cases under the sanction of the oath and if this is assured the purpose of the statute is met. We do not, therefore, consider the use of the word "thereto" as significant. Referable to a given state of facts, a witness whose testimony is taken down by a court reporter is spoken of as having sworn thereto, although the oath is administered before he testified. In the case of a deposition a witness is considered as having sworn thereto and yet the witness in such cases has, as a matter of practice, almost invariably sworn first and his narrative thereupon been taken down by the notary or other officer and then signed by the witness. Would it be contended in either of these last instances that the witness had not taken the oath because sworn before he testified? We cannot but believe that the administering of the oath and the immediate writing out of the statement under the dictation of the witness is a compliance with the statute and this, even though the signature of the witness and the signing of the jurat may for some sufficient reason, as here the sickness of the witness,
5 have been postponed until a subsequent date. It will be remembered that the indictment is not for certifying to a false date nor to a false place of the taking of

the affidavit, but for certifying that the witness was present when he was not, and that he took the oath when he did not. The tendered testimony tended to show both that the witness was present and that he was sworn and this, if believed by the jury as against the testimony of the government, justified defendant's acquittal. We do not deem it necessary to the determination of the case to consider the matter of intent, as involved in the fact that the statute imposes a penalty not simply upon one who certifies falsely, but one who *knowingly* certifies falsely. In the case as here of a sworn public officer performing an official act, we are, however, of opinion that the expressions of the Supreme Court of Wisconsin in Byrne v. State, 12 Wis. 519, 527, are highly relevant.

"They [the defendants] were obliged by law to act and to decide upon the qualifications of every person offering, as a duly qualified elector to vote at the polls at which they presided. When these qualifications were, by some proper method, called in question, and when so acting, the most that reason or justice could require of them was a *bona fide* effort to discharge their duties according to the best of their knowledge and ability; and if in so doing they committed an obvious but sincere mistake of the law or error of judgment, they are not criminally responsible therefor. The law only required of them true candor and sincerity, and it will only punish them for corruption and falsehood for acting contrary to their own sense of duty and the dictates of their own consciences. In this sense we understand the word 'knowingly' to be used in the statute: that is, knowing that their duty and the obligation of their oath commanded them to act otherwise. It is the wicked intent or corrupt motive which the laws punish as a crime, and it cannot be supposed that it was the intention of the Legislature, in this instant, to substitute for them the upright but misdirected efforts of the mind or judgment of one whose action was not voluntary but in obedience to the requirements of the law."

The judgment of the lower court is reversed with directions to quash the third count of the indictment and

to grant a new trial upon the second count of the indictment.

Cooley, A. J., and Mechem, A. J., not having heard the argument did not participate.

[No. 1210, August 31, 1909.]

TERRITORY OF NEW MEXICO, Appellant, v. HATTIE HODGDON CRARY, et al., Appellees.

SYLLABUS.

1. The Territory in proceeding under Section 3693, C. L. 1897, to obtain legal title to land in private ownership to hold the same for the use and benefit of the University, thereby creates an express trust and under sub-sec. 3, of Section 1685, C. L. 1897, could maintain such suit, as trustee, without joining the University or the Board of Regents of the University.

2. The petition in proceeding under C. L. 1897, section 3693, authorizing the Board of Regents of the University of New Mexico to acquire by condemnation in the name of the Territory, whenever it deems such acquisition necessary, is subject to demurrer if it fails to allege that the acquisition of the land was deemed necessary by the Board of Regents of the University.

3. Failure to allege in a petition under Section 3693, C. L. 1897, the possession of funds to pay for the land is not fatal either on motion to dismiss or on demurrer and is at most a matter of defense to be raised by answer.

Appeal from the District Court for Bernalillo County before IRA A. ABBOTT, Associate Justice. Reversed and remanded.

JAMES M. HERVEY, Attorney General, and F. W. CLANCY, for Appellant.

There is statutory authority for the condemnation of

real estate for the use of the University. C. L. 1897, secs. 3693, 3850, 3857; Laws 1905, chapter 97, sec. 15.

There are available funds for the compensation to the owners of the land. C. L. 1897, secs. 3636, 3571.

W. B. CHILDERS for Appellees.

Every action, suit or proceeding shall be brought in the name of the party in interest. C. L. 1897, sec. 3568-3591.

Acts authorizing the condemnation of private property for public use must be strictly construed. 2 Lewis Sutherland Stat. Con., 2 ed., pp. 1040, 1041, sec. 559; 10 Enc. L., 2 ed., p. 1052, note 6, p. 1054, note 3, p. 1055, note 1.

Use to which the land is to be appropriated and the necessity of taking. 1 Beach on P. Cor., sec. 666 and authorities at note 1; Cooley on Const. Lim., 6 ed., 660; Highland Boy Gold Min. Co. v. Strickley, 116 Fed. 852, 856; Robinson v. Penn. R. Co., 29 Atl. Rep. 268; C. L. 1897, sec. 3693.

Insufficiency of the petition. Laws 1905, chap. 97; Enc. P. & P., vol. 7, pp. 517, 518, and authorities cited in notes 1 and 2; 1 Beach on Pub. Cor., sec. 678; Colville v. Judy, 73 Mo., syllabus, p. 652; in re Grover Street, 61 Cal. 449; 15 Cyc., p. 812 and authorities cited in note 32, p. 813; Cavanagh v. Board of Police Comrs., 35 Atl. 793, 795; Van Wickle v. Railroad Co., 14 N. J. Law 162, 166; State v. Mayor, etc., 26 N. J. Law 444; New York, N. H. & N. R. Co. v. Long, et al, 37 Atl. 1070, 1074; McCulley v. Cunningham, 11 South. 694; C. L. 1897, sec. 3693.

There are no available funds for the compensation of the owners of the land. Laws 1907, ch. 89, sec. 2, p. 198; Sheldon v. Purdy, 49 Pac. 228; Harris v. Same, 17 Wash. 135; Mitchell v. Colgan, 54 Pac. 905-907; 15 Cyc. 640-642, 645, 646; Gardner v. Newsburgh, 2 Johns. ch. 168; 7 Am. Dec. 526; People ex rel. Utley v. Hayden, 6 Hill, 359; Sage v. City of Brooklyn, 98 N. Y. 189; in re South Market Street, 67 Hun. 594, 22 N. Y. Supp. 432; Bensley v. The

Mountain Lake Water Co., 13 Cal. 318; McCauley v. Weller, 12 Cal. 529, 530; People v. Hayden, 6 Hill. 359-361; Sweet v. Rechel, 159 U. S. 380-406.

OPINION OF THE COURT.

MECHEM, J.—This was a proceeding brought by the appellant to condemn certain land, the property of the appellees, for the use of the University of New Mexico.

The appellees filed their motion to dismiss the petition of appellant, for the reason that the same should have been brought in the name of the Regents of the University and not in the name of the Territory.

The court below granted the motion of the appellees, dismissed the petition and appellant prosecutes this appeal, assigning as error the action of the court below in granting appellee's motion.

The proceeding was brought under Sec. 3693, Compiled Laws 1897, which reads as follows:

Sec. 3693. "Hereafter, whenever it shall be deemed necessary by the Board of Regents of the University of New Mexico, and to acquire title to any lands for the use of any such institution and the owner or owners of such lands are unable or unwilling to accept a fair and reasonable price for such lands, then, and in that event, each of the several boards may acquire, in the name of the Territory of New Mexico, title to so much of said land or lands as shall be deemed necessary by any such board for the use of any such institution, in the same manner as now provided by law for the condemnation of land for railroad purposes, and such land so taken shall be deemed to be taken for public use."

We are of the opinion that the contention of the appellant is correct. In this proceeding the Territory sought to obtain the legal title to land in question, to hold the same for the use and benefit of the University. In other words the Territory by bringing this suit and obtaining

the legal title to said lands for the use and benefit of the University, would thereby create an express trust and
1 under sub-sec. 3 of Sec. 2685, Com. Laws 1897, could maintain such suit, as trustee without joining the University or the Board of Regents of the University.

As this case must be reversed, it may be well to call attention to the fact that the petition is subject to demurrer, in failing to allege that the acquisition of
2 the land was deemed necessary by the Board of Regents of the University.

It is asserted in one of the briefs that the court dismissed the petition because it failed to allege the possession of funds to pay for the land. We do not con-
3 sider the absence of such an allegation however, fatal either upon motion or demurrer. It is at most a matter of defense to be raised by answer.

For the reasons above assigned, the judgment of the lower court will be reversed and the cause remanded for further proceedings, and it is so ordered.

[No. 1231, August 31, 1909.]

DONACIANO GALLEGOS, Appellee, v. E. M. SANDOVAL, Appellant.

SYLLABUS.

1. The filing of too many assignments of error rebuked.

2. The court has a right to grant a new trial at any time during the term in which the judgment was entered.

3. A complaint should proceed upon a definite and distinct theory and upon this theory the plaintiff's case must stand or fall.

4. Where there is a fatal inconsistency between the general verdict and the special findings the latter must control.

5. Every reasonable presumption in favor of the general verdict will be indulged in, while nothing will be presumed in favor of the special findings.

6. If the writ was placed in the sheriff's hands within sixty days from the time the levy was made and the returns filed he cannot be held liable as a trespasser on the theory that the writ was functus officio.

7. The 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.

8. To render the sheriff liable as a trespasser ab initio it must be shown that in making the levy he was so grossly negligent as to indicate a wilful intention to exceed his authority or that his acts subsequent to the levy were of such character as to make it appear that he was influenced by motives of malice or corruption.

9. The word "oppressive" in its ordinary sense means an act of cruelty, severity, unlawful exaction, domination or excessive use of authority, and if the finding that the defendant acted "oppressively" is sufficient to render him liable there is not conflict between the general verdict on the theory that the sheriff was a trespasser in making an execution levy, though the jury do not affirmatively find that the writ was in the sheriff's hands, more than 60 days before the levy so as to make him liable on the theory that the writ was functus officio.

10. The seizure of $700 worth of goods to satisfy a judgment of less than $100 is not sufficient per se to render the sheriff liable as a trespasser.

Appeal from the District Court for Bernalillo County before IRA A. ABBOTT, Associate Justice. Affirmed.

KLOCK & OWEN for Appellant.

A complaint must proceed upon a distinct and definite theory and upon that theory the case must stand or fall: Carpentier v. Brenhan, 50 Cal. 549; Welsh v. Darragh, 52 N. Y. 590; Humiston v. Smith, 22 Conn. 19; Easterly v. Barber, 66 N. Y. 440; Chicago, etc., R. R. Co. v. Bills,

104 Ind. 13; Mescal v. Tully, 91 Ind. 96; Goodwin v. Griffis, 88 N. Y. 639; Raymond v. Toledo R. R. Co., 57 O. St. 271; Stoughton v. Mott, 25 Vt. P. 263; Chitty on Pl., vol. 1, 7 Eng. ed., p. 207; Tidd's Pr., vol. 1, Am. ed., p. 440; Enc. P. & P., vol. 21, pp. 828-830 and cases cited; Sexey v. Adkinson, 40 Cal. 408; State v. Martin, 77 Mo. 670.

An action for the abuse of legal process can only be predicated upon some collateral object and not where it is to collect the very debt in suit. Granger v. Hill, 4 Bing., N. C. 212; Stoughton v. Mott, 25 Vt. 263, Anno. ed., book 9, p. 667, note and cases cited in opinion.

If the jury fail to agree upon a special question, this is equivalent to a finding inconsistent with the general verdict, provided the fact is indispensable to support such a verdict. Abbott's Trial Brief, Civil Jury Trials, p. 547; Kansas Pac. Ry. Co. v. Reynolds, 8 Kan. 623; Clark v. Weir, 37 Kan. 98; Redford v. Spokane St. Ry. Co., 9 Wash. 55; Tourtelette v. Brown, 1 Colo. App. 408, 29 Pac. 130; Nichols v. Wadsworth, 40 Minn. 547; 42 N. W. 541; Awde v. Cole, et al., Sup. Ct. Minn., Nov. 23, 1906, 109 N. W. 812; Walker v. So. Pac. Ry. Co., 165 U. S. 593, 597, 598; Schofield v. Territory ex rel, 9 N. M. 540, 541; Robinson v. Palentine Ins. Co., 11 N. M. 178, 179; Walker v. N. M. & So. Pac. Ry. Co., 7 N. M. 282; C. L. 1897, sec. 2993.

The return on the execution was conclusive. Freeman on Executions, vol. 2, sec. 366, p. 1211; Tillman v. Davis, 28 Ga. 494, 73 Am. Dec. 786; Enc. Evidence, vol. 2, pp. 974, 975 and cases cited; Putnam v. Mann, 3 Wend. 202; Brown v. Kennedy, 15 Wall., U. S. 597; Allen v. Martin, 10 Wend. 301; Smith et al. v. Gains, 93 W. S. 901-903; Measure of Damages; Sutherland on Damages, vol. 3, pp. 484, 485.

The return of the sheriff imports verity, and the burden of proving it to be false rests on the party assailing it and must be discharged by evidence sufficient to overcome the presumption arising from the fact that it was made in the line of his duty by a sworn officer. Paul v. Malone, 87 Ala. 544, 6 So. 351; Titus v. Lewis, 33 O. St. 304; U. S. v. Crussell, 14 Wall. 4; Lea v. Polk Co. Cop-

per Co., 21 How. 493-497; Wilkes v. Dinsman, 7 How. 88.

NEILL B. FIELD for Appellee.

The court retains control of its judgments during the term. A return is conclusive only in the particular case in which it is made; and there is no authority the other way. III Freeman on Ex., sec. 366; Whitehead v. Keyes, 3 Allen 495; 1 Chitty on Pleading 594; C. L. 1897, sec. 2685, sub-sec. 1; Code, Article 4, sub-sec. 43; Bliss on Code Pl., sec. 394; Raker v. Bucher, 34 Pac. 850; Wolcott v. Ely, 2 Allen 338; McGough v. Wellington, 6 Allen 507; Gufford v. Woodgate, 11 East 296, Ph. Ev., 1 Am. ed. 293, 294; Hathway v. Goodrich, 5 Vt. 56; Stanton v. Hodges, 6 Vt. 66; Barrett v. Copeland, 44 Am. Dec. 363; Chetelat, Sheriff v. Kelter, 42 Pac. 495; Jackson v. Hill, 37 E. C. L. Repts. 158; Baker v. Seavey, 163 Mass. 527; Baker v. McDuffie, 23 Wend. 289; Brown v. Davis, 9 N. H. 76; Boynton v. Willard, 10 Pick. 166.

It is the duty of the officer, on the one hand, to avoid making an inadequate, and on the other hand, to avoid making an excessive levy. For an error of conduct in either respect, he is responsible to the person damaged. II Freeman Ex., sec. 253; Handy v. Sheriff of Wayne, 50 Mich. 357; Cook v. Jenkins, 30 Iowa 452; Silver v. McNeil, 52 Mo. 518.

An assignment of error is insufficient and presents no question for review if any one of the propositions asked was unsound. Schofield v. Territory, ex rel, 9 N. M. 540-1; Pearce v. Strickler, 9 N. M. 467; Territory v. Clark, 79 Pac., N. M. 708; Territory v. Guillen, 66 Pac., N. M. 527; Chateaugay Co. v. Blake, 144 U. S. 476; Union Pac. Ry. Co. v. Callahan, 161 U. S. 91; Union Ins. Co. v. Smith, 124 U. S. 405; C. L. 1897, sec. 3017, amended by Laws of 1901, p. 101; Steel Rail Sup. Co. v. Baltimore & L. Ry. Co., 130 Fed. 435; Holloway v. Dunham, 170 U. S. 615, Harvey v. Tyler, 2 Wall. 339; Express v. Kountze Bros., 8 Wall. 353; Block v. Darling, 140 U. S. 238; Texas & Pac. Ry. Co. v. Volk, 151 U. S. 78; Allis v. United States, 155 U. S. 122; Backus v. Fort Street Union Depot Co., 169 U. S. 575; Humes v. United States, 170 U. S.

211; Steel Rail Sup. Co. v. Baltimore & L. Ry. Co., 130 Fed. 435; Newport News & Miss. Val. Co. v. Pace, 158 U. S. 36; Frizzell v. Omaha St. Ry. Co., 124 Fed. 180; Isaacs v. United States, 159 U. S. 487.

It is within the discretion of the court to decide whether a specific answer should or should not be required. Drumms-Flato Com. Co. v. Edmisson, 28 Sup. Ct. Rep. 369; Robinson v. Palatine Ins. Co., 11 N. M. 162; Schofield v. Territory, ex. rel, etc., 9 N. M. 526.

OPINION OF THE COURT.

COOLEY, J.—This case was tried twice in the District Court for Bernalillo County. The original complaint was filed on February 24th, 1906, alleging the following cause of action: That the plaintiff, Gallegos, a resident of Sandoval County, was on the 23rd day of December, 1905, the owner and in peaceful and undisputed possession of certain specified personal property then contained in the store house owned and occupied by him in the town of Bernalillo, County of Sandoval, and the defendants on that day unlawfully and with force of arms took from his possession this property and converted it to their own use. An action was brought against the Appellant, Sandoval, jointly with one Michael Mandel and one O. P. Hovey. A verdict for Mandel was directed by the court and the cause of action as to Hovey was abated by his death. It is necessary, therefore, on this appeal to consider only the answer of the defendant, Sandoval.

This in substance alleged that he was elected sheriff of the County of Sandoval in November, 1904, and that he duly qualified and held such office for the two years ensuing from the first day of January, 1905. The answer further set up that on the 9th day of December, 1904, said Michael Mandel recovered a judgment against the plaintiff Donaciano Gallegos; that this judgment was duly filed and entered in the office of the clerk of the District Court for the County of Bernalillo on that day; that the court had jurisdiction over both the person of Gallegos and the subject matter of the action and was in all things authorized and had power to render the judgment against

him. It was further alleged by way of defense that on the 16th day of October, 1905, an execution upon the portion of the judgment remaining unpaid was received by the defendant, Sandoval, as sheriff of Sandoval County and that this execution was placed in the hands of the defendant, O. P. Hovey, then a deputy sheriff, of the said county, and that a levy was made on the 14th day of December, 1905, under this execution upon the property of the plaintiff, Gallegos, particularly described in the schedule annexed to the execution, and that this execution constitutes a justification of the defendant's action in the premises.

The reply of the plaintiff takes issue with the allegation contained in the answer that the levy was made on December 14th and alleges that the actual date of making the levy was December 23rd, and further denies the truth of the return as to the property seized.

The case was first tried on October 10th, 1906, and a verdict in favor of the defendants was entered by direction of the court. A motion for a new trial was made by the plaintiff at the close of the case and denied on December 3rd, 1906. On February 21st, 1907, at the same term of court, the judge of his own motion set aside the judgment rendered in the case and granted a new trial. To this action of the court the defendants objected and the objection was overruled.

In the second trial, which began on November 2nd, 1907, the jury found a general verdict for the plaintiff against the defendant Sandoval and assessed the damages at five hundred dollars ($500.00). In addition to this verdict the following special findings were made to interrogatories submitted to the jury at the request of plaintiff:

1. On what date was the property of the plaintiff seized by Deputy Sheriff Hovey?

Answer. Unable to agree.

2. What was the value of the property on the date of seizure?

Answer. Seven hundred dollars.

3. What amount, if any, do you award the plaintiff by way of interest and including your verdict?

Answer. None.

4. Do the jury find that any act of the defendant Emilio M. Sandoval, was oppressive?

Answer. Yes.

From the judgment in favor of the plaintiff entered on this verdict the defendant Sandoval took an appeal to this court. There are thirty-six (36) assignments of error. In this connection it may not be out of place to again call attention to the warning of Chief Justice Mills contained in the opinion in Robinson v. Palatine Insurance Co., 11 N. M. 162.

"Fifty-seven grounds of error are assigned in this cause, and as is usually the case, when the assignments are so numerous it will not be necessary to discuss them all. It will perhaps be proper for us, in view of the very many assignments, to call the attention of the members of the bar to what the Supreme Court of the United States say in regard to making so many assignments of error: 'Other errors are assigned which it is unnecessary to notice in detail. Most of them are covered by those already discussed, and some of them are so obviously
1 frivolous as to require no discussion. It is to be regretted that defendants found it necessary to multiply their assignments to such an extent, as there is always a possibility that, in the very abundance of alleged errors, a substantial one may be lost sight of. This is a comment which courts have frequently occasion to make, and one which is too frequently disregarded by the profession.' Grayson v. Lynch, 163 U. S. 468; 11 N. M. 173."

At the outset we desire to say there can be no question of the right of the court to grant a new trial at any time during the term in which the judgment was entered.
2 The second trial of the case was therefore clearly authorized.

The form of the action is trespass. The complaint alleges that the defendant in seizing the goods of the plaintiff was a trespasser; upon this theory the complaint proceeds and upon this theory the plaintiff's case must stand or fall.

"It is essential to the formation of issues and to the intelligent and just trial of causes that a complaint should

proceed upon a definite and distinct theory. It would violate all rules of pleading to admit a complaint to be construed as best suited the exigencies of the case. To allow such a course of procedure would produce uncertainty and confusion and materially trench upon the right of the defendant to be informed of the issue he is required to meet. The rule is that the complaint must proceed upon a distinct and definite theory and upon
3 that theory the case must stand or fall." Chicago, St. Louis & Pittsburg Railway Company, v. Bills, 104 Ind. 14.

"Nor can the answer in the original action be considered in determining the nature of the cause of action, but it must be determined by the complaint." Goodwin v. Griffis, 88 N. Y. 639.

"Nor do the allegations of the reply change or aid the plaintiff's case in chief. For that we look to the petition not to the reply, and the matter therein set up for the first time cannot avail." Raymond v. Railway Company, 57 Ohio St. 271-288.

We have here a general verdict for the plaintiff with certain special findings which it is alleged are inconsistent with that verdict. There can be no doubt that where
4 there is a fatal inconsistency between the general verdict and the special findings the latter must control. (Upton v. Santa Rita Mining Co., 89 Pac. 275-281). But it is equally well settled that every reasonable presumption in favor of the general verdict will be indulged in,
5 while nothing will be presumed in favor of the special findings and that where there is evidence to sustain the general verdict that verdict must stand. (29 Amer. & Eng. Enc. of Law 1035; Warren v. Southern Calif. Railroad Co., 67 Pac. 1.) It becomes our duty then to examine the entire record and if there is any theory upon which the general verdict can be sustained this must be done even though some or all of the special findings tend to throw doubt upon the soundness of the conclusion reached.

To sustain the cause of action the defendant must be held liable as a trespasser at the time the goods were

seized. An officer proceeding on a writ valid on its face issued out of a court of competent jurisdiction is not liable to a judgment debtor in action of trespass unless some abuse of authority can be shown. In the case at bar if the writ was placed in the sheriff's hands within sixty days from the time the levy was made and the
6 return filed he cannot be held liable as a trespasser on the theory that the writ was functus officio. To recover on this theory the plaintiff must affirmatively establish that more than sixty days had elapsed since the writ was placed in the sheriff's hands. To the question "on what date was the property of the plaintiff seized by the Deputy Sheriff Hovey" the jury answered "Unable to agree." While we fully recognize the rule that the court may in its discretion withdraw special questions and accept a general verdict, (Cleveland, etc., R. Co. v. Doer, 41 Ill. App. 530; Kansas Pac. R. R. Co. v. Reynolds, 8 Kan. 623; Johnson v. Hubbard, 22 Kan. 277; Wyandotte v. Gibson, 25 Kan. 236; Moss v. Priest, 1 Robt. N. Y. 632,) that rule has no application here. The jury here made a finding which was equivalent to saying, "we do not affirmatively find that the writ was placed in the sheriff's hands more than sixty days before the levy was made and the return filed." It necessarily follows that on this theory of the defendant's liability there is fatal inconsistency between the special findings and the general verdict.

To justify a general verdict for the plaintiff on the theory that the writ was functus officio it was essential that the jury should have found affirmatively that the writ was in the sheriff's hands more than sixty days before the levy was made.

But the mere possession of the writ authorizing an officer to seize property affords him no protection if he abuses his authority:

"An officer having a valid writ, if he does not pursue the authority given him by his writ under the rules of law in his execution of his duty under it, is a trespasser in the same manner as if he had no writ; as if he takes goods not belonging to the debtor or goods exempted by law, there an action of trespass lies. This proceeds on the ground

that the writ affords a definite and limited authority when regulated by law and the legal justification for his action is co-extensive with his legal authority and he has no protection when acting beyond the scope of that authority. The authority is given upon this restriction and condition; that it shall not be abused or exceeded or used to effect an unlawful purpose. To accomplish this the rule is well established that where an authority given by law is exceeded the party loses the benefit of his justification and the laws hold him a trespasser ab initio although to a certain extent he followed the authority given. The law will operate retrospectively to defeat all acts thus done under color of lawful authority when exceeded." Ilsley v. Nichols, 12 Pickering 276.

If an officer goes outside the mandate of his process and commits a tortuous act he may be held liable as a trespasser ab initio upon the theory that such an act indicates an unlawful intention on his part to disregard the limitations of his authority. It necessarily follows that to render him liable the misconduct must be so gross as to furnish an indication that he intended at the outset to use his process as a cover for wrongdoing.

"Such an error as a person of ordinary care and common intelligence might commit will not amount to an abuse but there must be such a complete departure from the ordinary line of duty or such improper and illegal exercise of the authority to the prejudice of another—such an active and wilful wrong perpetrated—as will warrant the conclusion that its perpetrator intended from the first to do wrong, and to use his legal authority as a cover for his illegal conduct. Where the acts proved warrant no such conclusion the person charged with them is not a trespasser." Taylor v. Jones, 42 N. H. 25, 35.

"While the liability of an officer for an excessive levy is undoubted, the instances in which actions for such levies have been sustained are rare. This is because the officer must be allowed to exercise his own judgment in determining how much property it is necessary to seize and because he must be permitted to steer clear of liability for an inadequate levy. The few cases in which officers have been

held liable for excessive seizures will, we think, on examination be found confined to instances where the excess was so great and so perceptible that it must be attributed either to inexcusable ignorance or wilful oppression." Freeman on Exe., sec. 253.

"The claim that the attachment was excessive and unlawful because the defendant officer, before attaching the chattels, had on the same writ commanding him to attach property of the value of $300 attached the plaintiff's real estate valued at $4,000, cannot be upheld on any facts stated in the case. To make an officer a trespasser for exceeding or abusing his authority, he must be shown to have committed acts, which persons of ordinary care and prudence would not under like circumstances have committed, and made such a departure from duty as to warrant the conclusion that he intended from the first to do wrong, and use his legal authority as cover for an illegal act. It does not appear that the officer acted in bad faith in making the attachment or that he was culpably negligent in not ascertaining the value of the real estate or that it was unencumbered, before attaching the personal property." Davis v. Webster, 59 N. H. 471, 473.

"From the situation of the property there must have been great uncertainty as to its value, and because it turned out when the flume was cleaned up that the value of the property was nearly double the amount of Hutching's demand it does not follow that the levy was therefore excessive." Saxey v. Adkinson, 40 Cal. 417.

"A levy is not an absolute satisfaction of the judgment, but a satisfaction *sub modo* only because until there has been a sale it cannot be known with any degree of certainty how much may be realized from the property. * * * At the same time he must be careful not to make an excessive levy, so excessive as to bear on its face the appearance of oppression and unnecessary rigor, but enough even at that hazard to make the money on the execution." French v. Snyder, 40 Ill. 339, 83 Am. Dec. 193.

The rule then seems to be that a sheriff seizing

goods in pursuance of a writ issuing out of a court of competent jurisdiction is protected against an action by
7 the judgment debtor owning the property unless there has been an abuse of authority. To render the sheriff liable as a trespasser *ab initio* it must be shown that in making the levy he was so grossly negligent as to indicate a wilful intention to exceed his authority or that his
8 acts subsequent to the levy were of such a character as to make it appear that he was influenced by motives of malice or corruption.

We believe that the rule is justified not only on principle and on authority but by reasons of sound public policy as well. A sheriff is held to a strict liability in seizing sufficient property and must take into consideration the likelihood that the property will have to be sacrificed at a forced sale. (Freeman on Executions 253). It would be manifestly unjust to hold an officer liable merely because his action resulted in an unnecessary hardship to the judgment debtor. He is obliged to levy upon all kinds of property, real and personal, and it would be altogether unreasonable to expect him to possess the varied knowledge which would be necessary to enable him to estimate accurately the value of anything he may suddenly be called upon to seize. It is also to be borne in mind that it is always within the power of the judgment debtor to avoid the inconvenience attendant upon a levy by satisfying the judgment.

But the jury in this case found that the defendant acted oppressively. If that finding is sufficient to render him liable there is no conflict between the general verdict and special findings, and the judgment must be affirmed. We are of opinion it is sufficient.

"The word 'oppression' has not acquired a strictly technical meaning and may in this statute be taken in its ordinary sense which is an act of cruelty, severity, un-
9 lawful exaction, domination or excessive use of authority." U. S. v. Deaver, 14 Fed. 595, 597.

The evidence in this case showed that the deputy sheriff

seized seven hundred dollars worth of goods to satisfy a judgment of less than one hundred dollars but this
10 is not, as we have seen, sufficient per se to render him liable. The evidence further showed, however, that not only was this large levy made, but the judgment debtor was locked out of his own store. For this we see no justification, and the jury may very well have felt that the deputy sheriff acted with such a reckless disregard of the plaintiff's rights as to indicate forgetfulness on his part of the rule that "the officer is or should be a minister of justice, not of oppression and he should execute every writ put in his hands in such a manner as to do as little mischief to the debtor as possible." Freeman on Executions, Sec. 253.

It is at least questionable whether the defendant properly raised the matters which he assigns as error through failure to seasonably make his objections, but in view of the practical importance of the questions we have discussed we prefer to rest our decision on the grounds we have indicated.

There are other assignments of error but we do not regard any of them as well taken and we do not consider it necessary to discuss them in detail.

The judgment is therefore affirmed.

[No. 1247, August 31, 1909.]

TERRITORY OF NEW MEXICO, Appellee, v. EMILIO VALLES, Appellant.

SYLLABUS.

1. Where the owner of stolen property is deceased, an indictment for larceny should lay the ownership in his representatives and not in his estate.

2. An indictment charging the larceny of one mule of the property of Matias Contreras, administrator, etc., sufficiently describes the stolen property.

3. It is equally as competent to establish the identity of a stolen animal by a brand, as by its color or by any distinguishing mark.

4. In a trial for the larceny of a mule, testimony that tended to establish the identity of the mule, the ownership by the prosecuting witness as administrator and the possession of the mule by the defendant was enough to make out a prima facie case of guilt.

Appeal from the District Court for Socorro County before FRANK W. PARKER, Associate Justice. Affirmed.

GEORGE W. PRICHARD for Appellant.

J. M. HERVEY, Attorney General, for Appellee.

No briefs.

OPINION OF THE COURT.

COOLEY, J.—The appellant, Emilio Valles, was indicted in Socorro County charged with the larceny of a mule, and on trial was found guilty. From the judgment of conviction an appeal was taken to this court. A review of the case convinces us that there was no error and that the judgment must be affirmed.

The indictment charges Valles with the theft of one mule, the property of Matias Contreras, the duly appointed and qualified and acting administrator of Ambrocio Gonzales, deceased.

It is assigned as error that the indictment charges the ownership of the mule as in Contreras as administrator. This contention is clearly without merit. Where
1 the owner is deceased the ownership should be laid in his representative and not in his estate. (22 Cyc. 354; People v. Hall, 19 Cal. 425).

It is further urged on appellant's behalf that the indictment does not sufficiently describe the property alleged to have been stolen. The indictment charges the
2 larceny of one mule of the property of Matias Contreras, administrator, etc. This is enough.

"It is no valid objection to an indictment that the

description of the property in respect to which the offence is charged to have been committed is broad enough to include more than one specific article. Thus, an indictment charging the larceny "of a horse of the property of A. B." is not overthrown by proof that A. B. is the owner of many horses, any one of which will satisfy the mere words of description." Dunbar v. U. S., 156 U. S. 185, 191.

In the course of the trial evidence was introduced tending to show that the animal alleged to have been stolen was a small black mule with a slight stiffness in one leg, and branded in a particular way. The defendant objected to the admission of any testimony as to the nature of the brand on the ground that the statute provided an exclusive method by which brands could be proved. There would be force in this objection if ownership were to be established by evidence of this character. But the trial judge excluded all evidence tending to show the ownership of the brand and allowed evidence of the mark itself only to identify the animal. There can be no doubt of the soundness of the ruling. It is equally as competent
3 to establish the identity of an animal by a brand, as by its color or by any distinguishing mark. Not only is this clear on principle, but it is also the settled law in this jurisdiction.

In Chaves v. Territory, 6 N. M. 455, 459, this court said:

"It is not to be presumed that the brand was offered for the sole purpose of proving ownership,—whether it was offered to prove ownership or not is immaterial, being competent evidence to aid the prosecution in establishing identity of the animal stolen, it was admissible." 11 N. M. 211, 220. And in Gale & Farr v. Salas, the following language was used:

"There was no attempt in this case to establish the ownership of the appellee by a recorded brand, such oral evidence as was received by the court in regard to the marks found on these animals was received for the purpose of identification and was competent evidence and there was no error in its admission."

The last point raised which we regard it as necessary

to consider calls into question the action of the trial court in overruling a demurrer interposed by the defendant to the evidence at the close of the Territory's case. The testimony introduced by the prosecution tended to establish the identity of the mule, the ownership by Contreras as administrator and the possession of the mule by
4 the defendant. This was enough to make out a *prima facie* case of guilt, and the demurrer was properly overruled. It follows that the judgment of conviction must be affirmed.

REPORTS OF CASES

DETERMINED IN

THE SUPREME COURT

OF THE

TERRITORY OF NEW MEXICO.

JANUARY TERM, 1910.

[No. 1230, January 6, 1910.]

JOSEPH SCHMIDT, Appellee, v. SOUTHWESTERN BREWERY & ICE COMPANY, Appellant.

SYLLABUS.

1. The master is liable for injury to servant by means of defective appliance where the defect was known to both master and servant, the defect being not so palpably dangerous that an ordinarily prudent, careful, cautious man would refuse to use it, the master having promised to repair and requested the servant to use the appliance until repaired, and where servant relied upon the promise of the master to repair.

2. The master is liable, during the running of his promise to repair a known defect, in all cases, unless the servant, either by continuing the service an unreasonable length of time or by the use of the appliance when in an imminently dangerous condition, has by his own conduct released the master.

3. There is no error in the refusal of an instruction which even though sound is not applicable.

4. Verdict of $7,500 for plaintiff not excessive. Quaere? It was for the jury alone to choose between the testimony of the plaintiff and that of the physician who testified for the defendant.

Appeal from the District Court for Bernalillo County before IRA A. ABBOTT, Associate Justice. Affirmed.

MARRON & WOOD for Appellant.

The law imposes on the master only the obligation to use reasonable and ordinary care, skill and diligence in the matter of machinery and appliances. 20 A. & E. Enc. 74; Sherman and Redf. on Negligence, secs. 186, 189, 4 ed.; Probst v. Dellanated, 100 N. Y. 272; Brymes v. Southern Pac. Co., 27 Pac. Rep. 371, 372; 26 Cyc. 1136-38; La Batt on Master and Servant, sec. 110; Moore v. Wabash Ry. Co., 85 Mo. 588; Bailey v. R. W. & O. Ry., 139 N. Y. 302; Sweeney v. Berlin Co., 101 N. Y. 520.

Where master is liable to servant for injury caused by defects he promised to repair, the injury must be inflicted by the particular defect, specified in the promise to repair. Showballer v. Fairbanks, 88 Wis. 376; International & S. N. Ry. v. Williams, 34 S. W. 161; Halloran v. Union Iron & Foundry Co., 133 Mo. 470.

Every man is presumed sane and rational until the contrary is shown by at least a preponderance of the evidence by the one who asserts the contrary. Thompson on Trials, sec. 2524; Sackett's Instruct. to Juries 439; Wigmore on Evidence, sec. 2500; Jackson v. King, 4 Cow. N. Y. 207; Beverly's Case, 4 Coke 123, Coke's Lit. 247 a.; Jones v. Jones, 137 N. Y. 610 at 613; Taylor v. Buttrick, 165 Mass. 547; Wyatt v. Walker, 44 Ill. 485; Atrip v. Ramake, 96 Va. 277.

The servant is required to exercise ordinary prudence. If the instrumentality by which he is required to perform his services is so obviously and immediately dangerous that a man of common prudence would refuse to use it, the master cannot be held liable for the resulting damage even if the servant relied on the master's promise to repair. District of Columbia v. McElligott, 117 U. S. 681; Dowd v. Erie Railway Company, N. J. 1904, 57 Atlantic 248; Thomas v. Quartermaine, L. R., 18 Q. B. Div. 686-697; Patterson v. Pittsburg Railway Co., 76 Pa. St. 389, 18 Am. Rep. 412; Ind. & St. L. Ry. Co. v. Watson, 114 Ind. 20; Clark v. Holmes, 7 Hurls, and N. 937; St. L. A. & T.

Ry. Co. v. Kelton, 55 Ark. 483; Tex. & N. O. R. Co. v. Bingle, 9 Tex. C. A. 382; McAndrews v. Montana Ry. 15 Mont. 290.

The measure of damages for personal injury, causing loss of time, is the wages actually lost, and not the market value or average wages of a person of plaintiff's average capacity working in the same employment. Braithwait v. Hall, 168 Mass. 38. Whenever plaintiff has been able to earn as much since as before the injury the jury should not consider the item of impairment of earning capacity. 8 A. & E. Enc. 654; Kane v. Railroad Co., 85 Ga. 858; M. C. Ry. Co. v. Mitten, 13 Tex. C. A. 653; Leeds v. Metropolitan Co., 90 N. Y. 26.

The damages awarded were excessive and grossly disproportionate to the injury and indicated the jury acted from passion or prejudice. Shultz v. Griffith, 103 Iowa, 150, 72 W. 445; A. T. & S. F. R. R. Co. v. Richards, 49 Pac. Rep. 432; Drumm v. Cessun, 49 Pac. Rep. 78; City of South Omaha v. Fennell, 94 N. W. Rep. 632; Baker v City of Madison, 22 N. W. Rep. 145; Railroad v. Parks, 18 Ill. 460; Zion v. Southern Pac. Co., 67 Fed. Rep. 507; K. P. Ry. Co. v. Reavey, 34 Kas. 472; L. etc Ry. Co. v. Foley, 94 Ky. 220; L. etc., Ry. Co. vs. Lan, 21 S. W. 648; Borgeson v. U. S. Proto, 2 N. Y. App. Div. 57; Shortsleeves v. N. Y. C,, 40 N. Y. Sup. 1105; Slett v. St. Nor. 53 Minn. 341; Lombard v. C. etc. Ry., 47 Iowa, 494; John v. St. Paul City Ry., 59 Minn. 45; Kenyon v. Gilmer, 131 U. S. 22; 18 Enc. Pl. & Pr. 136.

NEILL B. FIELD for Appellee.

Where a master has expressly promised to repair a defect, the servant can recover for an injury caused thereby, within such a period of time after the promise as it would be reasonable to allow for its performance. Hough v. Railway Co., 100 U. S. 213, 224-226; Sherman and Redfield on Negligence, secs. 96, 186; Sweney v. Berlin Co., 101 N. Y. 520; Conroy v. Vulcan Iron Works, 62 Mo. 35; Patterson v. P. & C. R. W. Co., 76 Pa. St. 389; Le Clair v The First Division of the St. Paul & Pacific Railroad Co., 20 Minn. 9; Brabbits v. R. W. Co., 38 Mo. 289; Cooley on Torts. 559; Ford v. Fitchburg Railroad Co., 110

Mass. 261; Laning v. N. Y. C. Railroad Co., 49 N. Y. 521; Railroad Company v. Gladmon, 15 Wall. 401; Wharton, Negligence, sec. 423, and authorities cited in note 1; Indianapolis & St. Louis Railroad Co. v. Horst, 93 U. S. 291; Holmes v. Worthington, 2 Fos. & Fin. 533; Holmes v. Clark, 6 H. & N. 937; Clark v. Holmes, 7 H. & N. 937; Detroit Oil Co. v. Graybill, 94 Fed. 73; Gowan v. Harley, 56 Fed. 973; Lutz v. Atlantic & Pacific Ry. Co., 6 N. M. 496; Kane v. Northern Central Railway, 128 U. S. 94; 2 Bailey, Master & Servant, sec. 3073.

The court in its discretion may properly refuse to instruct as to the burden of proof. Chicopee Bank v. Philadelphia Bank, 8 Wall. 641; Reynolds v. Staab, 4 N. M. 603; Union Pacific Ry. v. Harris, 158 U. S. 331.

If here had been evidence upon which the refused instructions might have been based, no error could be predicated upon their refusal in view of the special findings by the jury. Emerson v. Metropolitan Life Co., 185 Mass. 318; Germaine v. Muskegon, 105 Mich. 213; Tesch v. Milwaukee Co., 108 Wis. 593; Hess v. Lucas, 122 Ia. 517.

Contributory negligence and assumption of risk. Emerson v. Metropolitan Life Co., 185 Mass. 318; Germaine v. Muskegon, 105 Mich. 213; Tesch v. Milwaukee Co., 108 Wis. 593; Hess v. Lucas, 122 Ia. 517; Choctaw, etc. Railroad Co. v. McDade, 191 U. S. 68; Crookston Lumber Co. v. Boutin, 149 Fed. 680.

It was for the jury to assess the damages. Vicksburg Co. v. Putnam, 118 U. S. 554; 4 Suth. Dam., 3 ed., secs. 1241, 1242, 1246, 1251; Chicago & Northwestern Co. v. De Clow, 124 Fed. 142; Chicago, etc., Co. v. Lindman, 149 Fed. 946; Union Pac. Ry. Co. v. Jones, 49 Fed. 346; Swenson v. Bender, 114 Fed. 1; Kliegel v. Atken, 94 Wis. 432.

Amount of damages awarded is not subject to review or revision by appellate court. Walker v. Southern Pacific Co., 165 U. S. 593; Railroad Co. v. Fralaff, 100 U. S. 31; Erie Railroad Co. v. Winter, 143 U. S. 75; Lincoln v. Power, 151 U. S. 437.

OPINION OF THE COURT

PARKER, J.—This is an action for damages for personal injuries. It appears that plaintiff below was a brewer engaged in brewing beer for defendant below. In the course of his duties he used a covered kettle or cooker in which the materials for the manufacture of beer were cooked under steam pressure. Several months prior to the action, plaintiff noticed a leak in the cooker and called defendant's attention to the same and requested that it be repaired. Defendant requested plaintiff to examine the cooker, which he did, and repaired the same with a patch. The cooker still leaking, plaintiff by order of defendant, removed the patch and applied white lead, after which the leak was stopped. This was about three or four weeks before the accident and at that time defendant's foreman, when his attention was called to the defect, stated to plaintiff that they had to brew a couple of times more until the new bottom was installed and instructed plaintiff to put on the other patch and to proceed with the use of the cooker. Afterwards another leak appeared and was, by common consent, repaired by the plaintiff in the same manner. The cooker still continuing to leak and plaintiff continuing to complain of its condition and defendant still urging plaintiff to continue to use the cooker, about the last of November or the first of December, 1905, a boiler maker was summoned and, in pursuance of his opinion as to the requirements in the way of repairs, a new bottom for the cooker was ordered. Plaintiff testified that the day of the accident, January 2d, 1906, he had another talk with the foreman and asked him "if that kettle ever get fixed and he answered me the same way back again—that it ought to have been fixed before; it generally takes two or three or four months before we ever get something done in this foundry." It appears from the testimony that plaintiff relied on the promise of repair and would not have remained in the service but for such promise. The jury found specially that the cooker, at the time of the accident, was not in such bad condition and state of repair that a man of ordinary care, prudence and precaution would have

refused to use the same, thus absolving plaintiff of contributory negligence in that regard. The jury found specially that defendant was guilty of negligence in failing to repair the cooker when required.

We have, then, a case of a defective appliance known to both master and servant; the defective appliance not so palpably dangerous from the defect as that an ordinarily prudent, careful and cautious man would refuse to use it; a promise of the master to repair and a request by the master to the servant to use the appliance until repaired; a reliance upon the promise of the master to repair by the servant; and injury to the servant by means of the defective appliance. Under such circumstances it is clear
1 that the master is liable. Sherman & Redfield on Neg., sec. 215; Hough v. R. R. Co., 100 U. S. 213; R. R. Co. v. Young, 49 Fed. 723; Gowen v. Harley, 56 Fed 973; Detroit Crude Oil Co. v. Grable, 94 Fed. 73; Chicago, etc., Co. v. Van Dam, 36 N. E. 1024; Breckenridge Co. v. Hicks, 22 S. W. 554; Lutz v. Ry. Co., 6 N. M. 496.

1. Defendant predicates its first contention upon an alleged conflict between the special findings of the jury of negligence on its part in failure to repair and the special finding that the appliance was not so palpably dangerous as to preclude its use by a reasonably prudent person, and the general verdict for plaintiff. It is perfectly apparent, however, that the contention is unsound and based upon an erroneous view of the law. During the running of the promise to repair a known defect the master's liability is a continuing one and the servant, relying upon the promise, may recover in case of accident resulting from the defect, although obvious, if the claim to damage is otherwise well founded. If the performance of the promise to repair is unreasonably delayed the servant may, under some circumstances, be held to have assumed the risk of the employment, and if the defect renders the service so imminently dangerous that no prudent person would continue in it, the servant is guilty of contributory negligence or has assumed the risk and cannot recover. Thus the master is liable,

during the running of his promise to repair a known defect, in all cases unless the servant, either by continuing the service an unreasonable length of time or by the use of the appliance when in an imminently dangerous condition has by his own conduct released the master.

2. The second contention of defendant is that the court refused certain instructions offered. They were based upon the proposition that the master's liability is limited to the injuries caused by the particular defect covered by the promise to repair and were, no doubt, sound, if applicable. But they presented a proposition having no application to this case. As before seen, the defect covered by the promise was a defective bottom for the cooker and it was not confined to any particular crack or defect therein. The proofs show that the injury was caused by the defective bottom of the cooker. There was, therefore, no error in the refusal of the instruction.

3. Defendant complains of the refusal of the court to give requested instructions that the burden of proof was on the plaintiff to show himself incompetent at the time he executed a release of his cause of action to the defendant. We fail to understand how such complaint could be made here in view of the tenth and eleventh instructions of the court, which fully and correctly explain the nature of the mental disability necessary to be present in order to avoid its release; and direct them that the burden was on the plaintiff to establish such disability.

4. Defendant complains of the refusal of the court to give requested instructions on the subject of contributory negligence of a servant in using an appliance of an eminently dangerous character. The action of the court was correct in this regard. The contributory negligence of plaintiff pleaded and relied on by defendant was the alleged negligent method of the use of the appliance and had no reference to the subject covered by the requested instruction.

5. The defendant complains of the court's instruction as to the measure of damages and of its refusal to give requested instructions on that subject. It appears that from the time of the action down and to about two months

before the trial, [when the plaintiff voluntarily left the employ of defendant], defendant paid him the same amounts per month as he had formerly received and even slightly increased the same during part of the time. Defendant presented an instruction expressly excluding from the jury any consideration of loss of wages prior to the trial which, of course, if no other consideration intervened, would be correct. But it appears from a release of his cause of action by plaintiff to defendant, which defendant pleaded and relied upon, that the wages paid him during the time he was actually incapacitated from any labor were paid as a part of the consideration for said release and not as wages. It thus appears that there was loss of time to be compensated by defendant to plaintiff and the instruction given by the court of its own motion, which permitted compensation for loss of time prior to the trial was correct. Counsel for defendant seek to put upon the instruction given by the court a construction which we do not think it will bear and which is to the effect that it authorized the jury to award to the plaintiff damages for loss of time at a rate of wages or compensation different or greater than the plaintiff's earning capacity was shown by the evidence to be. An examination of the instruction, however, shows that the same taken in connection with the evidence, will not bear such a construction.

6. Defendant complains that the verdict is excessive. The jury awarded seven thousand five hundred dollars ($7,500.00) less nine hundred ten dollars and thirty cents ($910.30) which had been paid by defendant for medical and hospital fees and expenses and monthly allowances during the time plaintiff was wholly incapacitated.

Plaintiff was scalded by the boiling contents of the cooker. He exhibited his hands to the jury and testified that he could no longer work as formerly because his hands were stiff; that he could not take hold of anything and hold it tight; that his fingers were stiff and that when the weather changed they were in worse condition; that at times they felt paralyzed; that he suffered so much pain that he was unable to sleep at night. Defendant produced medical testimony to the effect that plaintiff was fully re-

stored and as capable as before the accident. The court submitted to the jury the question of damages for past and future loss of earning power and past and future pain and suffering. The jury found, as before stated. We are unable to say that the award was above the actual loss. The condition testified to was of such a character, if true, 4 as necessarily to be more or less permanent, and the jury alone were to choose between the testimony of the plaintiff and that of the physician who testified for the defendant.

There being no error in the record the judgment of the court below will be affirmed, and it is so ordered.

[No. 1235, January 6, 1910.]

TERRITORY OF NEW MEXICO, Appellee, v. ROBERT LESLIE, Sr., and ROBERT LESLIE, Jr., Appellants.

SYLLABUS.

1. Evidence sufficient to establish that a crime had been committed.

2. Circumstantial evidence is competent to prove conspiracy from the very nature of the case and the rule which admits this class of evidence applies equally in civil and criminal cases.

3. Where it is evident that there is but one company of that name, there is no material variance between the indictments and the proofs where the former state merely the name of the company and the latter the name of the company inclusive of the place of business.

4. Admission of evidence that hogs were eating beef at ranch of defendants, part of the res gestae in case charging larceny of cattle.

5. The jury, although they are the judges of the creditability of the witnesses who testify before them, have

no right arbitrarily to disbelieve the evidence of any witness, unless they believe that such witness has knowingly and wilfully sworn falsely as to some material fact at issue in the case, in which event they are at liberty to disregard the whole of any part of the evidence of such witness, except such parts thereof as are corroborated by other evidence or by facts and circumstances in evidence which they believe to be true.

6. As a general rule, objections and exceptions to charges given or to the failure to instruct as requested must be taken at once when the charge is given and before the jury retire, or they will not be considered on appeal or on a motion for a new trial. A general exception on the entire charge of the court is deemed to be insufficient. Exceptions must be specific.

Appeal from the District Court for Otero County before EDWARD A. MANN, Associate Justice. Affirmed.

GATEWOOD & GRAVES, and JAMES DERDEN, for Appellants.

Statute defining larceny of cattle. C. L. 1897, sec. 79.

No evidence to establish fact that crime was committed. 8 Enc. of Ev. 86; 1 Wharton Cr. Law, sec. 745; 1 McClain Criminal Law, secs. 612, 616; Will's Circumstantial Evidence 345, 351, 352; 3 Greenleaf on Evidence, sec. 30.

Instructions must be based upon the evidence. State v. De Wolf, 74 Pac. 1084, 1087; Yoder v. Reynolds, 72 Pac. 417, 419; Murray v. Ry. Co., 3 N. M. 580.

The fact of a conspiracy cannot be proved by declarations made nor acts committed after the alleged conspiracy was formed; the conspiracy must be clearly established before any evidence is admissible. 1 Greenleaf Evidence, sec. 111; 12 Cyc. 442, note 26 and authorities there cited; 14 Cent. Dig., Title "Crim. Law," sec. 1012; 12 Cyc. 444; U. S. v. McKee, 26 Fed. Cases No. 15,686; see charge of Judge Dillon at page 1109; Ormsby v. People, 53 N. Y. 472.

The court should instruct the jury as to the law in clear and concise language and should not refer the jury to the indictment to ascertain the elements of the crime. Territory v. Baca, 11 N. M. 559.

To convict a defendant of larceny when the name of the party owning the property is set out in the indictment, it is necessary to prove, that the parties named in the indictment and none other owned the property. 1 Bish. New Cr. Pr., Sec. 488 *et seq.*; Ter. v. Ortiz, 8 N. M. 220; Ter. v. Caldwell, 98 Pac. 167; C. L. 1897, sec. 67; 1 Thomp. Com. on Corp., sec. 284; 21 A. & E. Enc. of Law 313.

Evidence must be confined to the issues in the case. 3 Rice on Evidence, secs. 39, 153; 1 Bishop New Crim. Proc., secs. 1120, 1124; People v. Sharp, 107 N. Y. 427; Territory v. Livingston, 13 N. M. 318; State v. Myers, 52 Am. Rep. 389, 82 Mo. 558.

The jury are the sole and exclusive judges of the credibility of the witnesses, the weight of the evidence and the facts proved. 3 Ency. of Evidence 753, 754; Heldt v. State, 20 Neb. 492; 30 N. W., 626; Ter. v. Lucero, 8 N. M. 543, at p. 549; Ayers v. Chisum, 3 N. M. 59, at p. 60; Ter. v. Faulkner, 6 N. M. 464; Ter. v. Edie, 6 N. M. 555, at p. 565; Tracy v. Town of Phelps, 22 Fed. 634; Joy v. Diefendorf, 130 N. Y. 6.

FRANK W. CLANCY, Attorney General, for Appellee.

Sufficient evidence to establish that a crime was committed. State v. Cardelli, 19 Nev. 319, 327; State v. Wilson, 76 N. C. 120.

The combination and agreement of the party to commit a felony can be proved by circumstances connected with the transaction which is the subject of the accusation. State v. Sterling, 34 Iowa, 446-7; Bloomer v. State, 48 Md. 330-1; Jones v. Baker, 7 Cow. 449; Mussel Slough Case, 6 Saw. 618; Martin v. State, 89 Ala. 117; People v. Arnold, 46 Mich. 277; U. S. v. Nunnemacher, 7 Biss. 122; U. S. v. Goldberg, 7 Biss. 181.

Proper exception not being taken in the court below the objection by the appellants is not before the court.

Territory v. Watson, 12 N. M. 422; Territory v. Meredith, 91 Pac. 732; Territory v. Yarberry, 2 N. M. 454; C. L. 1897, sec. 3139; Laws of 1907, ch. 57, secs. 37, 46.

The jury, although they are the judges of the credibility of the witnesses, have no right arbitrarily to disbelieve the testimony, unless where such witnesses have wilfully and knowingly sworn falsely to material facts in the case. Evans v. George, 80 Ill. 53; Mitchell v. Brewster, 28 Ill. 163; Crawford v. The State, 44 Ala. 385, 386; Jones v. State, 48 Ga. 164; Johnson v. State, 9 Tex. App. 558, 559; Owens v. State, 63 Miss. 452.

OPINION OF THE COURT.

MILLS, C. J.—The defendants in this case together with one Elisha Leslie, were jointly indicted in the District Court of Lincoln County, charged with having committed the statutory crime of the larceny of six head of cattle of the property of El Capitan Land and Cattle Company of New Mexico. The defendants took a change of venue to the County of Otero. The Territory *nolled* the indictment as to Elisha Leslie, and on the second trial of the case the jury returned a verdict of guilty against the appellants herein, who after a motion for a new trial had been overruled, were sentenced to serve a term of imprisonment in the territorial penitentiary at Santa Fe, and thereupon appealed to this court.

In their brief counsel for appellants argue eight alleged errors, which we will now consider.

We think there is ample evidence in the record before us to establish the fact that a crime had been committed. The indictment charges that the defendants
1 "did take, lead, drive away and kill," six head of neat cattle. The hides of these cattle were found on the Leslie ranch, the witness, Oswald, testifies to seeing them killed, and Robert Leslie, Sr., on page 181 of the transcript of record, admits that they killed certain cattle belonging to El Capitan Land and Cattle Company, claiming that they were authorized by the foreman of said company, one Pridemore, to kill certain cattle belonging to that company which were running wild in the mountains.

Pridemore denied that he gave them any such permission, which was one of the facts to be decided by the jury in arriving at their verdict. Further comment on this point seems to us to be unnecessary.

Appellants claim that the court committed error in submitting to the jury instruction No. 3, as to the law of conspiracy.

It has been decided by this court in the case of Territory v. Claypool, et al., 11 N. M. 568, that it is reversible error for a trial court to give an instruction as to conspiracy, unless there is evidence before the jury to warrant such instruction, and in the same case basing our opinion on Bishop's New Criminal Law, we have defined conspiracy to be "a confederating of two or more persons to accomplish some unlawful purpose, or a lawful purpose by some unlawful means." Bearing in mind the ruling of this court and the definition of conspiracy as above set out, we will proceed to examine the record to ascertain whether there is evidence which justified the court in giving this instruction.

The evidence discloses that the appellants together with Elisha Leslie, had on their ranch a slaughter house, to which they drove cattle and slaughtered them, and that they peddled the meat of the animals so slaughtered in the towns and placitas which were within reasonable distance, and a portion of the meat they fed to the hogs, of which they had a considerable number, confined in pens near their slaughter house. The transcript of record discloses that the defendants drove cattle to the slaughter house, some of which it is clearly proved belonged to El Capitan Land and Cattle Company, Robert Leslie, Sr., holding open the gate to the corral while the cattle were driven in; that from the corral they were driven into the slaughter house, where they were killed by shooting by one of the Leslie's, the others standing by and assisting. We are clearly of the opinion that this was "a confederating of two or more persons to accomplish some unlawful purpose," for the killing of cattle which did not belong to them, under section 79, Compiled Laws of 1897, is in this territory a felony, and, being a felony as both of

the appellants took part in it and assisted in gathering and driving the cattle up to and into the slaughter house, and then killing them, we think that the instruction complained of was very properly given. It does not take direct evidence to prove a conspiracy, but the same may be proved by circumstantial evidence and by facts and circumstances in evidence. "Circumstantial evidence is
2 competent to prove conspiracy from the very nature of the case and the rule which admits this class of evidence applies equally in civil and criminal cases." 8 Cyc. 677.

Another alleged error relied upon by the appellants is that the court committed error in admitting the certificate of brand introduced by the Territory, in that the same showed a variance between the name set out in the indictment as the owner of the cattle, to-wit, El Capitan Land and Cattle Company of New Mexico, while the certificate of brand introduced in evidence was that of El Capitan Land and Cattle Company of Richardson, County of Lincoln, Territory of New Mexico.

It is true that there is a discrepancy in the name of the company set up in the indictment as being the owner of the cattle and that mentioned in the certificate of brand, in that the certificate has in it the words "Of Richardson, County of Lincoln, and Territory" which words are not in the indictment. There is no evidence before the court of there being any other corporation in New Mexico named El Capitan Land and Cattle Company, than the one which owned the cattle involved in this case. It seems to us that in any event the words in the certificate which are not in the indictment are unnecessary and are surplusage, setting out as they obviously do the place of business of the company which claims the cattle branded in the Block brand. In the case at bar it is not pretended that the cattle alleged to have been unlawfully killed were not the property of the owner alleged in the indictment. The witnesses Littleton, Scott and Byfield identify what is known as the Block brand, as the brand run by El Capitan Land and Cattle Company, described the brand and declared that the certificate represented the manner in

which the cattle of that company were branded, and the half hides found at the Leslie ranch are described as having on them the Block brand as shown by the certificate of the Cattle Sanitary Board.

To reverse this case on the ground of a variance between the proofs offered in evidence and the certificate of the Sanitary Board, as set out above, would be extremely technical, and we would hesitate to do so. We are not, however, compelled to do it, as the defendants themselves identify the cattle as the property of El Capitan Land and Cattle Co. Robert Leslie, Sr., testifies that his son Elisha killed Block cattle at his ranch by authority of Tom Pridemore, general manager of the Block Cattle Company, which was El Capitan Land and Cattle Co., (Record, pp. 179-181), and the younger Leslie testifies that Block cattle were killed by himself and brother by authority of the same person. (Record pp. 251-2).

We cannot see any reversible error in the action of the court in having admitted the certificate of the secretary of the Cattle Sanitary Board in evidence. It is evident that there was but one El Capitan Land and Cattle Co., and the certificate of the brand of the secretary of the Cattle Sanitary Board which contained the place of the busi-
3 ness of the company, is not such a material variance between the indictments and the proofs, as would justify us in reversing this case.

We can see no error in admitting evidence as to hogs eating beef at the Leslie ranch.

The contention of the appellants is that the admission of this evidence had no tendency to show that the defendants were guilty of killing the cattle described in the indictment. If this was all of the evidence in the case we think that the appellants would be correct in their claim, but it was not. The witnesses only testified to this as a part of what they saw at the Leslie ranch. Testimony was given that many quarters of beef were piled up in the slaughter house, that many cattle were slaughtered, that beef was piled into a wagon and hauled off; that the half hides with the Block brand were found. The descrip-

tion of the hogs eating beef which was thrown to them in their pens was but a portion of what the witnesses
4 saw, and was very properly admitted in evidence as a part of the *res gestae*.

Appellants claim that the court committed error in giving a part of instruction No. 12. The portion of the instruction to which they object reads as follows, to-wit: "Yet you have no right to reject the testimony of any witness without good reason and should not so do until you find it irreconcilable with other testimony which you find to be true."

The attorney general does not attempt to sustain the whole of that part of this instruction which is set out above, but he does contend that that portion of it is good which sets out that the jury "have no right to reject the testimony of any witness without good reason." We do not think that any valid reason can be given to dispute this claim of the attorney general. But the latter part of the instruction complained of, which sets out that the jury should not reject the testimony of any witness until they find it irreconcilable with other testimony which they find to be true, is in our opinion not a correct statement of the law. The rule is that the jury, although they are the judges of the credibility of the witnesses who testify
5 before them, have no right to arbitrarily disbelieve the evidence of any witness, unless they believe that such witness has knowingly and wilfully sworn falsely as to some material fact at issue in the case, in which event they are at liberty to disregard the whole or any part of the evidence of such witness, except such parts thereof as are corroborated by other evidence or by facts and circumstances in evidence which they believe to be true. In the case at bar, however, we do not believe that the instruction as given worked harm to either the appellants or the territory. We will not, however, pass upon whether the giving of this instruction is reversible error, for it is a well settled rule of law that if an instruction in a criminal case is thought by a defendant to be incorrect, objection must be taken to it at the time it is given, and the court asked to give the instruction which counsel for defend-

ant believes to be correct, and if the court does not correct the instruction an exception is taken, and it will then be considered on appeal. It is held to be the law in states where the rule prevails, as in this territory, that it is the duty of the court in criminal trials to instruct the jury upon all questions of law arising in the case which are necessary for their information, that if the defendant does not at the proper time call the court's attention to the omission in the charge, he must be regarded as having waived the same and will not be heard to complain, and as a general rule, objections and exceptions to charges given **6** or to the failure to instruct as requested must be taken at once when the charge is given and before the jury retire, they will not be considered on appeal or on a motion for a new trial unless this rule is complied with. A long list of authorities holding this to be the law are given in 12 Cyc. 666-667. Exceptions to the charge of the court must be specific. A general exception to the entire charge of the court is deemed to be insufficient. They should be specific, 12 Cyc. 668, and in the civil case of Beall v. Territory, 1 N. M. 507, this court held exceptions to instructions must be specific or the instructions will not be reviewed, and if excepted to as a whole, all must be affirmed if one is found correct. Appellants do not contend that all of the instructions given in this case were bad, nor indeed that all of instruction 12 is bad. The case is thus within the rule in the Beall case, which has been followed in Territory v. Alarid, decided at the last term and has the sanction of the federal Supreme Court. Cooper v. Schlesinger, 111 U. S. 148.

An examination of the record in this case discloses that no specific exceptions were taken to the charge of the court, nor was any error complained of asked to be corrected. At the end of the instruction 12 given by the court appear the words "Exceptions, Wharton and Lawson, attorneys for defendants." In view of the large number of cases cited in 12 Cyc. 668, note 14, and the decisions of this court, and the express law of the Territory, section 37 of chapter 57, of the Laws of 1907, we will not further consider the alleged error of the court in giving that

part of instruction No. 12, which is complained of. Exceptions to instructions were not intended to give loop holes for defendants who are guilty to escape punishment, but were designed to enable counsel to point out possible errors made by the trial courts, so that they might be corrected, and a just and proper verdict returned by the jury. Exceptions taken generally to the instructions of the court, as in the case at bar, point out nothing to and do not assist the court in correctly instructing the jury, but instead, if permitted, are a bar to the administration of justice, and reversals which rest upon such grounds tend to bring the administration of justice into disrepute.

We have carefully examined the other alleged errors, and see nothing in them to warrant the further attention of this court. The instructions asked for which were not given, are covered by those given by the court. The case seems to have been fairly tried and properly decided by the jury, and as there does not appear to be any reversible error in the case, the same is therefore affirmed, and it is so ordered.

[No. 1249, January 6, 1910.]

JOSEPH C. BALDRIDGE, Appellee, v. A. L. MORGAN, ANDRES ROMERO and MELITON CHAVEZ, Appellants.

SYLLABUS.

1. The clause in Section 2221, Compiled Laws of 1897, requiring a sub-contractor to file his claim of lien "within sixty days after the completion of any building, etc.," fixes a time after which such lien is not to be filed or in other words that the time for filing does not commence to run from or await the completion of the building.

2. The New Mexico Mechanics Lien Law, Sections 2216, et seq., Compiled Laws of 1897, is constitutional.

3. It is not within the competency of any court to question an act of a legislature on the ground that it is unrea-

sonable, unjust, unequal or oppressive, as long as the act is within the limitations fixed by the fundamental law of the state or territory.

4. Allowance of attorney's fee not an abuse of judicial discretion under the facts stated.

Appeal from the District Court for Bernalillo County before IRA A. ABBOTT, Associate Justice. Affirmed.

NEILL B. FIELD for Appellant.

This claim of lien was prematurely filed and was therefore void. Genest v. Building Association, 11 N. M. 251; Phillips on Mechanic's Liens, sec. 323 a; Boisot on Mechanic's Liens, sec. 470; Jones on Liens, sec. 1430; Fire Extinguisher Co. v. Chaplin, 183 Mass. 375; Catlin v. Douglas, 33 Fed. 569; Foushee v. Grugsbee, 12 Bush. (Ky.) 75; Taber-Pierce Co. v. International Co., 75 Pac., Colo., 150; Withrow Lumber Co. v. Glassgow Inv. Co., 101 Fed. 867; Davis v. Alvord, 94 U. S. 545; Franklin St. Church v. Davis, 7 S. E., Va., 245; Higley v. Ringle, 57 Kans. 222, 45 Pac. 619; Roylance v. San Louis Hotel Co., 74 Cal. 273, 20 Pac. 573; Davis v. MacDonough, 109 Cal. 547, 42 Pac. 450; Marchant v. Hayes, 120 Cal. 137, 52 Pac. 154; Phoenix Iron Co. v. Richmond, 6 Mackey, D. C. 180; Baker v. Lakeland Canal, 94 Pac. Cal. 773.

The Mechanics Lien Statute of New Mexico, Sections 2216 et seq., Compiled Laws of 1897, is unconstitutional. Hobbs v. Spiegelberg, 3 N. M. 357; Ruppe v. New Mexico Lumber Association, 3 N. M. 393; Straus v. Finane & Elston, 3 N. M. 399; Finane & Elston v. Las Vegas Hotel & Improvement Co., 3 N. M. 411; Railway Co. v. Orman, 3 N. M. 612; Railway Co. v. Orman, 3 N. M. 652; Newcomb v. White, 5 N. M. 435; Minor v. Marshall, 6 N. M. 194; Bucher v. Thompson, 7 N. M. 115; Mountain Electric Co. v. Miles, 7 N. M. 317; Ford v. Springer Land Association, 8 N. M. 37; Mountain Electric Co. v. Miles, 9 N. M. 512; Armijo v. Mountain Electric Co., 11 N. M. 235; Genert v. Las Vegas Masonic Building Association,

11 N. M. 251; Post v. Fleming, 10 N. M. 476; Johnson v. McClure, 10 N. M. 506; Pearce v. Albright, 12 N. M. 202; Jones v. Great Southern Fire Proof Hotel Co., 79 Fed. 477; Same case, 86 Fed. 370; Same case, 193 U. S. 532 and cases cited.

The statute is in conflict with the grant of legislative power contained in the Organic Act. Brenninger v. Belvidere, 44 N. J. L. 350; National Bank v. Yankton, 101 U. S. 133; Linford v. Ellison, 155 U. S. 506; Great Southern Hotel Co. v. Jones, 193 U. S. 532.

No attorney's fee should have been allowed. Builders Supply Depot v. O'Connor, 150 Cal. 265; Gulf Railway Co. v. Ellis, 165 U. S. 150.

E. L. MEDLER for Appellee.

The lien of the plaintiff did not depend upon and was not suspended until the completion of the building. Quale v. Moon, 48 Cal. 478; Hunter et al, v. Truckee Lodge, 14 Nev. 24; Cal. Stats., 1867-1868, 589; Skyrme v. Occidental Co., 8 Nev. 239; Phillips on Mechanic's Liens, sec. 330, p. 465; Hart v. Mullen, 4 Colorado 514; McDonald v. Hovey, 110 U. S. 619, 28 L. 272 and note in Rose's notes; Pennock v. Dialogue, 2 Pet. 18; People v. Ritchie, 12 Utah 193, 42 Pac. 212; Perea v. Colo. Nat. Bk., 6 N. M. 1; Lutz v. A. & P. Ry. Co., 6 N. M. 500; Davis v. Alvord, 94 U. S. 545, 24 L. 283; Flagstaff Silver Min. Co. v. Cullins, 104 U. S. 176, 26 L. 704; Davis v. Miller, 130 U. S. 284, 43 L. 932; Levert v. Read, 54 Ala. 529; French v. Powell, 1902, 68 Pac. 92; R. R. Co. v. Eubanks, 32 Mo. App. 184; Sanborn v. Insurance Co., 16 Gray 448; Atherton v. Corloss, 101 Mass. 40; Young v. The Orpheus, 119 Mass. 179; French v. Powers, 68 Pac., Cal. 94; Mass. St., 1855, c. 231, No. 2; Carey-Lambard Lum. Co. v. Fullenweider, 37 N. E. Rep. 899, 150 Ill. 629; Merchant & Traders Nat. Bank v. City of New York, 97 N. Y. 355, 361; Davis v. Bullard, 32 Kans. 234, 4 Pac. 75; Shaw v. Stewart, 23 Pac. 616; Catlin v. Douglass, U. S. Cir. Ct., Kan., 33 Fed. Rep. 569; Trummell v. Mount, Tex., A. S. W. Rep. 377; Henderson v.

Sturgis, 1 Daly 336; Jones on Liens, vol. 2, sec. 1438; Lumber Co. v. Savings Bank, 34 Pac. Rep. 1045; Main St. Hotel Co. v. Horton Hardware Co., 43 Pac., Kan., Rep. 769; Schwartz v. Knight, 74 Cal. 432, 16 Pac. 235; Catlin v. Douglass, 33 Fed. Rep. 569; 20 A. & E. Enc. of Law, 2 ed., 378; Basham v. Toors, 51 Ark. 309; Taber, Pierce Co. v. International Co., 75 Pac., Colo. 150; Willamette Steam Mills Co. v. Kremer, 29 Pac. 629; Roylance v. Hotel Co., 20 Pac. 575, 629; Genest v. Building Association, 11 N. M. 251; Hobbs v. Spiegelberg, 3 N. M. 357; Ruppe v. New Mexico Lumber Association, 3 N. M. 393; Mountain Electric Co. v. Miles, 9 N. M. 512; C. L. 1897, sec. 2221.

The New Mexico Mechanic's Lien Law is constitutional. Hotel Company v. Jones, 193 U. S. 532, 48 Law ed. 778; Note 4, A. & E. Ann. Cases 620.

The legislature of a territory has all legislative powers except as limited by the constitution of the United States, and the Organic Act and the laws of Congress appertaining thereto. Walker v. New Mexico, etc., R. R., 165 U. S. 604, 41 Law ed. 837; Wilkerson v. Utah, 99 U. S. 130, 25 Law ed. 345; Snow v. United States, 18 Wall. 320, 21 Law ed. 784; Rogers v. Burlington, 3 Wall. 441, 20 Law ed. 79; Sparrow v. Strong, 3 Wall. 104; 18 Law ed. 49; Clinton v. Englebrecht, 13 Wall. 320, 21 Law ed. 659; Hornbuckle v. Toombs, 18 Wall. 655, 21 Law ed. 966; Hotel Co. v. Jones, 193 U. S. 532, 48 Law ed. 778.

A reasonable attorney's fee in the district and supreme courts may be allowed as part of the costs. Genest v. Building Association, 11 N. M. 272; Pearce v. Albright, 76 Pac. 286; Pacific Mutual Life Ins. Co. v. Fisher, 106 Cal. 224, 39 Pac. 758; Watson v. Sutro, 103 Cal. 167, 37 Pacific 201.

OPINION OF THE COURT.

MECHEM, J.—The facts in this case are: That on the 27th day of May, 1905, the appellant contracted with one A. L. Morgan for the erection of a building on appellant's land by the terms of which contract Morgan was to build the building, furnish the necessary labor and materials for the sum of $10,000.00. The appellee on July

10, 1905, entered into an oral contract with Morgan to furnish lumber and building material for use in the construction of appellant's building and did furnish such materials, which were so used, to the amount of $4,290.53 on which appellee received the sum of $1,000.00 and no more. That the said material was furnished from time to time between July 10, 1905, and February 7, 1906. On March 27, 1906, appellee filed his notice and claim of lien in the office of the probate clerk of Bernalillo County and at that time Morgan had ceased work on the building for a period of about forty-five days. Thereafter appellant continued to work, completing the building about July 1, 1906. And it also appears instead of getting the building completed according to the original plans and specifications for $10,000.00 it cost appellant, about $20,000.00.

The court below allowed the appellee a lien for $3,251.36 with interest and costs, including costs for filing lien and $250.00 as an attorney's fees. From this decree the appellant appeals and seeks a reversal upon the following propositions:

1. That the claim of lien was prematurely filed and therefore void.

2. That our mechanics lien statute is unconstitutional.

3. That the mechanic's lien statute is in conflict with the grant of legislative power contained in the Organic Act, and

4. That no attorney's fees should have been allowed.

It is an admitted fact as shown by the record that the notice and claim of lien was filed March 27, 1906, and that the building was not completed until about July 1, of the same year. Our statute fixing the time for filing a lien is as follows:

"Every original contractor, within ninety days after the completion of his contract, and every person save the original contractor, claiming the benefit of this act, must within sixty days after the completion of any building, file for record with the county recorder of the county in which said property or some part thereof is situated, a

claim containing a statement of his demands, etc." Compiled Laws 1897, sec. 2221.

In his brief the able counsel for the appellant says that he finds "this court committed to the proposition that a substantial completion of the building is requisite before a lien can be filed." Citing Genest v. Building Assn., 11 N. M. 251, 67 Pac. 743.

We cannot agree with this statement for we are of the opinion that the only question decided in that case was that a substantial completion was a completion within the terms of the statute and that the court neither in express terms or by implication held that a completion of the building was a requisite to the filing of a lien. That question was not before the court in that case.

Here the question is squarely presented to us whether the legislature fixed a period of time during which a lien of a sub-contractor must be filed or did it fix a point of time after which such a lien could not be filed.

In the case of Davies v. Miller, 9 Sup. Ct. 560, 130 U. S. 284, 32 L. ed. 932, the court says:

"The clause requiring the importer to give such notice" within ten days after the ascertainment and liquidation of the duties "must therefore, according to the fair and reasonable interpretation of the words as applied to the subject matter, be held to fix only the terminus *ad quem,* the limit beyond which the notice shall not be given, and not to fix the final ascertainment and liquidation of the duties as the terminus *a quo,* or the first point of time at which the notice may be given."

To hold that the completion of a building was a requisite to the filing of a lien by a sub-contractor would not be a fair and reasonable interpretation of the words "within sixty days after the completion of any building, etc.," as applied to the subject matter. When the sub-contractor has performed labor or furnished materials his contract is executed. The building might be years in construction or it might never be completed, and when by force of the statute a privity of contract exist between the owner and a sub-contractor without reference to the original contractor there is no good reason, nor is it just that the

sub-contractor should be compelled to wait upon the happening of an event which neither fixes nor affects his rights, and which he cannot control. Hobbs v. Spiegelberg, 3 N. M. 357, 5 Pac. 529.

We therefore hold that the clause that requires a sub-contractor to file his claim of lien "within sixty days after the completion of any building, etc.," fixes a time after which such lien is not to be filed and does not fix a period of time during which it must be filed or in other
1 words that the time for filing does not commence to run from or await the completion of the building. Hunter et al, v. Truckee, Lodge, 14 Nev. 24.

Our attention has been called to numerous cases, especially from California and Kansas, where a different rule has been announced but it is to be observed that the statutes under consideration there gave the sub-contractor a lien solely by way of subrogation to the rights of the original contractor, while under our statute the sub-contractor has a direct lien. Hobbs v. Spiegelberg, 3 N. M. 357, 5 Pac. 529.

2. That because our mechanic's lien statute permits liens to be asserted in excess of the contract price of the building or other improvements, the appellant contends that it is a restraint on the liberty of contract and it is a taking of property without due process of law.

Since its adoption in 1880, different phases of this act have been the subject of many cases in this court, but never before has its validity been questioned.

However, in a number of states the constitutionality of statutes permitting liens in excess of the contract price agreed upon between owner and original contractor, have been upheld. Bowen, et al., v. Phinney, 162 Mass. 593, 39 N. E. 283, 44 Am. St. Rep. 39; Laird v. Noonan, 32 Minn. 358, 20 N. W. 354; Cole Mfg. Co. v. Falls, 90 Tenn. 466, 16 S. W. 1045; Mallory v. La Crosse Abattoir Co., 80 Wis. 170; 49 Wis. 1071.

In Great Southern Fire Proof Hotel Co. v. Jones, 193 U. S. 532, the constitutionality of the Ohio mechanic's lien law was before the court and upheld, but the counsel for the appellant seeks to distinguish that case in this, that

the Ohio statute contained an express proviso that the aggregate of all liens should not exceed the contract price and suggests that had the Ohio statute contained no provisions limiting the amount of liens which might be created and no provision whereby the owner could have protected himself against such, the court would have reached a different conclusion.

If it is admitted that a court in citing decided cases in support of its conclusions, necessarily adopts the prior decision as good law and as fixing the rule, then the case above cited constitutes an authority contrary to the contention of the appellant, for the court there cited the cases of Bowen v. Phinney; Mallory v. La Crosse; Laird v. Noonan; Cole Mfg. Co. v. Falls, *supra,* as sustaining its decision, and further the court adopted the opinion of Judge Lurton in the same case, 86 Fed. 370, in which opinion the case of Laird v. Noonan, *supra,* on this very point was quoted at length and approvingly, and the cases above mentioned cited in support.

In view of these decisions and of the tacit approval of our own statute by the Supreme Court of the United States in Ford v. Springer Land Assn., 168 U. S.
2 513; we hold that the constitutionality of our mechanic's lien law is not an open question and is settled.

3. In his brief, counsel for the appellant says that the "use of the word rightful as qualifying the subjects of legislation committed to the territorial legislature presupposes power in the courts to determine whether the particular act in question is or is not within the grant of power." And further that "the exercise of such legislative power is always subject to challenge in the courts upon the ground that it is unreasonable, unjust, unequal or oppressive, unless Congress has expressly authorized the act in question."

"New Mexico is a territory, but in it the legislature has all legislative power except as limited by the constitution of the United States and the Organic Act and the laws of Congress appertaining thereto." Walker v. Southern Pacific Railroad, 165 U. S. 604, 41 L. ed. 837.

If the legislature of this territory has all legislative power subject to the limitation that it must be exercised within the limits of the constitution and not in contravention of any law of Congress and if the law here in question is constitutional and does not contravene any law of Congress it must be held to be valid, for it is not within the competency of any court to question an act of a
3 legislature on the ground that it is unreasonable, unjust, unequal or oppressive, as long as the act is within the limitations fixed by the fundamental law of the state or territory. Baca v. Perez, 8 N. M. 187.

4. Because the appellant was ignorant of the liability of Morgan to the appellee, he argues that he could not safely pay appellee's claim until it had been established in a court of justice and to make him pay an attorney's fee is not in accordance with the equity of the statute and constitutes an abuse of judicial discretion such as justifies a reversal of this case.

The statute provides that "The court may also allow, as part of the costs, the moneys paid for filing and recording the lien and reasonable attorney's fees in the district and supreme courts."

Do the peculiar facts of this case constitute an exception in the appellant's favor? Are they not rather such facts as might exist and have existed and will continue to exist in most any other case of a mechanic's lien foreclosure? It is not denied that the appellee furnished materials that went to improve appellant's property of the reasonable market value of the amount allowed him by the decree and that at the date of the decree in this case he had been out of his money for over two years. The
4 appellant has no reason to complain of the allowance of an attorney's fee.

For the reasons given the judgment of the court below is affirmed.

[No. 1252, January 6, 1910.]

N. NASH, Appellee, v. A. L. MORGAN, et al., Appellants.

Appeal from District Court for Bernalillo County. Affirmed.

MARRON & WOOD for Appellee.

NEILL B. FIELD for Appellant.

OPINION OF THE COURT.

MECHEM, J.—It was agreed that this case and No. 1249 (Joseph C. Baldridge v. A. L. Morgan, et al.), involving similar facts and the same legal questions should be considered on the briefs filed in the foregoing case, and that the opinion rendered by the court should be decisive of each case. The briefs and opinion are on file in No. 1249.

The judgment of the District Court is affirmed.

[No. 1253, January 6, 1910.]

WILLIAM D. RADCLIFFE, Appellee, v. JOSE E. CHAVES, Adm., etc., Appellant.

SYLLABUS (BY THE COURT.)

1. Failure of the trial court to make special findings, as provided by C. L., Sec. 2999, is not a tenable assignment of error where no request for such findings was made and denied in the court below. Bank v. Baird, 13 N. M. 431, followed.

2. A motion to strike out the whole answer of a witness, where part of the answer is good, is properly denied.

3. In cases tried before the court it will be presumed that the court ultimately disregarded inadmissible testimony and the erroneous admission of testimony will afford no ground of error unless it is apparent that the court considered such testimony in deciding the case.

4. Under C. L., Sec. 3031, requiring, as a prerequisite

to receiving books of account, proof by customers that the party usually kept correct books, it is sufficient if it be shown by customers that during a period of years they had always found their accounts as tendered correct, coupled with testimony that such accounts were taken from the books in question, it not being essential that such customers shall have actually examined such books and compared their accounts with them.

5. Under C. L., Sec. 3031, admitting books of account where the party kept no clerk, the fact that a physician's wife from time to time made entries in such books from his dictation did not constitute her a clerk so as to render the books inadmissible.

6. The word "clerk" as used in the statute implies more than a mere amanuensis. It means one having knowledge of the business so as to be able of his own knowledge to testify as to it.

7. Books of account shown to conform to the requirements of C. L., Sec. 3031, are admissible and when so admitted in a suit against an administrator may constitute "other material evidence" corroborating the claimant as required by C. L., Sec. 3021.

8. Under C. L., Sec. 2550, interest runs on an open account against the estate of a deceased person, beginning six months after the date of the last item.

Appeal from the District Court for Valencia County before IRA A. ABBOTT, Associate Justice. Affirmed.

FRANK W. CLANCY for Appellant.

Plaintiff has no right to obtain a decision "on his own evidence in respect of any matter occurring before the death of the deceased person, unless such evidence is corroborated by some other material evidence." C. L. 1897, secs. 3021, 2999; Gildersleeve v. Atkinson, 6 N. M. 260; 2 Bouvier's Law Dic. 167, Materiality; Maddox v. Sullivan, 2 Rich. Eq. 6; State v. Raymond, 20 Iowa 582; Best on Evidence, sec. 609; Greenleaf on Evidence,

sec. 257, note; State v. Buckley, 22 Pac. 838; Byerts v. Robinson, 9 N. M. 427, 430, 433, 434; Commonwealth v. Holmes, 127 Mass. 424, 444; People v. Ames, 39 Cal. 404; State v. Raymond, 20 Ia. 587; Iowa Code, sec. 2998; State v. Willis, 9 Ia. 583; Goltra v. Penland, 77 Pac. 133; Regina v. Parker, 1 C. & M. 639-644; Williams v. Comm., 91 Penn. 501, 502; Pulsifer v. Crowell, 63 Me. 24; State v. Kingsley, 39 Iowa 440; State v. Lenihan, 88 Iowa 673; Cunningham v. State, 73 Ala. 51; Cooper v. State, 90 Ala. 641, 8 So. 821; Railway Co. v. Strickland, 116 Ga. 439; State v. Gilliam, 66 S. C. 419; Ellicott v. Pearl, 10 Pet. 439.

To make books of account admissible in evidence, they must be brought within the terms of the statute. C. L. 1897, sec. 3031; Price v. Garland, 3 N. M. 513.

FELIX H. LESTER for Appellee.

A general finding of facts by the court, where a jury is waived, is sufficient upon which to base a judgment, and the court is not bound to make special findings in the absence of a request therefor. C. L. sec. 2999; Lund v. Ozanne, 13 N. 293; Ford v. Springer Land Association, 8 N. M. 59; Territory v. Watson, 78 Pac. N. M. 504; Bank of Commerce v. Baird Mining Co., 13 N. M. 431; Kilbourn v. Anderson, 77 Ia. 503, 42 N. W. 431.

The evidence of plaintiff was sufficiently corroborated by other material evidence to support the judgment. St. John v. Lofland, 5 N. D. 140, 64 N. W. 930; Wigmore on Evidence, secs. 578, 2065; Garnett, L. R. 31, ch. D. 1, 9; Roche v. Ware, 71 Cal. 375, 12 Pac. 284; Whitney v. Whitney, 82 Cal. 163, 22 Pac. 1138; Bushnell v. Simpson, 119 Cal. 658, 51 Pac. 1080; Nicholas v. Haynes, 78 Pac. 174; St. Paul Fire & Marine Ins. Co. v. Gotthelf, 35 Neb. 351, 53 N. W. 137; Waldon v. Evans, 1 Dakota 11, 46 N. W. 607; Charles v. Bishoff, 1 Atl. 572; State v. Schlagel, 19 Iowa 169; State v. Allen, 10 N. W. 807; People v. Plath, 100 N. Y. 593, 3 N. E. Rep. 790; People v. Ogle, 11 N. E. 54; Todd v. Martin, 37 Pac. 873; Succession of Piffet, 37 La. Ann. 871.

Findings of a trial court are equivalent to a verdict

of a jury. Candelaria v. Miera, 13 N. M. 360 and cases cited.

Applications for leave to amend are addressed to the sound discretion of the trial court and the action of the court in refusing or permitting an amendment is not reviewable on appeal. Puritan Mfg. Co. v. Toti & Gradi, 94 Pac. 1022; Sanchez v. Candelaria, 5 N. M. 400; Gildersleeve v. Atkinson, 6 N. M. 263; Adams v. Adams, 21 Vt. 162; Holmes v. Holmes, 26 Vt. 536; Francis v. Lathrope, 2 Tyler 372; Manghan v. Burns' Estate, 23 Atlantic 584; Carson v. Waller, 78 S. W. 657; Cutler v. Ellis' Estate, 30 Atlantic 688; McCall v. Lee, 11 N. E. 522; Brown v. Brown, 28 Atlantic 666; Kilpatrick v. Helston, 25 Ill. App. 127.

Admission of evidence under C. L. 1897, sec. 3031. Wigmore on Evidence, secs. 1520, 1560; Lewis Suth. Stat. Con., secs. 267, 487; Jones on Evidence, sec. 582; 1 Greenleaf on Evidence, 12 ed., 1866, secs. 117 et seq.; McKenzie v. King, 3 Pac. 705; Taylor v. Tucker, 1 Ga. 231; Smith v. Smith, 163 N. Y. 168, 52 L. R. A. 545; Jackson v. Evans, 8 Mich. 476; Seven Day Adventist Pub. Co. v. Fisher, 95 Mich. 274, 54 N. W. 759; Cohn v. Salinus, 2 Tex. App. 615; Kilbourn v. Anderson, 77 Ia. 501, 42 N. W. 431; Montague v. Dugann, 68 Mich. 98; Lester v. Thompson, 91 Mich. 250; Blumhardt v. Rohr, 70 Md. 328, 17 Atl. 266; Lynch v. Grayson, 5 N. M. 508; Coleman v. Bell, 4 N. M. 21, 27, 12 Pac. 657; Lamy v. Catron, 5 N. M. 373, 380, 23 Pac. 773; Coler v. Board of County Commissioners, 6 N. M. 88, 115, 27 Pac. 619; Pearce v. Strickler, 9 N. M. 467, 471, 54 Pac. 748; McKenzie v. King, 93 Pac., N. M. 705; Bushnell v. Simpson, 51 Pac. 1081; Seven Day Adventist Pub. Co. v. Fisher, 95 Mich. 274; Brown v. Wrightman, 62 Mich. 557; Levine v. Lancashire Ins. Co., 66 Minn. 138, 68 N. W. 855; Alling v. Brazel, 27 Ill. App. 595; Oliver v. Phelps, 20 N. J. L. 180, 21 N. J. L. 597; District of Columbia v. Woodbury, 136 U. S. 450, 10 Sup. Ct. Rep. 990; Frisk v. Reigelman, 43 N. W. Rep., Wis. 1119; White v. White, 23 Pac. Rep. 284; Hathaway v. Bank, 134 U. S. 494, 10 Sup. Ct. Rep. 608; Zans v. Stover, 2 N. M. 29; Kundinger v. Railway

Co., 51 Mich. 185, 16 N. W. Rep. 330; Arthurs v. Hart, 17 How. 12; Taylor v. Tucker, 1 Ga. 231; Boyer v. Sweet, 4 Ill. 120; Patrick v. Jack, 82 Ill. 81; Atwood v. Barney, 8 Hun. 1, 29 N. Y. Sup. 810; Stroud v. Tilton, 3 Keyes, 139; Pearce v. Strickler, 9 N. M. 467.

The facts are stated in the opinion.

OPINION OF THE COURT.

POPE, J.—The appellee Radcliffe filed an itemized claim in the probate court of Valencia County against the estate of one Chaves, deceased, for services as physician from April 2, 1904, to April 10, 1905, the account aggregating $1,410.00. The Probate Court allowed $472.00. Upon appeal to the District Court by Dr. Radcliffe the cause was tried before the court and a judgment rendered for $1,047.35. From that judgment an appeal is prosecuted to this court by the administrator.

The assignments of error are numerous but most of them may be briefly disposed of.

It is urged that the court erred in failing to make findings of fact and conclusions of law as provided by section 2999, C. L. We have recently held, however, in Bank of Commerce v. Baird Mining Company, 13 N. M. 431, that such failure is not available as error where such findings are not specially requested, nor the omission
1 to make them called to the attention of the court by some appropriate motion. In the present case no such request was made and the administrator must be assumed therefore to have acquiesced in the sufficiency of the general finding embodied in the judgment. We entertain no doubt that had the omission been called to the attention of the trial judge he would have made findings. We do not, however, consider it sound practice that complaint of such omission should be made in the first instance in this court, necessitating a remanding of the case when this could have been obviated by timely application in the court below.

It is said that the court erred in refusing to strike out the answer of the witness Emma Radcliffe who in re-

sponse to a question as to what she knew as to Dr. Radcliffe's having attended the deceased said: "Why, I know of his earning the fee and seeing the buggy stop at the house which I could see from our house; also making a charge on the books." At least so much of the answer as refers to the doctor's buggy stopping at the house of deceased was competent evidence as corroborative of the claim that he visited deceased professionally. A motion directed
2 against a whole answer, part of which is good, is properly overruled.

A like observation applies to an answer of the witness Wittwer, given in response to the question as to whether he knew of his own knowledge of Dr. Radcliffe's refusing to leave during the last month of the illness of deceased, to which he replied: "Yes, sir; I could not give any specified date, but I know Dr. Radcliffe told me personally that he could not leave and also specified that it was on account of Felipe Chavez." Upon objection to the whole answer upon the ground that it was incompetent and hearsay the court ruled: "A part of it is hearsay." From this it is evident that the court disregarded the latter portion of the answer as hearsay in rendering decision, so that a failure to strike out the whole answer was not error and even if erroneous was not prejudicial. It is a familiar rule of this court, applicable to each of the last two assignments of error that in cases tried before the court the erroneous admission of testimony will
3 afford no ground for reversal unless it is apparent that the court considered such testimony in deciding the case. Lynch v. Grayson, 5 N. M. 487, 508, s. c. 163 U. S. 468.

It is further said that the court erred in admitting in evidence the claimant's books of account marked "C" and "D." The testimony showed that the initial memorandum of professional visits made was in two physician's pocket day books, which were received in evidence as Exhibits A and B. These latter, however, while recording all the visits, failed after a certain date to record the charges for such visits. As conceded by appellant's counsel in his brief: "It was shown by plaintiff that while these books were

ledgers and the books marked "A" and "B" were his original memorandum books, yet in part the entries in the ledgers were original entries made there for the first time and to that extent they might be considered books of original entries and admissible in evidence, if otherwise competent under the statute." Two respects are suggested, however, in which it is said these books fall short of the statutory requirements to render them admissible, first, in that there is no proof by appellee's customers that he usually kept correct books, and second, it is not shown that he kept no clerk, or else that the clerk was dead or inaccessible. The contention is in short that the third and first requirements of C. L., section 3031, have not been met. That section is as follows: "Hereafter in the trial of civil causes in the courts of this Territory, the books of account of any merchant, shopkeeper, physician, blacksmith or other person doing a regular business and keeping daily entries thereof, may be admitted in evidence as proof of such accounts upon the following conditions: First. That he kept no clerk, or else the clerk is dead or inaccessible. Second. Upon proof, the party's oath being sufficient, that the book tendered is the book of original entries. Third. Upon proof, by his customers, that he usually kept correct books. Fourth. Upon inspection by the court to see if the books are free from any suspicion of fraud."

This section has been the subject of consideration by this court in a number of cases. In Price v. Garland, 3 N. M. 505, certain books of account were not received in evidence because the proof did not measure up to this statute. In Byerts v. Robinson, 9 N. M. 427, it was held that section 3031 supersedes the common law and that books of account cannot be received unless the statutory requirements are first complied with. In McKenzie v. King, 93 Pac. 703, it was held by this court, diverging from Byerts v. Robinson, that section 3031 supplemented but did not supersede the common law rule and that a book kept by a clerk, who testifies to having made the entries, is admissible without the proof required under section 3031. Appellee contends that the books offered below were properly

received if not under section 3031, then under the doctrine of McKenzie v. King. This leads us to determine whether the preliminary proof was sufficient. First, as to the proof by customers. Two witnesses—Raff and Gerpheide—testified to appellee's having been their physician during a long period of years and that his statements of account as rendered to them had always been correct. The admission of the testimony of these two witnesses is also assigned independently as error. We think, however, that it was properly received and that in connection with the testimony of appellee that his bills were made from this ledger, it was sufficient to show the correctness of his books.

4 While it is true that the customers do not in so many words testify that his books were generally speaking kept correctly, they do testify that their accounts—which appellee testified came from the books—were uniformly correct. It would be an unreasonable construction of the statute to hold that the customer, before he could testify, must have inspected the books and be prepared to testify to their general accuracy. The character of the books may be determined by their results. Where, therefore, as here, two patients come in and testify that their accounts as presented were uniformly correct and where as here it is shown that such accounts were drawn from the books in question, the law infers from the treatment of the two a like treatment of the remainder and considers the verity of the books established. We are not unaware that there are cases cited as holding to a stricter rule. Most of them are mentioned in the note to 2 Ency. of Evidence, 632. An examination of these will show, however, that with the exception of the New York decisions the cases do not sustain the text. As to the New York cases they will be found to be from the intermediate courts of that state and their declaration of the rule is different from that embodied in our C. L. Sec. 3031, which latter is of course in this jurisdiction controlling. We hold therefore that there was sufficient proof to justify the trial judge in his finding that appellee's books were usually kept correctly.

But it is further urged that appellee kept a clerk and therefore section 3031 does not apply. The testimony on

this point is that Dr. Radcliffe, was accustomed to transfer to his ledger—usually at the close of each day's work—the charges for the various visits made, as shown by his pocket memorandum book. His wife often acted as his amanuensis in making these entries. She had no knowledge of the visits nor the charges (save as he gave them to her) either from memorandum or memory. We are of opinion that this did not make her his clerk within the meaning
5 of the law. Statutes of the nature of our section 3031 were passed at an early day to relieve cases from the hardship of the common law rule that no party to a cause could testify. By allowing the party's books to speak for him —when these were shown to be properly kept—failure of justice was avoided. Where a clerk was kept, however, the necessity for the rule failed and thus with it the rule, since the clerk, if not dead or inaccessible, could, not being a party, give the necessary proof. But the clerk here contemplated was one having actual knowledge of the sales and the business and who by virtue of that fact could testify of his own knowledge to the correctness of the accounts. It was never intended to include a mere
6 amanuensis. Thus in McGoldrick v. Traphagen, 88 N. Y. 334, it was held that a mere bookkeeper was not a clerk within the meaning of the statute. In that case it was said: "The rule excluding books of account kept by a party who keeps a clerk applies only where there is an employe who has something to do with and has knowledge generally of the business of his employer as to goods sold or work done so that he can testify on the subject." So also in Smith v. Smith, 163 N. Y. 168, 52 L. R. A. 545, (with full note) it was shown that plaintiff's wife kept his books, making the entries thereon from memorandum furnished by him as made after the delivery of the coal. The court says: "Of course the plaintiff's wife cannot be claimed to be a clerk within the meaning of the rule. The clerk so intended means one who had something to do with and had knowledge generally of the business of his employer and who would be enabled to testify upon the subject of the goods sold." To the same effect are the cases cited in the notes to this case. 52 L. R. A. 571. Without

recourse to the doctrine of McKenzie v. King, we hold, therefore, that under our statute the books were not objectionable upon either of the grounds urged and were properly received in evidence.

It is further and chiefly contended that the court erred in rendering judgment for the appellee because, his claim being one against an administrator, there could be under C. L. Sec. 3021 recovery only where the testimony of the claimant "is corroborated by some other material evidence." It is contended that such corroborating evidence was absent. In determining this matter we accept as expressing the doctrine of this court the language used in Gildersleeve v. Atkinson, 6 N. M. 260, and reiterated in Byerts v. Robinson, 9 N. M. 427, 432, as follows: "Corroborating evidence is such evidence as tends, in some degree, of its own strength and independently, to support some essential allegation or issue raised by the pleadings testified to by the witness whose evidence is sought to be corroborated, which allegations or issue, if unsupported, would be fatal to the case and such corroborating evidence must of itself without the aid of any other evidence exhibit its corroborative character by pointing with reasonable certainty to the allegation or issue which it supports. Such evidence will not be material unless the evidence sought to be corroborated itself supports the allegation or point in issue."

Within the rule just stated was the plaintiff's testimony corroborated by other material evidence? This involves an analysis of the account sued on. This was composed of several classes of items. There were (1) 167 visits for which there was a charge of five dollars per visit. In addition there were (2) extra charges for some 16 ordinary examinations of urine at five dollars each; (3) for some five microscopic examinations—necessitating trips to Albuquerque—extra charges of twenty-five dollars each; (4) for washing out bladder six times at ten dollars each; (5) for limiting practice in order to stay near patient 69 days at five dollars per day $345.00; (6) for all day and all night service on the date of the patient's death $50.00. The plaintiff testified to the correctness of all of these

charges. Being of six separate classes, corroboration of one would not suffice to sustain the other. We proceed therefore to see what further "material evidence" is contained in the record to support each class of charge. As we have seen the books of the claimant were properly received in his behalf, and when so received we con-
7 sider them as constituting, under section 3031, "proof of such accounts" and were material evidence, corroborating his testimony. Bushnell v. Simpson, 119 Cal. 658.

But claimant went further. The testimony of his wife showed that he had attended deceased as physician a number of times during the period charged for. Dr. Wittwer testified to a knowledge of the case and to the necessity for examination of the urine, both ordinary and microscopic, to the fact that six of the former had been made with his help and to the reasonableness of the charges made therefor, to the presence of claimant there the night and day on April 10th, to the fact that his presence was for the purpose of keeping patient alive until some one who had been notified could arrive, and to the reasonableness of the charge of fifty dollars therefor; to his knowledge of the fact that claimant had for a considerable period previous to the death of Mr. Chaves limited his practice to Mr. Chaves and declined outside practice and that a charge of five dollars a day was a reasonable charge for such limitation. He further testified that $2.00 was a reasonable price for the ordinary visit of a physician. Mrs. Benigna Jaramillo testified for claimant that she was nurse in attendance upon deceased for two months and eleven days before his death and that during that period, on Mr. Chaves's request, the claimant attended, making sometimes two and sometimes three visits a day and sometimes at night, and that Mr. Chaves from February, 1905, on asked claimant to be in attendance on him constantly during the time until he either died or got well. This last was corroborative of claimant's testimony to the effect that he had upon the special request of deceased limited his practice so as to be near him during the last sixty-nine days of his illness. We deem this testimony, in connection with the books, sufficient to corroborate and sus-

tain all six of the classes of items above mentioned.

It is said, however, that even conceding this last, two of these classes of items should not have been allowed as claimed, for the reason, as to the item for 167 ordinary visits that the weight of the testimony is that two dollars per visit was the ordinary charge, whereas five dollars per visit is charged; and as to the item of fifty dollars for services day and night on April 10, 1905, that this was not claimed in the probate court and was improperly admitted by amendment on the trial in the district court, being barred by C. L., Sec. 2062, requiring such claims to be filed with the administrator within a year. A plain answer to each of these assignments, however, is that the court in rendering judgment apparently decided both of these contentions in favor of appellant. The claim, exclusive of the fifty dollar item last mentioned, was $1,410.00. Deducting from this $501.00 on account of alleged overcharge of three dollars on each of 167 visits, the balance is $909.00.

Interest was allowable on this from October 10, 1905,
8 six months after the date of the last item, to date of judgment, June 24, 1908. C. L. Sec. 2550; Armijo v. Neher, 11 N. M. 645, 655; Parker v. Parker, 33 Ala. 459; Newel v. Keith, 11 Vt. 214. This at six per cent, the statutory rate, added to the principal, makes a sum slightly in excess of that for which judgment was given. It is manifest, therefore, that in rendering judgment the court decided both of these points in favor of the administrator, limiting the first class of items to two dollars each and rejecting the fifty dollar item entirely.

The judgment is accordingly affirmed.

Associate Justice Cooley took no part in this decision.

[No. 1258, January 6, 1910.]

JAMES REAGAN, Appellee, v. EL PASO & NORTHEASTERN RAILWAY COMPANY & EL PASO AND NORTHEASTERN RAILROAD COMPANY, Appellants.

SYLLABUS.

1. Before a plaintiff can recover he must prove his case.

2. Negligence may not be inferred from the mere fact that stock have been killed or injured by a railroad train. Negligence must be alleged and proved.

3. It is within the power of persons, under C. L. 1897, Sec. 242, whose stock has been injured to shift the burden of proof to the railroad by a ninety day notice of claim to a station agent in the county.

Appeal from the District Court for Otero County before EDWARD A. MANN, Associate Justice. Reversed and remanded.

W. A. HAWKINS and JOHN FRANKLIN for Appellants.

The burden of proving that the animals mentioned in the pleadings were killed through the negligence of appellants was on appellee. C. L. 1897, secs. 241, 242; Houston v. Brusk, 29 Atlantic 380; State v. Philadelphia Railway Co., 60 Md. 555; Sheridan v. Foley, 33 Atl. 484; Lyndsay v. Connecticut & P. R. R. Co., 27 Vt. 643; 21 Am. Enc. of Law, 2 ed. 510.

JOHN E. THOMPSON for Appellee.

No brief.

OPINION OF THE COURT.

MILLS, C. J.—This is a suit for damages brought by James Reagan to recover from the El Paso & Northeastern Railway Co., and the El Paso and Northeastern Railroad Co., for the killing of a mare and the injury to

a jack, caused by a train run by the defendants, their agents or servants.

The cause was heard by a jury which returned a verdict for $300.00 in favor of the plaintiff and against the E. P. & N. E. Ry. Co. The railway company filed a motion for a new trial, and on the motion being overruled, took an appeal to this court.

In the motion for a new trial, nine alleged errors are assigned, but we will only consider the second, as the others relate to instructions either given or refused by the court, and as the instructions are not brought up with the transcript, we cannot consider them.

The second error assigned is that the trial court erred in not sustaining appellant's motion for a new trial, because the evidence in the case does not show that the mare was killed or the jack injured by the defendants or either of them, or by their or either of their servants, agents or employees, and that the only evidence upon this fact tends to show that the mare was killed and the jack injured by the El Paso and Southwestern Railway Co.

We have carefully examined the record before us in this case and can find no evidence to show that the mare was killed or the jack injured by the defendant companies or their servants, agents or employees. There is nothing in the record to show that the El Paso & Northeastern Railway Co., or the El Paso & Northeastern Railroad Co., either owned or operated the railroad where it is alleged the accidents to the animals occurred. What little evidence there is concerning this point shows that the mare was killed and the jack injured by the El Paso & Southwestern Railroad Co., and not by the defendant companies. The witness McCallum who testified for the plaintiff, on page 38, of the Transcript, says:

"Q. What railroad are you connected with?
A. El Paso & Southwestern.
Q. Is that this railroad running through here?
A. Yes, sir.
Q. And the only one running through here?
A. That is the only one I see."

And the witness Wahlenburg also a witness for the

plaintiff, testified as shown on page 52 of the transcript, that he was working for the El Paso and Southwestern Railroad, under Mr. McCallum, the witness referred to above.

With the exception of this testimony the record is absolutely silent as to who owned or operated the railroad and the trains run thereon at the places where the jack was injured and the mare killed.

It is an elementary principle of law which needs no citation of authorities to support it, that before a plaintiff can recover he must prove his case. In ejectment he
1 must prove his right to the possession of the land sought to be recovered and locate it on the ground; in replevin he must identify the property sought to be recovered and his right to its possession; in assumpsit he must prove the debt and also that the defendant is liable, and in actions sounding in tort he must prove the injuries complained of and also who committed them.

In the case at bar the plaintiff has not done this. He has proved that the jack was injured and the mare killed, but the record does not disclose that it was done by the defendant companies or by either of them. There is no evidence in the record to sustain the judgment against the El Paso & Northeastern Railway Company.

But even assuming that the defendant company caused the injury complained of, we find it necessary to reverse the cause upon another ground, to-wit, the total lack of proof that the injury was due to any negligence of the defendant. Negligence may not be inferred from
2 the mere fact that stock have been killed or injured by a railroad train. Negligence must be alleged and proved. This was settled by the decision of this court in A. T. & S. F. Co. v. Walton, 3 N. M. 530. True, it is under C. L., sec. 242, as construed by this court in P. V. & N. E. Ry. Co. v. Cazier, 13 N. M. 131, within the power of persons whose stock has been injured to shift the
3 burden of proof to the railroad by a ninety day notice of claim to a station agent in the county. But there is no showing that such was done in this case. The case therefore is subject to the general rule laid down in the

Walton case and tested by that, the proofs fail to show negligence and thus fail to establish liability.

The cause is for the foregoing reasons reversed and remanded.

Associate Justice Cooley took no part in this decision.

[No. 1275, January 6, 1910.]

NICK METZ, Appellee, v. ANDRES ROMERO, Apellant.

Appeal from the District Court for Bernalillo County before IRA A. ABBOTT, Associate Justice. Affirmed.

N. B. FIELD for Appellant. See Brief for No. 1249.

B. F. ADAMS for Appellee.

Neither of appellant's propositions are within the issues made by the pleadings in his case and were not, therefore, properly before the court below. Chaves v. Meyers, 11 N. M. 342; Armijo v. Mountain Elec. Co., 11 N. M. 243; Bliss Code Pl., par. 352; Pom. Rem. Pars. 691, 711; Hagan v. Surch, 8 Iowa 309; Smith v. Holmes, 19 N. Y. 271; Elder v. Rourke, 41 Pac. Rep. 7; Hickey v. Thompson, 12 S. W. Rep. 477; Johnson v. Meyer, 16 S. W. Rep. 123.

Objections not raised in the court below will not be considered in the appellate court. Conway v. Carter, 11 N. M. 430; Ford v. Springer Land Assn., 8 N. M. 59; Romero v. Coleman, 11 N. M. 538; Springfield Fire and Marine Ins. Co. v. Sea, 88 U. S. 161; 2 Enc. Pl. & Pr. 516, 519; 2 Cyc. 670; 9 Cyc. 702 and Note 7, 734, and authorities cited; 11 Enc. Pl. & Pr. 626, 665, 666; Brink v. Morton, 2 Iowa 411; Phoenix Ins. Co. v. John G. Copelin, 9 Wall. 467; Waldo v. Beckwith, 1 N. M. 97; Badeau v. Baca, 2 N. M. 194; Territory v. Webb, 2 N. M. 147; Territory v. Maxwell, 2 N. M. 250; Lynch v. Grayson, 7 N. M. 26; Hooper v. Browning, 19 Neb. 420; Romero v. Coleman, 11 N. M. 537.

In contemplation of law, the building was completed when appellee filed his lien. Perry v. Brainard, 8 Pac. Rep. 883; Armijo v. Mountain Electric Company, 11 N. M. 243; 11 Cyc. 35 and authorities cited 36.

"The decisions of this court are of the law of this Territory." Bennett v. Zabriski, 2 N. M. 179.

The New Mexico mechanics' lien law is constitutional. Ellis v. Railroad Co., 165 U. S. 150; Genest v. Las Vegas Masonic Bdg. Assn., 11 N. M. 272; C. L. 1897, sec. 2226; Hobbs v. Spiegelberg, 3 N. M. 363; Parker v. Bell, 7 Gray, 431; Neely v. Searlight, 15 N. E. Rep., Ind. Sup. 598; Wecks v. Walcot, 15 Gray 54; Clark v. Kingsley, 8 Allen 46; Phil. Mech. Liens, 52-65; Pomeroy v. Timber Co., 49 N. W. Rep., Neb. 1131; Post v. Miles, 7 N. M. 325, 326; 8 Cyc. 1102 and authorities cited; 27 Cyc. 18; Warren v. Sohn, 13 N. E. Rep. 868; Spofford v. True, 54 Am. Dec. 623; Laird v. Moonan, 20 N. W. 354; Donahy v. Clapp, 12 Cush. 440; Bardwell et al, v. Mann et al, 48 N. W. 1121; Bohn v. McCarthy, 20 Minn. 23, 11 N. W. 127, Blauvelt v. Woodworth, 31 N. Y. 285; O'Neil v. St. Olaf's School, 26 Minn. 329; McMurray v. Brown, 91 U. S. 266; Spofford v. True, 33 Me. 283; Langston v. Anderson, 69 Ga. 65; Trensch v. Shryrock, 51 Md. 173; Winslow v. Urquhart, 39 Wis. 260; Vreeland v. O'Neil, 36 N. J. Eq. 399; Sims v. Bradford, 12 Lea 434; Atwood v. Williams, 40 Me. 409; Ballou v. Black, 21 Neb. 147, 31 N. W. Rep. 673; Ainslie v. Kohn, 16 Or. 371, 19 Pac. Rep. 97; Lonkey v. Cook, 15 Nev. 58; Merritt v. Pearson, 58 Ind. 386; Railroad Co. v. Miller, 80 Va. 821; Jensen v. Brown, 2 Colo. 697; Hill v. Witmer, 2 Phila. 72; Henry & Coatsworth Co. v. Evans, 10 S. W. 872; Donchy v. Clapp, 12 Cush. 440; Atwood v. Williams, 40 Me. 409; White v. Miller, 18 Pa. St. 52; Boyle v. Mining Co., 9 N. M. 253; Davis v. Alford, 94 U. S. 547.

The statute requires that the notice of lien must be filed inside the limit or compass of sixty days after the completion of the building and not later, and the notice of lien may be filed before or after the completion of the building. Chavez v. Myers, 11 N. M. 342; Genest v. Bdg. Ass., 11 N. M. 251; Minor v. Marshall, 6 N. M. 197; Fynne v.

Hotel Co., 3 N. M. 256; Ford v. Springer Land Ass., 8 N. M. 47, 48; T. C. F. & N. Ry. Co. v. Orman, 3 N. M. 654; Davis v. Alford, 94 U. S. 545; Minor v. Marshall, 6 N. M. 197; Hobbs v. Spiegelberg, 3 N. M. 361; Davis v. Alford, 94 U. S. 24, 283; Flagstaff Silver Mining Co. v. Cullins, 104 U. S. 176, 36, 704; 27 Cyc. 22, 89, 90-92; Perry v. Brainard, 8 Pac. 882; Post v. Miles, 7 N. M. 322; Boyle v. Mining Co., 9 N. M. 253; French v. Powell, 68 Pac. 94; Bates v. Santa Barbara Co., 90 Cal. 543, 27 Pac. 438; Codlin v. County Commissioners, 9 N. M. 581; Ezek. 3:24; Matt. 23: 26; Chicago etc., Ry. Co. v. Eubanks, 32 Mo. App. Rep. 189; Sanborn v. Insurance Co., 16 Gray 448; Atherton v. Corliss, 101 Mass. 40; Young v. The Orpheus, 119 Mass. 179; Levert v. Reed, 54 Ala. 529; Jennings v. Russell, 9 So. Rep. 492; 30 A. & E. Enc. of Law, 2 ed. 893; Words and Phrases Judicially Defined, vol. 8, p. 7498; Rev. St. Ill., c. 82, sec. 31; Carey-Lombard Lumber Co. v. Fullenweider, 37 N. E. 899, 900, 150 Ill. 629; Merchants & Traders National Bank v. City of New York, 97 N. Y. 355, 361.

Including in the notice of lien the demand for extra work did no invalidate appellee's claim. Boyle v. Mining Co., 9 N. M. 251; Mountain Electric Co. v. Miles, 9 N. M. 517; Springer Land Ass. v. Ford, 168 U. S. 527.

Attorney's fees were properly allowed. 2 Enc. P. & P. 465, 486, and citations 492; Armijo v. Mountain Elec. Co., 11 N. M. 249; Wortman v. Kleinschmidt, 30 Pac. 280, 12 Mont. 316; Helena Steam Heating Co. v. Wells, 40 Pac. 78, 16 Mont. 65; Jewell v. McKay, 82 Cal. 144; McIntyre v. Trautner, 78 Cal. 489; Rapp v. Gold, 74 Cal. 532; Genest v. Las Vegas Bldg. Assn., 11 N. M. 271; Williams v. Liverpool, etc., Ins. Co., 5 A. & E. Ann. Cases, 405 and authorities cited

OPINION OF THE COURT.

MECHEM, J.—The facts and legal questions involved in this case are practically the same as those in case No. 1249 (Joseph C. Baldridge, v. A. J. Morgan, et al.) and it was agreed that the opinion filed in the foregoing case should be decisive of each case.

The judgment of the District Court is therefore affirmed.

Justice Cooley did not participate in this decision.

[No. 1280, January 6, 1910.]

A. H. PATTEN, Appellee, v. W. W. BALCH, Appellant.

SYLLABUS.

1. The main point on which every forcible entry and detainer suit must be maintained, is the fact that the defendant by his mode of entry or detention has committed a wrong in the nature of a public offense.

2. The description should be definite and certain enough so that the premises may be readily identified—reasonable and not absolute certainty being all that is required.

3. There is no law to support the contention of appellant that because appellee never ate or slept upon land he had purchased of grantee of original squatters, and because others occupied it, he forfeited his right to it.

Appeal from the District Court for Roosevelt County before W. H. POPE, Associate Justice. Affirmed.

T. C. TAYLOR for Appellant.

it should have been originally brought in the District Court by ejectment proceedings. Jones v. Seawell, 76 Pac. 154, 155; Laws of 1907, Ejectment, 285.

Where the description does not identify the land, nor state directly where it is, nor indicate any extrinsic fact, from which its locality can be ascertained and fixed, specific performance cannot be decreed, nor can parol evidence be received to fix the locality. Warvelle on Vendors, vol. I, 2 ed. p. 128, secs. 96, 97; 19 Cyc. Law and Procedure, 1173; 55 Schuster v. Gray, Pacific 489; Barnes v.

Cox, 41 Pacific 557; Schlattler v. Cassinelli, 19 S. W. 746.

HARRY L. PATTON for Appellee.

Regular order of pleading was not observed by appellant. Laws 1907, c. 107, sec. 303.

While title cannot be determined in actions of forcible entry and detainer and deeds tending to establish title are inadmissible in evidence, yet muniments of title are admissible in such cases to show the character, extent, right or basis of possession. Potts v. Magnes, Colo., 30 Pac. 58; Jenkins v. Tynon, Colo., 27 Pac. 893; Brown v. Hartshorn, Okla., 69 Pac. 1049; McClain, et al, v. Jones et al, Kans. 57 Pac. 500; Murphy v. Snyder, Cal., 8 Pac. 2; 19 Cyc. 1165; 13 A. & E. Enc. Law 754.

While title is in the government, the right of possession only, remains to be determined by the courts. McQuiston v. Walton, Okla., 69 Pac. 1048.

Any description by which the premises may be readily identified and located is sufficient. Reasonable and not absolute certainty is required. 19 Cyc. 1154; 9 Enc. P. & P. 61; Ayers v. Reidel, 84 Wis. 276; Hernandez v. Simon, 4 Cal. 182.

To constitute occupancy within the meaning of the Federal Statute, it is not necessary to reside upon the lots claimed. Leech v. Rauch, 3 Minn. 448; Grenier v. Fulton, Kan., 26 Pac. 705; Hagar v. Wikoff, Okla., 39 Pac. 281; Downman v. Saunders, Okla., 41 Pac. 104.

The assigns of occupants stand in the position of their grantors. Aspen v. Rucker, Colo., 15 Pac. 791; Aspen v. Aspen Town Co., Colo., 15 Pac. 794; Leecher v. Chapin, 12 Nev. 72; C. L. 1897, sec. 3345.

OPINION OF THE COURT.

MECHEM, J.—This is an action of forcible entry and unlawful detainer, originally brought before a justice of the peace. In his complaint the plaintiff, appellee here, alleged that on the 21st day of March, 1908, he was lawfully possessed and entitled to the possession of the certain described tract of land and "being so lawfully possessed

and entitled to the possession as aforesaid," the defendant then and there "unlawfully and with force entered into and upon the said tract or parcel of land, and detained and held the possession thereof, and as such detains and holds the possession thereof against the plaintiff." Judgment being against the defendant both before the justice of the peace and in the District Court he brings this appeal.

1. The appellant by his first and second assignments of error complains first of the action of the court below in overruling his plea to the jurisdiction and second that the court did not decide upon said plea until after the trial upon the merits. It is certain that if the plea was not good, the time of overruling it was immaterial.

The gist of the plea was that the court could not "determine the rights of the parties herein without determining the same upon the strength of the title of the respective parties" and "because the suit should have been brought originally in the District Court by ejectment, for the reason that said case must be determined as to which party was entitled to possession by their respective deeds."

This court in the case of Romero v. Gonzales, 3 N. M., 51 Pac. 171, laid down the following doctrine, which effectually disposes of this assignment:

"The legal title to land, or even the right to the possession of land, cannot be determined in this form of action. The main point on which every forcible entry
1 and detainer suit must be maintained, if at all, is the fact that the defendant by his mode of entry or detention has committed a wrong in the nature of a public offense, and the object of the statute is to punish the wrongdoer by a restitution of the premises to the plainiff without inquiry as to which has the legal right to possession."

2. By his third assignment of error the appellant raises the question of the sufficiency of the description of the premises, to which he demurred.

The description is as follows:

"One hundred and twenty feet off the south side of the east half of the unsurveyed block located in the southeast corner of the original town of Texico, except that part

of said block owned and occupied by the Eastern Railway of New Mexico."

The rule is that the description should be definite and certain enough so that the premises may be readily identified—reasonable and not absolute certainty being all
2 that is required; 19 Cyc. 1154; 9 Ency. Pl. & Pr. 61; and the above description complies with the rule.

3. The appellant's fourth and last assignment of error is as follows: "The court erred in finding the issue of fact in favor of the plaintiff for the reason that the stipulation of evidence, upon which this case was tried, fails to disclose that plaintiff was ever in possession of the lots in controversy, or that he did any act indicating *pedes possessio,* or showing any dominion or control over the land in controversy."

The facts as shown by the stipulation are as follows:

The tract of real estate in controversy is unsurveyed public domain, not subject to entry, to which neither party has any right or title from the United States.

The appellee on May 11th, 1907, purchased of the grantee of the original squatters on the tract the improvements thereon. He was a non-resident and after making the purchase placed the property in the hands of an agent for rent, and left the Territory for his home. The agent rented the houses and for a short time thereafter remitted the rentals to appellee. The agent also left and others went into possession, including the appellant, in March, 1908, under quit claim deeds from persons who had had possession less than 30 days before. The appellee never intended to abandon the land and as soon as he heard of appellant's adverse claim came to the Territory and instituted this suit. In his argument the appellant claims that because appellee never ate or slept upon the land and because others occupied it he forfeited his rights to it. Appellee cites no law to support his contention, and we believe there is none.

Finding no error the judgment of the court below is affirmed, and it is so ordered.

Cooley, Justice, did not participate in this decision.

[No. 1287, January 6, 1910.]

THE UNITED STATES OF AMERICA, Appellee, v. CARL ADAMSON, et al., Appellants.

Appeal from the Sixth Judicial District Court. Affirmed.

J. E. WHARTON for Appellant.

D. J. LEAHY, United States Attorney, for Appellee.

OPINION OF THE COURT.

PER CURIAM—The only point raised by this record is as to alleged error of the admission of evidence. The appellant and one Sullivan and one Webb were indicted for conspiracy to bring unlawfully into the United States, Chinese persons not entitled to enter. The defendant Sullivan took the stand as a witness and, on cross examination, was asked whether, at the time of his arrest, he did not state that unless he was furnished bond he would implicate a prominent man in El Paso. Sullivan denied the admission and the United States in rebuttal, proved the admission. Objection was made to the testimony on the ground of immateriality. It is impossible to understand how it was immaterial. Sullivan was on trial and the admission reflected directly on his guilt. He was also a witness and it reflected upon his credibility. Counsel for appellant urges here the inadmissibility of the evidence on the ground that the admission was made for the consummation of the conspiracy and was consequently inadmissible against the other two defendants. But no such objection was made in the court below and no request was made of the court to limit the testimony to the defendant making the admission. We cannot, therefore, consider the objection. There being no error in the record the judgment of the court below will be affirmed; and, it is so ordered.

WILLIAM J. MILLS,
Chief Justice.

[No. 1161, February 28, 1910.]

JOHN JENKINS, Plaintiff in Error, v. THE MAXWELL LAND GRANT COMPANY, et al., Defendants in Error.

SYLLABUS.

1. An appellate court will not disturb the verdict of the jury or the findings of fact made by a trial court on the ground that it is against the preponderance of evidence.

2. Evidence held insufficient to establish the contents of a lost instrument.

3. An instrument termed an "Improvement Contract", held to have conveyed all improvements on land claimed on the ground of continued adverse possession.

4. Grazing of stock in this country has no value as evidence of practical location.

5. To constitute adverse possession the occupancy of one so claiming must be (1) actual, (2) visible, (3) exclusive, (4) hostile, and (5) continuous. If any of these elements is lacking no title by adverse possession can ripen.

6. The possession of all but a relatively insignificant part of this large area was constructive and not actual and such constructive possession was ineffectual against the true owner.

7. The law adjudges the seisin of all that is not in the actual occupancy of the adverse party to him who has the better title.

8. Possession held not to have been exclusive.

9. Possession held not to have been hostile.

Error to the District Court for Colfax County before W. J. MILLS, Chief Justice. Affirmed.

A. C. VOORHEES for Plaintiff in Error.

When one enters on land, claiming a right to it, and

gains a seisin by such entry, the seisin shall extend to the whole tract which he claims. Kennebec Purchase v. Springer, 4 Mass. 416, 3 Am. Dec. 227; Wright v. Mattison, 18 How. 50-60; Hall v. Law, 120 U. S. 466; Pillow v. Roberts, 13 How. 472; Elicot v. Pearl, 10 Pet. 412.

One positive witness' testimony is worth more than a dozen negative. Moore on Facts, vol. 2 p. 1331; Patterson v. Gaines, 6 H. 550, 589; Brockway v. Mutual Ben. L. Ins. Co., 9 Fed. Rep. 249, 253; U. S. v. Rycraft, 27 Fed. Cas. No. 16211, at p. 922; Gaines v. New Orleans, 6 Wall. 642, 704; Rhodes v. U. S., 79 Fed. Rep. 740, 743; Au v. New York, etc. R. Co., 29 Fed. Rep. 72.

Where by adverse possession one has gained title in fee, payment of rent by him for two years to the person holding the paper title will not defeat the title already gained. Riggs v. Riley, 113 Ind. 208.

One holding the superior title can not set up his ignorance of the claim of right under which his land was occupied by an adverse claimant. Bronson v. Scanlon, 59 Tex. 222.

If the occupant resides upon the land, claiming it as his own, making such use of it as it is susceptible of, and appropriating the products thereof to his own exclusive use, and does not recognize the right of any other person to the use for any purpose without his consent and by his authority, that is an exclusive possession. Ewing v. Burnett, 11 Pet. 41; Whitney v. U. S., 167 U. S. 529; Bergere v. U. S., 168 U. S. 66; Florida Southern Ry. Co. v. Loring, 51 Fed. 932; Goodson v. Brothers, 111 Ala. 589; Murray v. Hudson, 65 Mich. 670; Glencoe v. Wadworth, 48 Minn. 402; Jacksonville etc. Ry. Co. v. Oyler, 82 Ind. 394; Dixon v. Bales, 61 Pac. 403; Davis v. Young, 2 Dana 299; Alden v. Gilmore, 13 Me. 178; Ntl. Min. Co. v. Powers, 3 Mont. 344; Murray v. Romine, 82 N. W. 318; Folk v. Bond, 41 N. J. L. 527; Pearsall v. Westcott, 45 N. Y. App. Div. 34; Wolf v. Ament, 1 Grant 150; Texas, etc. Ry. Co. v. Maynard, 51 S. W. 255; Flint v. Long, 12 Wash. 342.

Adverse possession for the statutory period not only bars the remedy of the holder of the paper title, but extinguishes his title and vests title in fee in the adverse

occupants. Maxwell Land Grant Co. v. Dawson, 151 U. S., 566; Probst v. The Domestic Missions, 129 U. S. 132; Pueblo Nambe v. Romero, 61 Pac. 122; Solomon v. Yrisarri, 9 N. M. 420.

To constitute adverse possession there need not be a fence, a building or other improvements made. Ewing v. Burnett, 11 Pet. 41; Ellicott v. Pearl, 10 Pet. 412; Nelson v. Davidson, 160 Ill. 245; Alexander v. Pendleton, 83 Cranch. 462; Fanning v. Wilcox, 3 Day, 258; Smith v. Canton, 21 Conn. 531; Shannon v. Kinney, 1 A. K. Marsh 3; Chilton v. Wilson's Heirs, 9 Humph. 399; Cunningham v. Patton, 6 Bar 355; Sheetz v. Fitzwater, 5 Ib. 126; Overfield v. Christie, 7 Serg. & R. 137; Johnson v. Nash's Heirs, 15 Tex. 419.

It is immaterial whether title be valid or not, provided the entry made be bona fide under that title. Erdman v. Corse, 87 Md. 506; Murphy v. Doyle, 37 Minn. 113; Ewing v. Burnett, 11 Pet. 41; Ellicott v. Pearl, 10 Pet. 412; Ill. Steel Co. v. Bilot, 109 Wis. 418, 85 N. W. 402; 83 Am. St. Rep. 905; Humbert v. Trinity Church, 24 Wend. 587; Barnes v. Light, 116 N. Y. 34; Hall v. McElhaney, 69 P. St. 309; Gillispie v. Jones, 26 Tex. 543; Black v. Tenn. C. & I. R. Co., 93 Ala. 109; Hammond v. Crosby, 68 Ga. 767; Murray v. Doyle, 92 Ala. 599; Quindaro Township v. Squire, 51 Fed. 502; Omaha Land & Trust Co. v. Hanson, 32 Neb. 449; Florida Southern Ry. Co. v. Loring, 51 Fed. 932; Langtry v. Parker, 55 N. W. 962; Connor v. Sullivan, 40 Conn. 26; Robison vs. Sweet, 3 Me. 316; Hood v. Hood, 25 Pa. St. 417; Barros v. Gallup, 32 Conn. 493; and numerous authorities cited in Cyc. L. & P. 1010, note 32; Moore v. Green, 19 How. 69; Doe v. Reynolds, 27 Ala. 364; Langford v. Poppe, 56 Cal. 73; Bowell v. Little Guarantee Co., 27 Ore. 77; Workman v. Guthrie, 29 Pa. St. 495; Bullock v. Smith. 72 Tex. 545; Fuller v. Fletcher, 44 Fed. 34; Armstrong v. Morrill, 14 Wall. 20; Downing v. Mayes, 153 Ill. 330; Lewis v. N. Y. Hudson River Co., 162 N. Y. 202; Harpending v. Ref. Prot. Dutch Church, 16 Pet. 455; School Dist. v. Benson, 31 Me. 381; Dean v. Goddard, 55 Min. 290, 56 N. W. 1060; Heinricks v. Terrell, 65 Iowa 25; 21 N. W. 171;

Simpson v. Eckstein, 22 Cal. 580; Allen v. Mansfied, 82 Mo. 688; Cummings v. Powell, 16 Mo. App. 559; Sherman v. Kane, 86 N. Y. 57; Spiess v. Rome, etc. R. Co., 15 N. Y. Sup. 348; Hughes v. Groves, 39 Vt. 359; Cannon v. Stockman, 36 Cal. 535; Chilis v. Davis, 58 Ill. 411; Chritenburg v. King, 85 N. C. 229; Byees v. Shanpler, 7 Atl. 182; Austin v. Baily, 37 Vt. 219; Wash. Real Prop., vol. 3, 164; Todd v. Huafmab, 19 D. C. 304; Langtry v. Parker, 55 N. W. 962; Young v. Withers, 2 Dana 165; Robison v. Sweet, 3 Me. 316; Bowen v. Guild, 180 Mass. 121; Johnson v. Fitzgeorge, 50 N. J. L. 407; Jackson v. Schoonmaker, 4 Johns. 399; Ranson v. Lewis, 63 N. C. 43; Hood v. Hood, 25 Pa. St. 417; Miller v. Snow, 7 Serg. & R. 129; New Shoreham v. Ball, 14 R. I. 566; St. Croix Land, etc. Co. v. Ritchie, 78 Wis. 492; 42 N. W. 657.

Where the evidence shows that the maker of a deed is illiterate and unable to read, the burden of proof is upon the grantees or claimants of the benefits under said deed to show fairness in the transaction. Worcester v. Eaton, 13 Mass. 371, 7 A. M. D. 155; Franklin v. Kelley, 2 Neb. 79; Staley v. Housell, 52 N. W. 888; Hovark v. Hablik, 95 N. W. 990; C. L. 1897, secs. 3939, 3942.

No title passes by an unacknowledged deed. C. L. 1897, sec. 3943; Smith v. Hunt, 13 Ohio 260, 268; Nevis v. Munson, 108 N. Y. 435; Chamberlain v. Spragg, 86 N. Y. 603; Black v. Vaughn, 70 Tex. 47; Thomas v. Thomas, 10 Ind. 123; Pfeifer v. Bernard, 88 N. C. 333; Devlin on Deeds, sec. 466; Wood v. Owings, 1 Cranch 239.

If an ignorant man is induced to sign a deed, believing it to be another instrument, then the deed has no other effect than a forgery; and especially when he made request to have the instrument read, but the request not complied with but represented to him that it was only a bill of sale of the old improvements. Dev. on Deeds, secs. 228, 229 and 230; Jackson v. Hayner, 12 Johns 469; McGinn v. Tobey, 62 Mich. 252; Brummond et ux v. Krause, et al., 80 N. W. 636.

When the right of property and possession unite in the same person, a conveyance could only be made by feoffment and livery of seizin. Runyon v. Smith, 18 Fed.

579; Porte v. Perkins, 5 Mass. 236; Warren v. Childs, 11 Mass. 222; Bennett v. Irwin, 3 Johns 366; Washburn Real Property, 356-359.

Defendant's paper title, having been barred by the Statute of Limitations, was inadmissible in evidence. Chapman v. Del. Lackawanna & W. R. R. Co., 3 Lang, 261; Thompson v. Wheatley, 5 Sm. & M. 499; Mather v. Hutchison, 25 Wis. 25; Staley v. Housel, 52 N. W. 888; Arrington v. Liscom, 34 Cal. 365; Anderson v. Fisk, 36 Cal. 632.

A title once acquired by adverse possession can not be conveyed by parole abandonment or relinquishment, but must be transferred by deed. Washburn Real Property, vol. 3, 164; 1 Cyc. L. & B. 1139; Parkham v. Dudman, 66 Ark. 36; School Dist v. Benson, 31 Me. 381; Sage v. Rudnick, 67 Minn. 362; Allen v. Mansfield, 33 Mo. 688; Byers v. Shepler, 7 Atl. 182; Austin v. Bailey, 37 Ver. 219; Jones v. Hughes, 16 Atl. 849.

CHARLES A. SPIESS for Defendants in Error.

An appellate court will not disturb the verdict of the jury or the findings of fact made by a trial court on the ground that it is against the preponderance of evidence. De Baca v. Pueblo of Santo Domingo, 10 N. M. 38; Torlina v. Trorlicht, 5 N. M. 148; Newcomb v. White, 5 N. M. 435; Trorlina v. Trorlicht, 6 N. M. 54.

An acknowledgment is not essential to the validity of a deed.

OPINION OF THE COURT.

COOLEY, J.—Mr. Justice McFie, who tried this case in the District Court, prepared an opinion in which the testimony was carefully analyzed and the law applicable to the case was clearly stated. In view of that fact we do not consider it necessary to do more than review the evidence generally and outline the reasons why, in our opinion the judgment must be affirmed.

This is an action in ejectment. It is admitted that the property in controversy is situated within the exterior

limits of the Maxwell Land Grant, but the plaintiff in error, who was also the plaintiff below, bases his alleged title on the adverse possession of the land by himself and his predecessors in title from 1873 to 1900. A jury was waived and the case was tried by the court. Sixteen findings of facts were made by the presiding judge, each one of which is assigned as error in the bill of exceptions. We think that there was evidence to sustain each finding and that the exceptions are not well taken. Without expressing any opinion on the weight of the evidence in the case at bar, we re-affirm the universal rule that an appellate court will not disturb the verdict of a jury
1 or the findings of fact made by a trial court on the ground that it is against the preponderance of evidence.

The plaintiff's claim was to some six thousand acres of land lying within the exterior boundaries of a tract the record title to which was conceded to be in the defendant. The plaintiff alleged, however, that Robert Dillon through whom he claimed was in actual, open, notorious, exclusive, uninterrupted and hostile occupation from 1872 or 1873 to 1878 or 1879; that about 1878 or 1879 the land was sold by him to James Runyan and Thomas Boyd, who in turn deeded it to the plaintiff in 1882 by an instrument which was subsequently lost. The testimony offered to prove the contents of this deed fell far short of the
2 evidence required to establish the contents of a lost instrument. The only description of the contents was contained in the following testimony of the plaintiff:

"Well, it was a paper about a foot long and ten inches wide, taken out of a book and it stated something like this: I don't remember very well; I have this day sold to John Jenkins my right and title, or something like that, or quit claim deed, to the tract of land, mentioning the main mounds and every mound on it. And then at the bottom of the first was, transferred from Dillon to Boyd and Runyan, and all the three names were on it."

Nothing could well be vaguer or more uncertain than the description of the land alleged to have been conveyed,

and there is no evidence whatever that the deed was ever acknowledged or recorded.

It is admitted that there was never at any time any enclosure of any kind around the land, nor was there anything to put the defendant upon notice of the extent of the plaintiff's claim. The plaintiff occupied a house and was in possession of a few acres of land immediately adjacent to the house. The trial judge was of opinion that as to this small tract there was a possession sufficiently adverse to amount to an ouster of the true owner, but even as to this it appears that by an instrument termed an "Improvement Contract" the plaintiff conveyed all his im-
3 provements on the land. The instrument also contained the following:

"And he (the plaintiff) also hereby positively declares and states that he does not occupy any other lands or improvements nor that he claims any rights or interests in or to any other lands, premises or improvements situated or embraced within the Beaubien and Miranda or Maxwell Grant.

"And the said John Jenkins in further consideration of the said sum of money, so as aforesaid paid to him, does hereby on this day give possession to, and does hereby release, convey, and quit-claim unto the said trustees all his right, title and interest in and to the lands embraced within the Beaubien and Miranda Grant as patented by the United States, by letters patent dated May 19th, 1879, and all improvements on the same or any part thereof; and he also hereby covenants and agrees to and with the said trustees that he will not hereafter, in any manner, trespass upon, nor occupy nor locate upon any portion said grant, except under rights derived by purchase or contract from the Maxwell Land Grant Company or those deriving title through it."

On the plaintiff's behalf it was urged that his signature to this instrument was obtained by fraud, but the trial court found otherwise and we are not disposed to disturb that finding.

The plaintiff laid great stress upon the contention that during the entire period of his occupancy his cattle

ranged over this tract, but the court found that during the same period cattle belonging to the defendant company and to an organization known as the Sugarite Cattle Outfit as well as to other persons also grazed on this range. On this point the Supreme Court of the United States has said: (Bergere v. U. S., 168 U. S. 66, 79).

"In regard to proof of the fact of pasturing cattle as evidence of an adverse possession upon which to base a claim of title, we have held that such fact is of very slight weight when applied to cases arising under alleged grants of land of the nature of the one under consideration. In the case of Whitney v. United States, already above cited, 167 U. S. 529, 546, this court said, speaking through Mr. Justice Brown, as follows:

"The claimant also relies upon a long continued adverse possession of this land, maintained for nearly 170 years from the date of the grant, and nearly eighty years from the date of the testimonial issued by the alcalde mayor, de Baca. Had it been shown that this possession was complete, adverse and undisputed during the whole life of this grant, such possession would probably be regarded as complete evidence of title. Nor are we disposed to deny that the fact that the Luceros and their descendants pastured stock upon these lands is evidence of such possession, but in order to make it of any particular weight it should be shown to have been exclusive, and that no other person pastured or had the same right to pasture upon these lands. The proceedings in the case first above mentioned, of the intrusion of the Romeros, indicate the lands to have been held in common, and to have been subject to pasture by the Indians and other residents of that neighborhood. Under such circumstances, it should be made to appear that the rights of Lucero and his descendants were exclusive in this particular. In addition to this, however, it is a fact so notorious that we may take judicial notice of it, that mere pasturage upon these western lands is very slight evidence of possession.

The court below was of the opinion that 'from a
4 practical standpoint the grazing of stock in this country has no value as evidence of practical location.'

In view of the fact that all, or nearly all, of the testimony respecting possession is given by witnesses who are descended from Lucero, or connected with his family, or are interested in the litigation, and the possession relied upon is not shown to have been exclusive or inconsistent with the use of this vast tract as a pasturage common to all the dwellers in that neighborhood, we think the court did not err in refusing to give it weight as evidence of title.'

" 'These remarks apply with great force to this case, so far as the evidence herein goes to show actual possession by reason of the pasturing of stock, which is really all the evidence of possession the case affords. It is entirely lacking in evidence of an exclusive possession under a claim of right, and the testimony is consistent with a mere occupancy of but a small portion of the land by Baca and his servants for purposes of pasturage and without claim of further or exclusive right or title.' "

It further appears that in the period during which the plaintiff contends that his title was being acquired the defendant company leased portions of the land in controversy to various individuals and organizations including the plaintiff himself.

Such in substance is the evidence upon which the plaintiff's title by adverse possession is based.

The elements necessary to establish title by adverse possession are considered by the Supreme Court in Ward v. Cochran, 150 U. S. 597, 606, where the following language was used:

"In French v. Pearce, 8 Connecticut, 439, 440, it was said that 'it is the fact of exclusive occupancy, using and enjoying the land as his own, in hostility to the true owner, for the full statutory period, which enables the occupant to acquire an absolute right to the land.

"In Sparrow v. Hovey, 44 Michigan 63, a refusal of the court to charge that, when the title is claimed by an adverse possession, it should appear that the possession had been 'actual, continued, visible, notorious, distinct, and hostile,' but merely charging the jury that the possession 'must be actual, continued, and visible,' was held erroneous. In Pennsylvania, 'it has been repeatedly held that, to give

a title under the statute of limitations, the possession must be 'actual, visible, exclusive, notorious and uninterrupted.' Johnston v. Irwin, 3 S. & R. 291; Mercer v. Watson, 1 Watts 330, 338; Overfield v. Christy, 7 S. & R. 173.

"In Jackson v. Berner, 48 Illinois 203, it was held that an adverse possession sufficient to defeat the legal title, where there is no paper title, must be hostile in its inception, and is not to be made out by inference, but by clear and positive proof; and further, that the possession must be such as to show clearly that the party claims the land as his own, openly and exclusively.

"In Foulk v. Bond, 12 Vroom, (41 N. J. Law) 527, 545, it was said: 'The principles on which the doctrine of title by adverse possession rests are well settled. The possession must be actual and exclusive, adverse and hostile, visible and notorious, continued and uninterrupted.'

"It was held in Cook v. Babcock, 11 Cush. 206, 209, that 'When a party claims by a disseizin ripened into a good title by the lapse of time as against the legal owner, he must show an actual, open, exclusive and adverse possession of the land. All these elements are essential to be proved, and failure to establish any one of them is fatal to the validity of the claim.'

"In Armstrong v. Morrill, 14 Wall. 120, 145, this court, speaking through Mr. Justice Clifford, said: 'It is well settled law that the possession in order that it may bar the recovery, must be continuous and uninterrupted as well as open, notorious, actual, exclusive and adverse. Such a possession, it is conceded, if continued without interruption for the whole period which is prescribed by the statute for the enforcement of the right of entry, is evidence of a fee, and bars the right of recovery. Independently of positive statute law, such a possession affords a presumption that all the claimants to the land acquiesce in the claim so evidenced.' Hogan v. Kurtz, 94 U. S. 773, is to the same effect. * * * *

"Tested by these definitions, it is obvious that if the title relied on in this case, by the defendant below, was fully described and characterized by the special verdict,

it was defective in two very essential particulars, in that it was not found to have been actual and exclusive. A possession not actual, but constructive; not exclusive, but in participation with the owner or others, falls very far short of that kind of adverse possession which deprives the true owner of his title."

We therefore hold in accordance with these and other authorities, too numerous to cite, that to constitute adverse possession the occupancy of one so claiming must be
5 (1) actual, (2) visible, (3) exclusive, (4) hostile, and (5) continuous. If any one of these elements is lacking no title by adverse possession can ripen. At least three were lacking in the case at bar.

The possession of all but a relatively insignificant part
6 of this large area was constructive and not actual and such constructive possession was ineffectual against the true owner.

"'It is this instruction of which the defendants complain. But we think it was correct. It was in accordance with the doctrine asserted in Clark's Lessee v. Courtney, 5 Pet. 319, and generally recognized. It is true that when a person enters upon unoccupied land, under a deed or title, and holds adversely, his possession is construed to be co-extensive with his deed or title, and the true owner will be deemed to be disseized to the extent of the boundaries described in that title. Still, his possession beyond the limits of his actual occupancy is only constructive. If the true owner be at the same time in actual possession of part of the land, claiming title to the whole, he has the constructive possession of all the land not in the actual possession of the intruder, and this, though the owner's actual posession is not within the limits of the defective title. 'The reason is plain. Both parties can not be seized at the same time of the same land under different titles. The law, therefore, adjudges, the seisin of all that is not in the actual occupancy of the adverse party to him who has the better title.' These distinctions are
7 clearly shown in the cases. One who enters upon the land of another, though under color of title, gives no notice to that other of any claim, except to the extent of

his actual occupancy. The true owner may not know the extent of the defective title asserted against him, and if while he is in actual possession of part of the land, claiming title to the whole, mere constructive possession of another, of which he has no notice, can oust him from that part of which he is not in actual possession, a good title is no better than one which is a mere pretense. Such, we think is not the law. When the owner of the Basquez title entered upon the tract, took actual possession of a part by his tenant, and retained it, claiming the whole, the law gave to that owner the constructive possession of all that was not in the actual adverse possession or occupancy of another." Hunnicutt v. Peyton, 102 U. S. 368.

The possession was not exclusive. It appears that
8 various other persons were in possession of portions of the land in controversy while the plaintiff's title was alleged to have been ripening.

The possession was not hostile. The defendant company, through its officers and agents frequently exercised acts of ownership over the property. It is at least doubtful whether any one of the five necessary elements was present. Certainly the three we have mentioned were not.

The remaining exceptions, relate (1) to the conclusions of law and (2) to the admission of certain testimony. In neither instance do we regard the exceptions as well taken. The judgment will be affirmed.

[No. 1254, February 28, 1910.]

UNITED STATES OF AMERICA, Appellee, v. JACOB M. AURANDT, Appellant.

SYLLABUS (BY THE COURT.)

1. Arraignment and a plea are elements necessary to a valid trial of one charged with crime.

2. Such arraignment and plea must precede the empaneling and swearing of the jury as until plea there is no issue for the jury to try.

3. If, after the trial is commenced, it be discovered that there has been no arraignment or plea, it is the duty of the trial court to begin the trial anew.

4. This last includes not only the retaking of any testimony but the re-empaneling and the re-swearing of the jury.

5. In a prosecution under U. S. Rev. St. Sec. 5467, an indictment is fatally defective which fails to show that the letter embezzled came into the possession of the defendant officially, that is to say, as an employe of the postal service. Shaw v. United States, 165 Fed. 174, followed.

6. While it is permissible under certain circumstances to allege elements of description as unknown to the grand jury, recourse to this method of pleading is justifiable only on grounds of a reasonable necessity.

7. The allegation in the present case that the embezzled letter contained "an article of value" a more definite description of which "being to grand jurors unknown" considered in the light of the record; and doubted, but not decided, whether the allegation was sufficient under the rule last mentioned.

8. The defendant is placed in jeopardy when after issue joined upon a valid indictment before a competent court the jury is empaneled and sworn to try his cause.

9. In so far as a different rule is countenanced by the statute of this Territory (C. L. Sec. 2423) providing that "a nolle prosequi cannot be entered after any testimony has been introduced for the defendant," such statute is unconstitutional and void.

10. Relatively to a given charge there is, however, no former jeopardy where the testimony necessary to sustain the latter charge would not be admissible to sustain the former.

11. The present record examined in the light of the rule last stated and held that the defendant's plea of autrefois acquit was not well taken.

Appeal from the First Judicial District Court before JOHN R. MCFIE, Associate Justice. Reversed and remanded.

A. B. RENEHAN for Appellant.

In prosecution under 5 Fed. Stats. Ann., sec. 5467, p. 959, the indictment should describe the valuable content of the packet according to its nature under one of the appropriate classifications in the Statute. Rosencrans v. United States, 165 U. S. 257; United States v. Eliason, 18 D. C. 104; United States v. Clark, Crabbe 584; United States v. Patterson, 6 McLean 466; Jones v. United States, 27 Fed. 447; U. S. v. Keen, 1 McLean 439; U. S. v. Lancaster, 2 McLean 435; Jones v. U. S., 27 Fed. 447.

The offense charged in the first indictment was substantially identical with that sought to be proved in the second trial. The plea of *autre fois acquit* should have been sustained. Hans Neilson, Petitioner, 131 U. S. 188; People v. Hughes, 41 Cal. 236; 17 Enc. Law, 2 ed. 595, 597, 598; State v. Moore, 66 Mo. 372; ex parte Lange, 18 Wall. 168, 169.

After the jury are empanelled and sworn the prosecuting attorney has no right to enter a *nolle prosequi*, because the evidence is not sufficient to convict, and such abandonment is equivalent to a verdict of acquittal. Cooley Const. Limitations, pp. 467, 468; United States v. Shoemaker, 2 McLean 114; ex parte Ulrich, 42 Fed. 587; United States v. Moses, 84 Fed. 329, approving ex parte Ulrich; ex parte Glenn, 111 Fed. 247, 261.

Confusing and inaccurate statements of the law may be error. 1 Bish. Crim. Proc., sec. 978, p. 602 and sec. 980, p. 605, and sec. 980 a, p. 608; 11 Enc. Pl. & Pr., pp. 153, 156, 158, 159.

The jury should have been sworn after the arraignment. 1 Bish. Crim. Proc., sec. 946; 17 Enc. Law, 2 ed. 1115, 1139, 1140, 1145-1147; Commonwealth v. Knapp, 9 Pick. 496; Keech v. State, 15 Fla. 59; Jefferson v. State, 52 Miss. 767; Babcock v. People, 15 Hun. 347.

Vital or essential facts cannot be omitted on the

ground that they are unknown, and especially where the government had the necessary facts in hand. State v. Ferriss, 3 Lea, Tenn. 703; Commonwealth v. Noble, 165 Mass. 15; Horan v. State, 24 Texas 161; United States v. Moore, 60 Fed. 739.

The averment "article of value" is a mere conclusion, not a fact, and such conclusions are vicious. 10 Ency. Pl. & Pr., pp. 473, 474, and cases cited; United States v. Mann, 95 U. S. 586; 1 Fed. Stats. Ann., p. LXVII et seq.

D. J. LEAHY, U. S. District Attorney; STEPHEN B. DAVIS, Jr., Assistant U. S. Attorney, for Appellee.

The description in the indictment was sufficient. Rosen v. U. S., 161 U. S. 29; U. S. v. Rosecrans, 165 U. S. 257; R. S., sec. 5467.

Acquittal because of a variance between the charge made and the evidence given is no bar to a new prosecution. 12 Cyc. 280; Campbell v. People, 109 Ill. 565; Spears v. People, 220 Ill. 72, 4 L. R. A., N. S. 402; 1 McLain Criminal Law, 592, and cases cited; 1 Greenleaf on Evidence, par. 65; U. S. v. Denicke, 35 Fed. 407; State v. Fleshman, 40 W. Va. 726; Browne v. People, 66 Ill. 344; State v. Jackson, 30 Me. 29; Morgan v. State, 61 Ind. 447; People v. McNealy, 17 Cal. 334; Dill v. People, 19 Colo. 469, 36 Pac. 229; State v. Ammons, 3 Murph. 123; Burress v. Com., 68 Va. 934; State v. Revels, 44 N. C. 200; State v. Stebbins, 29 Conn. 463; State v. Sullivan, 24 Pac. 23; People v. Hughes, 41 Cal. 234; Swindel v. State, 32 Texas 102; Simms v. State, 66 Miss. 33, 5 So. 525.

"No indictment found and presented by a grand jury in any district or circuit court of the United States shall be deemed insufficient, nor shall the trial, judgment, or other proceeding thereon be affected by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant." R. S., sec. 1025; Smith v. State, 1 Tex. App. 408; Morris v. State, 30 Tex. App. 95, 16 S. W. 757; McGrew v. State, 31 Tex. C. R. 336, 20 S. W. 740; Wallace v. State, 72 Tenn. 309;

Reardon v. Smith, 36 Ill. 204; U. S. v. Malloy, 31 Fed. 19; State v. Cassady, 12 Kan. 550.

The facts are stated in the opinion.

OPINION OF THE COURT.

POPE, J.—On March 10, 1906, Aurandt, the appellant was indicted for embezzling a letter containing an article of value, in violation of U. S. R. S. 5467. He was found guilty on March 11, 1908, and after motions for new trial and in arrest was sentenced to imprisonment in the territorial penitentiary for one year. He thereupon appealed to this court.

The first ground of error proceeds upon the following statement of facts. During the cross examination of the first witness for the government it was discovered that the defendant had never been arraigned. Thereupon arraignment was had and a plea of not guilty entered. This having been done his counsel demanded "a new jury" and claimed that he was entitled to "a jury selected and sworn" since the making up of the issues. This contention was overruled, the testimony of the first witness retaken and the trial continued to its conclusion. The jury was not resworn, however, after the arraignment and plea. Was this an irregularity and if so, is it fatal to the present record? That there must be an arraignment and plea to
1 constitute a valid criminal trial is elementary. The first is necessary to fix the identity of the accused, to inform him of the charge and to give him an opportunity to plead. The second is necessary to make the issue for trial. As was said by this court, speaking through Mr. Justice Abbott, in Territory v. Gonzales, 13 N. M. 97:

"It is essential to a valid trial that in some way there should be an issue between the Territory and the appellant and without a plea, in the absence of the statutory
2 provisions to the contrary, there could be no issue."

This is but a reiteration of the views of the federal Supreme Court in Crain v. United States, 162 U. S. 625, where in remanding a cause because the record failed to show an arraignment and plea it is pointed out that "safety

lies in adhering to established modes of procedure devised for the security of life and liberty."

The necessity of a plea to the validity of the trial is illustrated by the authorities to the effect that no jeopardy attaches until an issue has been made by plea. 12 Cyc. 268; Dismey v. Comm., Ky., 5 S. W. 360; Yerger v. State, Tex., 41 S. W. 621; Weaver v. State, 83 Ind. 289; 1 Bish. New Crim. Law, sec. 1029a.

All this is not controverted by the government, but it is insisted that the present question is different. Here the defendant was arraigned and pleaded not guilty and it is contended that the fact that the jury may have been sworn in advance of the plea and not again after, it makes the irregularity one at most, of form. The authori-
3 ties, however, do not so regard it. There being no issue for trial before the plea, to swear the jury to try the cause before such plea is to obligate it to a duty not yet known, for of course in advance of plea it cannot be known whether the plea will be one of not guilty, of former acquittal or some other of the several pleas available to defendants. Reference to the books will demonstrate how clearly it is held that to swear the jury before plea is a fatal irregularity. Thus, in the Crain case it is pointed out that "a plea to the indictment is necessary before the trial can be properly commenced" and that "until the accused pleads to the indictment and thereby indicates the issue submitted by him for trial there is nothing for the jury to try."

In State v. Ulger Cheiner, 32 La. Ann. 103, 104, cited with approval in the Crain case, the accused was, after the trial commenced, by order of court arraigned and his plea taken. The trial then proceeded under the direction of the court. The Supreme Court of that state said: "We cannot sanction such a departure from ancient landmarks in criminal procedure. The prisoner must be arraigned and must plead to the indictment before the case can be set down for trial or tried." In the leading case of State v. Hughes, 1 Ala. 655, 657, it was said: "This proceeding cannot be sustained without a wide departure from established usage. * * * The idea of selecting and swearing a

jury to try a case which in its progressive steps has not reached the stage where it is triable, is a perfect anomaly. The oath administered to the jury related to the present time and cannot authorize them to try a case which is afterwards placed in a condition for trial." To the same effect are Dixon v. State, 13 Fla. 631; State v. Montgomery, 63 Mo. 296; Weaver v. State, 83 Ind. 289; Parkinson v. People, 135 Ill. 401, 10 L. R. A. 91; Dansby v. U. S., 51 S. W. 1085, and cases cited; Browning v. State, 54 Neb. 204.

We shall now notice the cases cited by the appellee to sustain the position that the irregularity was merely formal. In U. S. v. Malloy, 31 Fed. 19, it was held that the absence of arraignment and plea in a case where the defendant, without objection to such absence, went to trial and testified that he was not guilty, was within the provision of Section 1025, Rev. St. U. S., providing that no trial shall be affected "by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant." This case, however, decided in 1887, must be deemed overruled by the Crain case decided in 1896 in which latter case it is in terms held that the omission is not a matter of form only, which is cured by U. S. Rev. Stat., Sec. 1025, but is a matter of substance in the administration of the criminal law, involving the substantial rights of the accused. Certain cases are also cited from Texas, Smith v. State, 1 Tex. App. 408; Morris v. State, 30 Tex. App. 95; McGrew v. State, 31 Tex. Crim. R. 336, which in effect hold that the order in which the oath is taken by a jury, whether before or after plea, is immaterial. A Tennessee case, Wallace v. State, 72 Tenn. 309, is cited to the same effect. We are of opinion, however, that these decisions are contrary to the clear weight of state authority and against the reasoning employed in controlling federal authority. We think therefore, that the court erred in requiring the cause to proceed, after arraignment and plea, with-
4 out giving the parties anew the opportunity of selecting the jury and without having the jury resworn.

This brings us to the next question presented by the record, which deals with the validity of the indictment.

A demurrer seasonably interposed proceeded upon the general ground that no offense was stated against any law of the United States and there was a further objection that the indictment failed to describe "any article of value" within Sec. 5467 and failed by its averments to apprise the defendant of what he had to meet. Omitting the formal portions, the indictment is as follows:

"That Jacob M. Aurandt, late of the First Judicial District, in the Territory of New Mexico, on the eighteenth day of March in the year of our Lord 1904, at the First Judicial District aforesaid, and within the jurisdiction of said court: Being then and there a person employed in a department of the postal service of the said United States to-wit, a postmaster of and for the postoffice of the said United States at Santa Cruz in said First Judicial District, feloniously did secrete and embezzle a certain letter and packet which then and there came into his possession, and contained an article of value, and was intended to be conveyed by mail, that is to say, a certain letter and packet then and there directed to Jose Maria Martin, at Chimayo, in the Territory of New Mexico, a more definite description of the said article of value so then and there contained in the said letter, being to the said grand jurors unknown, and the said letter and packet not having then been delivered to the person to whom it was so directed."

After a careful consideration of its terms, we deem this indictment subject to the demurrer for the reason that while alleging that the letter in question came
5 into the possession of the defendant it fails to set out that it came into and was in his possession officially. Without such allegation the case was not brought within the statute. We find this matter treated in a recent decision of the Circuit Court of Appeals for the Sixth Circuit, Shaw v. U. S., 165 Fed. 174. In that case the person indicted was a railway postal clerk and the allegations of the indictment were practically the same as here. We quote from that decision as follows:

"It is urged that this count of the indictment is bad in that it fails to charge with sufficient legal certainty

that the letter came into the respondent's possession by reason of, or because of, his employment in the postal service; and we think that upon demurrer it should have been so held. It is a necessary implication of the statute that the letter should have come to the carrier in his official character. It is only a matter of inference, and not of necessary consequence, that it came into his possession as a postal carrier. It may have been delivered to him as a mere private person to be taken to the postoffice, or picked up by him on the street and was being taken to the postoffice, or perhaps to be returned to the sender whose name and address were on the envelope; and other not extraordinary circumstances may have attended his coming into the possession of the letter as a private individual. His possession acquired in any of these ways would be sufficient to meet the allegation of the indictment in this particular, and yet there would be no violation of the statute." The opinion was rendered by Circuit Judge Severens and concurred in by Mr. Justice Lurton and Circuit Judge Richards. We accept the views there expressed as conclusive of the present case. We may add that the proper form of an indictment covering this point under Sec. 5467 is shown in Wright's Case, 134 U. S. 136.

Further complaint is made upon demurrer that the indictment was insufficient in its averments descriptive of the article of value alleged to have been contained in the letter stolen. We deem this complaint not without force. That the stolen letter contained an article of value was a material element of the charge, under R. S. 5467. This section covers a higher grade of offense denounced by R. S. 3891, which latter penalizes the simple taking of a letter without contents of value. Being a material element of the crime the defendant was entitled to know what the article of value was. The indictment alleging it simply to have been "an article of value" attempts to excuse further amplification upon this conclusion of law by the allegation "a more definite description of said article of value * * * being to the said grand jurors unknown." We concur with counsel for appellant in his view that knowledge by the grand jury that the contained article was one "of

value" necessarily showed greater knowledge of the article than the indictment discloses. It is hardly conceivable that the grand jury knew the article to be one "of value" and yet was unable to describe it further. We are impressed that the defendant should have had the benefit of that knowledge. Neither do we not overlook, in this connection, the fact shown by the record that the war settlement warrant, which it ultimately appeared by photographic copy on the last trial was the article of value in question, was at the date of the finding of the indictment in the hands of officers of the government and subject to the inspection of the grand jury upon the proper process. While the allegation that further particulars of a transaction are unknown is permissible in indictments under certain conditions and serves a useful purpose in
6 preventing variances, it must not be overlooked that its use proceeds purely upon grounds of necessity. With the ceasing of the necessity ceases the rule. It should not be so used as to withhold unnecessarily from defendants information which in their proper defense they should have. Bishop's New Crim. Proc. 549; State v. Stowe, 132 Mo. 199, 209; Blodger v. State, 3 Ind. 403; Cheek v. State, 38 Ala. 227; Hill v. State, 78 Ala. 1; Jarasco v. State, 6 Tex. App. 242; State v. Ferriss, 3 Lia, Tenn., 703. We find it unnecessary, however, to place our ruling as to the demurrer upon this last ground, since with the facts fully disclosed by the last trial before any future
7 grand jury a further indictment will doubtless specifically describe the article contained in the letter.

A further assignment of error arises out of the court's ruling directing the jury to find against defendant's plea of former acquittal. The facts developed by that plea are briefly stated. At the September term, 1905, an indictment was found against defendant identical with that at bar with one exception. In describing the contents of the letter, instead of stating it, as in the last indictment, to be an article of value with further description unknown, it is set up as being "a certain draft then still unpaid for the sum and of the value of thirty-one dollars." The case upon that indictment came on for trial in March, 1906.

After the jury had been sworn and part of the testimony for the prosecution taken, the United States attorney by leave of the court but over defendant's objection, entered a *nolle prosequi*. The present indictment was returned within a day or two thereafter. Upon the trial of the plea in abatement it was disclosed that the article of value relied upon by the prosecution was not a draft for thirty-one dollars, but a war settlement warrant for thirty-one dollars and fifty-seven cents. The question presented is whether the facts just recited made a case of former jeopardy. The law we deem to be clear that jeopardy upon a given charge has resulted when upon a valid indict-
8 ment and issue joined before a competent court the jury has been empanelled and sworn to try defendant's guilt or innocence. 12 Cyc. 261 and cases cited; 1 Bish. New Crim. Law, Sec. 1014; Pizano v. State, 20 Tex. App. 139 and cases cited. It follows, therefore, that the dismissal of the case in the manner disclosed—after the jury had been sworn and some testimony taken—was tantamount to an acquittal upon the charge made by the indictment. 12 Cyc. 269 and cases cited; Williams v. State, 42 Ark. 35; Williams v. Com., 78 Ky. 93; State v. Richardson, 47 S. C. 166, 35 L. R. A. 238; State v. Collendine, 8 Ia. 288.

The fact that our Territorial Statute [C. L. Sec. 3423] provides that "a *nolle prosequi* cannot be entered after any testimony has been introduced for the defendant"—does not affect the case. Assuming that statute to be a legislative attempt to give the right to dismiss at any time before the defendant offers proof, it is in vio-
9 ation of fundamental law and void. Williams v. Com., 78 Ky. 93. It is, of course, not within the power of the legislature to take away from the citizen the constitutional guarantee of immunity from second jeopardy by any such provision as this. The question remains, however, whether construing, as we must, the dismissal as an acquittal, there was former jeopardy upon the particular charge made in the present case. The test by which prior jeopardy is determined is variously stated. We find no fault with the rule as stated by appellant's counsel to the

effect that the proper test is "whether the facts required to support the second indictment would have been
10 sufficient if proved to have procured a conviction under the first indictment." This is stated in another form by Judge Cooley in his Constitutional Limitations, p. 328: "If the first indictment or information were such that the accused might have been convicted under it on proof of the facts by which the second is sought to be sustained then the jeopardy which attached in the first must constitute a protection against a trial on the second." Applying this principle the conviction of the defendant was upon proof that the article of value was a war settlement warrant for $31.57. This proof diverged from the allegation of the first indictment in that there the article was alleged to be a draft for $31.00. If offered in the first case the proof in the second case could not have been received. The defendant was therefore in legal contemplation not tried the second time upon the case alleged against him in the first instance. A second indictment framed specifically, as we have hereinbefore indicated, should have been done, would have disclosed the variance and the absence of jeopardy. As it is, we look to the proof in elucidation of the description and find that there were in law two articles of value and that a trial upon an indictment involving one was not second jeopardy by reason of the fact that the party had been previously acquitted upon the other. As was said in Dill v. People, 19 Colo. 469, 36 Pac. 229: "The affidavits set out in the indictments respectively were variant in description. The variance was material. The allegations of the two indictments clearly indicate two different affidavits though in fact there may have been but one. Each of the affidavits bears a single date. That date cannot be both November 28 and November 29. Therefore, the affidavit particularly described in the second indictment was not admissible
11 under the first. * * * The court did not err in sustaining the demurrer to the plea of *autrefois acquit.*"

We consider this case within the principles just quoted and within the well recognized rule in cases of this kind that the plea will not lie where there is a material variance,

so that proof of the material facts charged in the second indictment would not have been admissible to secure a conviction under the first. 12 Cyc. 266; 17 A. & E. Enc. of Law, 2 ed. 598; State v. Revels, 44 N. C. 200.

While holding that there is no constitutional barrier against further prosecution, we are constrained upon the other grounds discussed to reverse and remand the cause, with directions to quash the indictment, and it is so ordered.

Alford W. Cooley, A. J., concurred in the result.

M. C. Mechem, A. J., who did not hear the argument, did not participate.

[No. 1265, February 28, 1910.]

THE FIRE ASSOCIATION, Intervenor, Burton Lingo Co., Appellants, v. S. E. PATTON, et al., Appellees.

SYLLABUS.

1. The Texas court had jurisdiction of the person of Patton, but not of the real estate in New Mexico. The lien which it attempted to reinstate, declare valid and in effect turn over, was a statutory lien enforceable only in New Mexico.

2. Even though an insurance policy is assigned, it is still the assignor's insurance, which he is entitled to have applied to the extinguishment of his indebtedness, and the payment to the assignee of the insurance operated to discharge the lien debt.

3. Conditions for forfeiture in the printed forms of insurance now in general use should be strictly construed against the insurer, and in favor of the insured, when invoked by an insurance company to limit or avoid its liability. No intendment will be indulged in to invalidate a policy which the language used does not require.

4. Cases cited to show that a contract of fire insurance being a contract of indemnity and no more, the insurer after paying the loss is entitled to be subrogated to all "the

means of indemnity which assured held against the party primarily liable," held not applicable.

Appeal from the District Court for Chaves County before W. H. POPE, Associate Justice. Affirmed.

REID & HERVEY and CRANE, SEAY & CRANE for Appellant.

The judgment rendered in Texas is *res adjudicata.* Southern Pac. R. Co. v. United States, 168 U. S. 1, 18 Sup. Ct. 18, 42 L. ed. 355; 2 Black on Judgment, 2 ed. sec. 504, et seq. and cases cited, 514, 690, 864, 791; Stewart v. Maxwell, 1 N. M. 563; Farish v. Mining Company, 5 N. M. 279; Nave v. Adams, 107 Mo. 414, 28 Am. S. Rep. 421; Parhurst v. Berdell, 110 N. Y. 386, 6 Am. S. Rep. 384; Shearon v. Terry, 1 L. R. A. 572; Union Pac. R. Co. v. Baker, Kansas, 47 Pac. 563; Nicholl v. Mason, 21 Wend. 339; Roger v. Odell, 39 N. H. 457; Baxley v. Linn, 16 Pa. 241; U. S. v. Dewey, 6 Biss. 503, F. D. C. A. S. No. 14,956; Leech v. Beatty, 127 Cal. 177, 59 Pac. 837; Freeman on Judgment, sec. 249; Bigelow on Estoppel, 5th ed. p. 261; Wolverton v. Baker, 86 Cal. 591, 25 Pac. 54; Voorhees v. Bank of the U. S., 10 Peters 449; Marble v. Keyes, 9 Gray's Rep., Mass. 221.

A stranger at the time he pays to the creditor the amount of the debt may take an assignment of it without the consent or knowledge of the debtor; and if, when he pays the amount, there be an express agreement that the debt is to be assigned to the stranger, this would amount to an equitable assignment of the debt, though no formal assignment was ever executed. Neeley v. Jones, 16 W. Va. 625; Swan v. Patterson, 7 Mo. 164; Bk. of U. S. v. Martson, 2 Bock. 254; Burr v. Smith, 21 Barb. 262; Dayton v. Tagg, 8 Leigh 602; Pittsburg, etc., R. Co. v. Thompson, 56 Ill. 138; 1 May Ins., secs. 276, 457, 2 and cases cited; Meadows v. Ins. Co., 62 Ia. 387, 17 N. W. 600; Titus v. Ins. Co., 81 N. Y. 410; Shroeder v. Imperial Ins. Co., Cal., 63, Pac. 1074; 19 Cyc. 750 and cases cited; Norris v. Hartford Ins. Co., S. C.,

33 S. E. 566, 74 A. S. R. 765; Del. Ins. Co. v. Greer, 120 Fed. 916; 57 Va. 188; 61 L. R. A. 137; Wibengo v. Ins. Co., Mich., 57 N. W. 833; Wilcox v. Ins. Co., Wis., 55 N. W. 188; Quinbar v. Ins. Co., 133 N. Y. 356; 31 N. E. 31, 28 A. S. R. 645; Findlay v. Ins. Co., 74 Vt. 211; 52 Atl. 429; 93 A. S. R. 885; Ins. Co. v. Brown, 77 Mo. 79; 25 Atl. 992; Hayes v. Ins. Co., 132 N. C. 702; 44 S. E. 404; Crikelair v. Citizens Ins. Co., Ill., 48 N. E. 167; Riddelsbarger v. Ins. Co., 7 Wall. 390; Wells Fargo v. Ins. Co., 44 Cal. 397; Yoch v. Ins. Co., 111 Cal. 503, 44 Pac. 189, 34 L. R. A. 857; Supple v. Ia. St. Ins. Co., 58 Ia 29, 11 N. W. 716; Speagle v. Dwelling House Ins. Co., Ky., 31 S. W. 282; Eaton Eq., p. 449; C. L. 1897, sec. 3938; Ins. Co. v. Stenson, 103 U. S. 25; Hall v. R. R. Co., 13 Wallace 370; Hart v. R. R. Co., 13 Metcalf 99; Ins. Co. v. Basher, 39 Me. 253; Ins. Co. v. Frost, 37 Ill. 333; Ins. Co. v. Ry. Co., 25 Conn. 265; Mason v. Sainsburg, 3 Douglas 60; Yates v. Whyte, 4 Bing New Cases 272; Clark v. Blything, 2 B. & C. 254; Randal v. Cockran, 1 Vesey Sr. 98; Wilker v. Harper, 2 Barb. Ch. 338; Sherman's Admin. v. Shaver, 75 Va. 1; Ins. Co. v. Stinson, 103 U. S. 25, 28; Ins. Co. v. Woodruff, 2 Dutch, N. J. 541; Mathews v. Aiken, 1 Com. 595; Peake v. Estate of Darwin, 25 Vt. 32; Carter v. Jones, 5 Ired. Eq. 197; Elhibor v. Newman, 20 Pa. St. 281.

FREEMAN, CAMERON & FULLEN for Appellees.

The Texas judgment was not *res adjudicata.* Lindauer v. Boyd, 70 Pac. Rep. 568; 1 Cook on Corporations, sec. 1; American Sugar Refining Co. v. Johnson, 60 Fed. 511; Bridge v. Wooley, 78 Ky. 523; Bank v. Earle, 13 Pet. 519; Ry. Co. v. Koontz, 104 U. S. 5; Ex parte Scholenberger, 96 U. S. 369; Clark v. Barnard, 108 U. S. 452; Nashua R. R. Co. v. Lowell Railroad, 136 U. S. 356; County Court v. Baltimore, etc. R. R., 35 Fed. 161; B. & O. R. R. v. Ford, 35 Fed. 161; 3 Cook on Corporations 910; 1 Cook on Corporations, sec. 1; American Sugar Refining Co. v. Johnston, 60 Fed. 511; Nichil v. Mason, 21 Wend. 339; Davis v. Dunkhill, 9 N. H. 545; Renner

v. Marshall, 1 Wheaton 215; Gains v. Reilf, et als., 12 How. 536; Reynolds v. Stockton, 140 U. S. 264; 2 Smith's Leading Cases 800, 813, 790; 2nd Black on Judgments, 2 ed., secs. 513, 508; Guarantee Co. v. Glenn Cove Springs, 139 U. S. 137; Franz Falk Brewing Co. v. Herch, 78 Tex. 192; 14 S. W. 450; Abbott v. Mut. Life Ins. Co., 127 Ind. 70, 26 N. E. 153; Sackett v. Montgomery, 57 Neb. 424; 77 N. W. 1083, 73rd Am. St. Rep. 522; Cockran v. Parker, 12 Colo. App. 169, 54 Pac. 1027; 2nd Story on the Conflict of Laws, secs. 619, 513, 592; Stout v. Lyle, 103 U. S. 68; Peck v. Jenness, 7 How. 612; Hale v. Frick, 104 U. S. 261; Russel v. Plate, 94 U. S. 606; Gaines v. Relf, et als., 12 How. 536.

Subrogation. Warring v. Loder, 53 N. Y. 581; Douglas v. White, 3 Barb. Ch. 621; 37 A. & E. Ency. of L., 2 ed., 207; Campan v. Molle, 124 Cal. 415; Farman v. Heath, 19 Ind. 63; Walse v. McBride, 72 Md. 45; George v. Summerville, 153 Mo. 7; Harris v. Elliott, 45 W. Va. 245; 44 Cent. Digest 3344; Nisbit v. Martin, 4 Pa. Co. Ct. R. 95; Pearman v. Gould, N. J., 5 Atl. 815; Kernochan v. N. Y. Fire Ins. Co., 17 N. Y. 428; Traders Insurance Co. v. Race, Ill., 29 N. E. 846; 31 Ill. App. 625, 31 N. E. 392; Speagle v. Dwelling House Insurance Co., Ky., 31 S. W. 283; Ins. Co. v. Stetson, 105 U. S. 28; Wood v. N. W. Ins. Co, 46 N. Y. 425; Ulster County Savings Inst. v. Lake, 73 N. Y. 165; King v. Mutual Fire Ins. Co., 7 Cush. 1, 54 Am. Dec. 683; Carpenter v. Providence Ins. Co., 16 Peters 502; Garrison v. Memphis Ins. Co., 19 Howard 312; Hall and Long v. Railroad Co., 13 Wallace 370; Wager v. Providence Ins. Co., 150 U. S. 107; Insurance Co. v. Stenson, 103 U. S. 28; Lysle v. Rogers, 113 N. Car. 197, 37 Am. State Rep. 627; Traders Ins. Co. v. Race, 31 N. Eastern, 392; Pendleton v. Elliott, 38 Minnesota, 371, 38 N. West. Rep. 97; Mercantile Mutual Ins. Co. v. Knabales, 20th N. Y. 173; Richardson v. Fraser, 112 U. S. 432; Mobile Ins. Co. v. Columbia, etc., Railroad Co., 44 Am. State Repts. 732; Memphis, etc., Railroad Co. v. Dow, 120 U. S. 301; Aultman, Miller & Co. v. Bishop, 74th N. Western 55; Bank v. Wright, 63 N. W. 126; Rice v. Winters, 63 N. W. 830; McNeil, v. Miller, W. Va.,

2 S. E. 355; 44 Cent. Dig. 3344; Mobile, etc., Railroad Co. v. Jurey, 111 U. S. 595; Phenix Ins. Co. v. Erie Transportation Co., 117 U. S. 321; St. Louis, etc., Railroad Co. v. Commercial Ins. Co., 139 U. S. 235; W. F. Ins. Co. v. Pac. Ins. Co., 4 Cal. 406.

STATEMENT OF THE CASE.

This suit was begun June 16th, 1903, by the appellant, Burton-Lingo Company, a New Mexico corporation, to foreclose a mechanic's lien on certain lots in the city of Roswell, County of Chaves, this Territory, against Patton and wife as owners, and Haynes and Smith as mortgagees of Patton. Patton took out two insurance policies in the sum of fifteen hundred dollars ($1500.00) each with the appellant, the Fire Association of Philadelphia, one dated June 15th, 1903, and the other March 16th, 1904, each of said policies containing the following clause: "Loss or damage, if any, under this policy, shall be payable to Burton-Lingo & Co., as their mortgagee (or trustee) as interest may appear." May 2, 1904, the improvements on the lots in question, for the construction of which the Burton-Lingo Company claimed a lien, were totally destroyed by fire, and on the same day Patton, in consideration of three hundred dollars ($300.00) and the release of said lien executed an assignment of said policies to the Burton-Lingo Company.

On the 10th day of August, 1904, the Burton-Lingo Company, a Texas corporation, brought suit against the Fire Association of Philadelphia and Patton in the District Court of Tarrant County, Texas, to recover on the policies assigned to it by Patton. Personal service on Patton and he failed to answer. Judgment in favor of the Burton-Lingo Company against the Fire Association for the amount of the policies and upon its cross bill and answer, to which Patton had been made a party, the Fire Association was on the 1st day of March, 1905, by said District Court, awarded judgment against said Patton as follows:

"It is further ordered, adjudged and decreed by the court that the said contract (the contract releasing the

mechanic's lien in consideration of the assignment of the policies by Patton) is null and void and that the plaintiff Burton-Lingo Company have a valid and subsisting lien on the lots situated in the Territory of New Mexico upon which said buildings stood, covered by the two policies of insurance sued upon, to foreclose which lien a suit is now pending in the courts of New Mexico in the name of Burton-Lingo Company and against said Patton. And that the defendant Fire Association of Philadelphia is hereby subrogated to all the rights of the said Burton-Lingo Company in said litigation pending, and to all of the liens upon said property, to foreclose which said litigation was instituted in the courts of New Mexico as aforesaid, and it is further ordered and decreed that said Patton has no just or valid defense thereto. And that the defendant Fire Association of Philadelphia may continue to prosecute said litigation in the name of the Burton-Lingo Company for its own use and benefit and to take all necessary orders and processes therein in the courts of New Mexico, all this to be done at its own cost."

There was no provision in the above judgment for its enforcement against Patton. The Fire Association satisfied this judgment. On the 11th day of September, 1905, the Fire Association filed its petition as intervenor in this suit, in which it set up its judgment obtained in the Texas court as *res-adjudicata,* and further claimed that it was subrogated to the rights of the Burton-Lingo Company to the lien sought to be foreclosed. Issue being duly joined and testimony taken, the court rendered its decree in favor of the appellees, and this appeal was taken.

OPINION OF THE COURT.

MECHEM, J.—1. This case falls clearly within that class wherein a court of equity, having jurisdiction of the parties, has decreed in relation to the title to real estate without its territorial jurisdiction, but has not taken the necessary steps to give force and effect to its decree by some process or order compelling obedience to its judgment.

The Texas court had jurisdiction of the person of

Patton, but not of the real estate in New Mexico. The lien which it attempted to reinstate, declare valid and
1 in effect turn over to the Fire Association, was a statutory lien enforceable only in New Mexico. In Carpenter v. Strange, 141 U. S. 105, it was said:

"The real estate was situated in Tennessee and governed by the laws of its situs, and while by means of its power over the person of a party a court of equity may in a proper case compel him to act in relation to property not within its jurisdiction, its decree does not operate directly upon the property nor affect the title, but is made effectual through the coercion of the defendant, as, for instance, by directing a deed to be executed or cancelled by or on behalf of the party. The court "has no inherent power, by the mere force of its decree, to annul a deed, or to establish a title." Hart v. Sanson, 110 U. S. 151, 155.

"Hence, although in cases of trust, of contract and of fraud, the jurisdiction of a court of chancery may be sustained over the person, notwithstanding lands not within the jurisdiction may be affected by the decree, (Massie v. Watts, 6 Cranch, 148) yet it does not follow that such a decree is in itself necessarily binding upon the courts of the state where the land it situated. To declare the deed to Mrs. Strange null and void, in virtue alone of the decree in New York, would be to attribute to that decree the force and effect of a judgment in rem by a court having no jurisdiction over the *res*.

"By its terms no provision whatever was made for its enforcement as against Mrs. Strange in respect of the real estate. No conveyance was directed, nor was there any attempt in any way to exert control over her in view of the conclusion that the court announced. Direct action upon the real estate was certainly not within the power of the court, as it did not order Mrs. Strange to take any action with reference to it, and she took none, the courts of Tennessee were not obliged to surrender jurisdiction to the courts of New York over real estate in Tennessee, exclusively subject to its laws and the jurisdiction of its courts. Story Confl. Laws, 543; Whart. Confl. Laws, 288, 289;

Watkins v. Holman, 16 Pet. 25; Northern Indiana Railroad v. Mich. Cent. Railroad, 15 How. 233; Davis v. Headley, 22 N. J. Eq. (7 C. E. Green) 115; Miller v. Birdsong, 7 Baxter, 531; Cooley v. Scarlett, 38 Illinois, 316; Gardner v. Ogden, 22 N. Y. 327."

And so in this case to declare the mechanic's lien in question valid, that Patton had no defense to it and that the Fire Association was subrogated to the rights of Burton-Lingo Company to it, and entitled to prosecute this action in the name of Burton-Lingo Company for its own benefit, solely by virtue of the judgment of the Texas court, "would be to attribute to that decree the force and effect of a judgment in *rem* by a court having no jurisdiction over the *res*."

In the late case of Fall v. Eastin, U. S., the court after restating with approval the doctrine announced in Carpenter v. Strange, *supra,* goes on to say that it is a well recognized principle:

"That when the subject matter of a suit in a court of equity is within another state or country, but the parties within the jurisdiction of the court, the suit may be maintained and remedies granted which may directly affect and operate upon the person of the defendant and not upon the subject matter, although the subject matter is referred to in the decree, and the defendant is ordered to do or refrain from certain acts toward it, and it is thus ultimately but indirectly affected by the relief granted. In such cases the decree is not of itself legal title, nor does it transfer the legal title. It must be executed by the party and obedience is compelled by proceedings in the nature of contempt, attachment or sequestration. On the other hand, where the suit is strictly local, the subject matter is specific property, and the relief when granted is such that it must act directly upon the subject matter, and not upon the person of the defendant, the jurisdiction must be exercised in the state where the subject matter is situated. 3 Pomeroy's Equity, sections 1317. 1318 and notes."

It is clear that the decree of the Texas court, in so far as it undertook to adjudicate and transfer a lien on

land in New Mexico, not having been enforced by its control of the person of Patton, was *coram non judice* and therefore properly disregarded by the trial court.

2. The court below held that independent of the contract of May 2, 1904, by which the Burton-Lingo Company in consideration of the assignment to it of the policies, released the mechanic's lien, the payment to it of the amount of the policies paid off and discharged the lien, because having been taken out in the name of Patton and at his expense, the proceeds of the policies, had they not gone to the Burton-Lingo Company, would have constituted a fund out of which Haynes and Smith and other creditors of Patton would have been satisfied, and this holding is assigned as error. Counsel for the Fire Association contend that the payment of the policies did not discharge the lien, but on the contrary the rights of the Burton-Lingo Company passed to the Fire Association and an equitable assignment was effected.

There is not in the record any assignment of the lien, nor agreement to assign, nor of the debt for which the lien was claimed by the Burton-Lingo Company, to the Fire Association, nor does the Fire Association in its petition of intervention set up any such assignment or agreement to assign; nor did the payment by the Fire Association of the policies have the effect of creating an assignment of the debt, for the insurance was Patton's, paid by him. As was said in Carpenter v. Providence Washington Ins. Co., 16 Pet. 500:

"Far different is the case where an insurance is made by the mortgagor on the premises, on his own account; for, notwithstanding any mortgage or other incumbrance upon the premises, he will be entitled to recover the full amount of his loss, not exceeding the insurance; since the whole loss is his own, and he remains personally liable to the mortgagee or other incumbrancer, for the full amount of the debt or incumbrance.

"These principles we take to be unquestionable, and the necessary result of the doctrines of law applicable to insurances by the mortgagor and the mortgagee. If, then, a mortgagor procures a policy on the property against fire,

and he afterwards assigns the policy to the mortgagee, with the consent of the underwriters (if that is required by the contract to give it validity), as collateral security, that assignment operates solely as an equitable transfer of the policy, so as to enable the mortgagee to recover the amount due, in case of loss; but it does not displace the interest of the mortgagor in the premises insured. On the contrary, the insurance is still his insurance, and on his property, and for his account."

So even though Patton had assigned the policies to the Burton-Lingo Company, it was still his insurance, which he was entitled to have applied to the extinguishment of his indebtedness, and the payment to the
2 Burton-Lingo Company operated to discharge the lien debt. First Nat. Bank v. Ins. Co., 2 Tenn. Ch. App. (1901) 90.

3. The Fire Association further claims, that it is entitled to be subrogated to the rights of the Burton-Lingo Company, under the latter company's lien, by reason of the payment of the insurance policies, and for this assigns two reasons:

(1) That by the terms of the policies this subrogation is expressly provided for; and

(2) Irrespective of such express provision the right to subrogation exists as a matter of right.

The Fire Association claims that as to Patton, no liability existed because of the foreclosure proceedings on the lien, and therefore under the terms of the policies it is entitled to be subrogated.

The two clauses of the policies under which the Fire Association claims the forfeiture and consequent subrogation are:

"This entire policy, unless otherwise provided by agreement endorsed hereon, or added hereto, shall be void, if, with the knowledge of the insured, foreclosure proceedings be commenced or notice given of the sale of any property covered by this policy by virtue of any mortgage or trust deed."

"Whenever this company shall pay he mortgagee or trustee, any sum for loss or damage under this policy, and

shall claim that as to the mortgagor or owner no liability therefore existed, this company shall, to the extent of such payment, be thereupon legally subrogated to all the rights of the party to whom such payment shall be made, under all securities held as collateral to the mortgage deed, or may, at its option, pay to the mortgagee (or trustee) the whole principal due or to grow due on the mortgage, with interest, and shall thereupon receive a full assignment and transfer of the mortgage and of all such other securities; but no subrogation shall impair the right of the mortgagee (or trustee) to recover the full amount of this claim in court."

If the policy was void because of the foreclosure proceedings, then the Fire Association, owing no liability thereon to Patton, would, it claims, be subrogated to the rights of the Burton-Lingo Company to the lien. But this is a mechanic's lien, not a mortgage or a deed of trust, and the clause provides that the foreclosure proceedings working the forfeiture should be "by virtue of any mortgage or deed of trust." We are then called upon by the Fire Association to add restrictions and obligations to the contract never contemplated by the parties, and which in the language of the court in Ins. Co. v. Stinson, 103 U. S. 25, would be "making it a mere shadow of security, and increasing the avenues of escape from obligation to pay, already too numerous and oppressive." It was well said by McCormick, J., in Pennsylvania Fire Ins. Co. v. Hughes, 108 Feb. 497, 47 C. C. A. 459:

"Conditions for forfeiture in the printed forms of insurance now in general use have been prepared by the insurance companies with studious care, and should be
3 strictly construed against the insurer, and in favor of the insured, when invoked by an insurance company to limit or avoid its liability. No intendment will be indulged in to invalidate a policy which the language used does not require."

We take the contract as it comes before us, and assume that the parties to it, have therein expressed and embodied their entire intention and set forth all the conditions of their agreement, and we are not at liberty either

to disregard words that they have used or to insert words that they have not used. Harrison v. Fortlage, 161 U. S. 57; Seitz v. Brewer's Refrigerating Co., 141 U. S. 510.

Counsel for the Fire Association argue that as a contract of fire insurance is a contract of indemnity and no more, the insurer after paying the loss is entitled to be subrogated to all the "means of indemnity which assured held against the party primarily liable." The case of Hall & Long v. Railroad Companies, 13 Wall. 370, is cited by counsel in support of their position. In that case the question was whether the underwriter, who insures personal property against loss by fire, and pays the insurance upon a total loss while in transit, can bring an action, in the name of the owner, for his use against the common carrier based upon the common law liability of such carrier, and the court held that:

"In respect to the ownership of the goods, and the risk incident thereto, the owner and insurer are considered but one person, having together the beneficial right of indemnity due from the carrier for a breach of his contract or for non-appearance for his legal duty. Standing thus, as the insurer does, practically in the position of a surety, stipulating that the goods shall not be lost, or injured in consequence of the peril insured against, where he has indemnified the owner for the loss, he is entitled to all the means of indemnity which the satisfied owner held against the party primarily liable." Nowhere in the record
4 nor in the brief is there any intimation of a liability occasioned by the loss existing in favor of Patton, the assured.

Counsel also rely on the case of Insurance Co. v. Stinson, supra., in which Stinson, the plaintiff in the suit, had secured a policy of insurance upon a building, on which he then held a lien, his interest being stated in the policy as that of contractor and builder; thereafter during the life of the policy the building was destroyed by fire; after loss Stinson did not further prosecute his lien but sued the Insurance Company to recover on the policy, to which suit the company made two defenses: first, the failure of Stinson to prosecute his suit to foreclose the lien,

and, second, want of insurable interest. On the first defense, which alone is of interest here, the court held:

"But even then we do not think that the creditor is bound to take any active steps to realize the fruits of a collateral, or to keep it from expiring, unless the insurance be first paid and notice be given to him of a desire on the part of the insurers to be subrogated to his rights, with a tender of indemnity against expenses. We are aware that views somewhat differing from these have been held by respectable authority; but we think without any sound reason. See May on Insurance, sec. 457; Insurance Company v. Woodruff, 2 Dutch, N. J. 541.

Neither of the above cases is authority here: Patton was the assured. Judgment of the lower court is affirmed.

[No. 1267, February 28, 1910.]

JEMEZ LAND COMPANY, Appellant, v. ANTONIO JOSE GARCIA, Appellee.

SYLLABUS.

1. The contention that C. L., sec. 2950, par. 5, confers jurisdiction upon the District Court of Bernalillo County to try the cause notwithstanding the fact that the complaint shows the land involved to be situated in the County of Sandoval would be correct if the claim for damages was the sole object of the suit, but the claim for damages is not the sole object.

2. Complaint examined and found to contain both a legal and equitable cause of action which is permissible under the Code.

3. It cannot be contended successfully that the allegations of ownership and right of possession cannot be denied by the answer to such a complaint.

4. The action to strike because the answer of the appellee not only denies the ownership and right of possession of the appellant of the land involved, but also claims owner-

ship and right of possession to be in the appellee, was properly overruled.

5. From examination of complaint it is apparent that the injunction prayed for in the complaint cannot be treated as a mere incident to the action for damages.

6. Growing trees are part of the realty and no part of the claim for damages for trees already cut.

7. As complaint shows that an interest in land is necessarily involved in the suit within meaning of C. L. 1897, sec. 2950, par. 4, and that the land is situated in Sandoval County, and not in Bernalillo county, there was a want of jurisdiction for which the demurrers were properly overruled by the court below.

8. The cause is in form an action of "trespass to try title" which action is authorized by the laws of the state of Texas but not in New Mexico.

9. The answers in this case being responsive to the complaint and challenging its allegations, are not obnoxious to either the demurrers or motion to strike interposed by the appellant, and therefore errors assigned upon their denial by the court below, cannot be sustained.

10. As there was want of jurisdiction, as concluded by the court below, there could be no error in sustaining the motion to strike the reply.

11. As appellant declined to plead further in the court below the judgment of dismissal was properly rendered and error assigned as to this action is overruled.

Appeal from the District Court for Bernalillo County before IRA A. ABBOTT, Associate Justice. Affirmed.

ALONZO B. MCMILLEN for Appellant.

The court had jurisdiction. C. L. 1897, sec. 2950, par. 1, 2, 3, 5.

FRANK W. CLANCY for Appellee.

Lack of jurisdiction is apparent on the face of the

complaint. C. L. 1897, sec. 2950; Jones v. Rogers, 85 Miss. 834-5; Wayne v. Caldwell, 1 S. D. 485-6; New Orleans v. Benjamin, 153 U. S. 431; Mining Co. v. Ore Purchasing Co., 188 U. S. 643.

STATEMENT OF THE CASE.

The appellant, a corporation, brought suit in the District Court of Bernalillo County, alleging that it was the owner in fee and in possession of the tract of land specified in the complaint, situated in the County of Sandoval in said Territory; that within three years and while the appellant was owner and in possession of the land the appellee went upon appellant's land and cut many small growing trees thereon and piled them so as to make a kind of brush fence around a portion of a smaller tract of land within the Canon de San Diego Grant referred to in the complaint; that on information and belief appellant alleges that the appellee was not in possession of the land but that the appellant was and is in possession; that the damage amounted to one hundred dollars.

The complaint further alleges that when the appellant, through its employes, was about to clear away the brush and rubbish from said land and improve it, the appellee forbid the same threatening to beat, injure and do the appellant's employees bodily harm, and will do so unless restrained.

Appellant further alleges that the growing timber is in great danger from destruction by fire unless said brush is removed, and on information and belief alleges that unless restrained by the court appellee will continue to cut and carry away from appellant's land the growing timber thereon.

The prayer of the complaint is as follows:

"Wherefore, plaintiff prays judgment against said defendant for the sum of one hundred dollars damages for the cutting and destroying of growing trees upon plaintiff's premises, together with interest and cost of suit, and the said plaintiff prays that the said defendant be enjoined and restrained from interfering with the plaintiff, its officers, agents and employees in the clearing away of the

brush and improving said property, and that said defendant be also restrained from cutting timber upon the land of said plaintiff or removing wood or stone therefrom until the further order of the court, and that upon final hearing the said defendant be perpetually enjoined from claiming any right, title or interest in or to said premises and from interfering in any way with the clearing, improving or use of said premises by the said plaintiff, its officers, agents and employees, and for all proper relief in equity."

Upon this complaint a temporary injunction was issued on the 9th day of August, 1906.

On the 3rd day of September, 1906, the appellee by his attorney filed his answer to the complaint, in which he admitted the first paragraph of the complaint, admitted forbidding the employees of the appellant from entering upon a tract of land "occupied and owned by him" but denied all of the other allegations of the complaint. In paragraph 5 appellee alleges:

"5. And for further answer to said complaint, by way of new matter, defendant shows that he is the owner in fee simple of the smaller tract of land mentioned and referred to in said complaint; that he became such owner by purchase from Felipe Atencio and wife on the 20th day of May in the year, 1865, as will appear by reference to the deed of conveyance from said Atencio and wife, a copy of which is attached hereto as a part hereof; and that under and by virtue of said deed of conveyance, from said 20th day of May, 1865, down to the present time, he has had open, notorious, exclusive, adverse possession of said tract of land described in said deed against the whole world, and that during the whole of said time no claim by suit in law or equity effectually prosecuted has ever been set up or made to the said tract of land against this defendant, the said Canyon de San Diego Land Grant being a tract of land which was granted by the government of Spain in the year 1798.

"Wherefore, defendant prays judgment that the said complaint may be dismissed and that he go hence with his costs in this behalf wrongfully sustained."

On the 3rd day of September, 1906, appellee filed

two additional answers in the nature of pleas to the jurisdiction, in the first of which he challenged the jurisdiction of the District Court of Bernalillo County upon the ground that the suit involved the recovery of the possession of land situated in Sandoval County, and the second challenges the jurisdiction of the court in that appellant seeks to obtain possession of a tract of land by means of a writ of injunction thus depriving appellee of his right to a trial by jury.

On the 22nd day of December, 1906, appellant demurred to the two answers challenging the jurisdiction, and moved to strike paragraph 5 from the answer on the merits.

These demurrers and motion to strike were denied by the court with leave to plead further if appellant so desired.

On the 23rd day of October, 1907, appellant filed a reply denying all of the allegations of the several answers and specifically denying the allegations of paragraph 5 of the answer.

On motion of counsel for appellee, the court struck from the files the reply of the appellant, and appellant declining to plead further on the 16th day of May, 1908, final judgment was entered dismissing the cause for want of jurisdiction.

From this judgment an appeal was granted and the cause is now in this court by virtue of that appeal.

OPINION OF THE COURT.

McFIE, J.—It appears from the briefs of the respective counsel in this case, that section 2950, Comp. Laws 1897, is relied upon by both of the parties to this litigation, therefore, in order to obtain a clear understanding of the rulings and judgment of the court below, the paragraphs relied on will be set out in full.

"Sec. 2950. All civil actions which may hereafter be commenced in the District Courts shall be brought and shall be commenced in counties as follows, and not otherwise:

* * *

"Fourth. When lands or any interest in lands are the object of any suit in whole or in part, such suit shall be brought in the county where the land or any portion thereof is situate.

"Fifth. Suits for trespass on land shall be brought as provided in the first paragraph, or in the county where the land or any portion thereof is situate. * * * * * *"

The appellant, contending that the object of the suit is to recover damages for a trespass on lands relies upon paragraph 5 of section 2950 above quoted, as conferring jurisdiction upon the District Court of Bernalillo County to try the cause notwithstanding the fact that the complaint shows the land involved to be situated in the County of Sandoval. The contention of appellant would, un-
1 doubtedly, be correct if the claim for damages was the sole object of the suit. The claim for damages for trespass to land, however, is not the sole object of the present action. Upon this theory, appellee insists that under the pleadings and circumstances of this case the cause involves an interest in lands within the meaning of paragraph 4 of section 2950 above set out. Appellee, therefore, denies the jurisdiction of the District Court of Bernalillo County to try the cause.

The demurrers and motion to strike were interposed after the answers were filed, the demurrers challenging two of the answers, while the motion seeks to strike out only paragraph 5 of the remaining answer, but in the brief of appellant's counsel it is insisted that the complaint alone must be considered upon the question of jurisdiction; that the complaint is for one hundred dollars damages and that such is the prayer of the complaint.

Examining the complaint then, (without conceding the correctness of the above contention) it is found to con-
tain both a legal and an equitable cause of action,
2 which is permissible under the Code of this Territory.

The legal cause alleged is damages for a trespass on land of which the appellant not only is the owner in fee simple, but was in possession at the time of the trespass, thus disclosing a clear right of action if the allegations are

true and undisputed. But, can it be contended successfully that the allegations of ownership and right of
3 possession cannot be denied by the answer to such a complaint? We think not, as a defendant who is the owner and in lawful possession of a tract of land is not liable for trespass upon his own land. In this case the answer of the appellee not only denies the ownership and right of possession of the appellant of the land involved, but paragraph 5 of the answer claims ownership and
4 right of possession to be in the appellee. We are of opinion, therefore, that the motion to strike was properly overruled.

The injunction prayed for in the complaint cannot be treated as a mere incident to the action for damages as is apparent from an examination of the complaint. In
5 the first place, the complainant claims title in fee simple to the land upon which the growing trees are alleged to have been cut and improvements made; alleges that the growing timber is in danger from fire caused by appellees piling brush on the land, and further alleges that unless restrained the appellee will continue to cut down and carry away the growing trees. Now these allegations of the complaint demand protection of the realty as growing trees are a part of the realty and no part of the
6 claim for damages for trees already cut. Based upon these allegations is the prayer, "that upon final hearing the said defendant (appellee in this court) be perpetually enjoined from claiming any right, title or interest in or to said premises and from interfering in any way with the clearing, improving or use of said premises by said plaintiff, (appellant)."

It is clear that if the relief sought should be granted by the court, the appellee would be perpetually restrained from asserting title or any interest whatever in or to the lands in dispute of which he claims to be the absolute owner by deed. Under these allegations of the complaint itself it is apparent that an interest in land is necessarily involved in this suit within the meaning of the fourth paragraph of section 2950 *supra,* which provides that suit shall

be brought in the county in which the land is situated, and as the complaint shows that the land is situated
7 in Sandoval and not in Bernalillo County there was a want of jurisdiction for which the demurrers were properly overruled by the court below.

This cause is in form an action of "trespass to try title" which action is authorized by the laws of the state of Texas, but not in this Territory, the complaint
8 herein being almost identical with the forms of complaint in actions of trespass to try title provided for by the Texas code.

The answers in this case, being responsive to the com-
9 plaint, and challenging its allegations, are not obnoxious to either the demurrers or motion to strike interposed by the appellant, and therefore errors assigned upon their denial by the court below, cannot be sustained.

The conclusion of the court below that there was a want of jurisdiction necessarily led to the sustaining of the motion of appellee's counsel to strike from the
10 files the appellant's replication, and as we agree with the court that there was a want of jurisdiction, it follows that there could be no error in the sustaining of the motion to strike the reply.

From the views above expressed, and the further fact disclosed by the record, that the appellant declined to plead further in the court below, we are of the opinion that the judgment of dismissal was properly rendered, and the
11 error assigned as to this action of the court below is overruled with costs. And it is so ordered.

[No. 1268, February 28, 1910.]

FRANK M. DUNCAN, Appellee, v. S. W. HOLDER, et al., Appellants.

SYLLABUS.

1. Record examined and verdict of the jury as to question of agency sustained.

2. In cases where a principal sues his agent for money had and received by the agent for a sale of the principal's property, the value of the property is quite immaterial.

3. Even if agent receives a greater price than that fixed by the principal, he is bound to account for it.

4. It was not error for the court below to fail in instructing the jury on a point not raised by the pleadings.

5. If advantage be not taken, of a variance between the pleadings and the allegations, at the trial such variance will be treated as waived.

6. The granting or refusal of a motion for a new trial, being addressed to the sound discretion of the trial court, will not unless it plainly appears that such discretion has been abused, be reviewed on appeal.

7. It is not the office of a motion for a new trial to raise any question not relied upon at the hearing.

8. Points not raised or insisted upon at the trial cannot be presented and urged on appeal.

9. Allowance of mileage for distance necessarily traveled in the Territory by witness who voluntarily appeared, was proper.

Appeal from the District Court for Chaves County before W. H. Pope, Associate Justice. Affirmed.

Richardson, McClure & Heflin for Appellants.

An instruction which assumes a fact as proved, where the evidence is conflicting or against said fact, is erroneous and prejudicial. Thompson on Trials, vol. 2, p. 1646, sec. 2295; Bates v. Hearte, 82 Am. St. Rep. 187.

There is only one rule for measuring a party's damage when he has been induced by fraud to part with his property and that is, he is entitled to recover the difference in value between that which he received and retains as a consideration for his said property, and the fair market

value of the property with which he has parted. Ritko v. Groves, 113 N. W. 629, Minn.; Mattauch v. Walsh Brothers, 113 N. W. 118, Ia.; Butler v. Anderson, 107 S. W. 656, Tex.

The remedies being inconsistent by electing to pursue one with knowledge of all the facts a party waives his right to the other. 1st Nat. Bank v. McKinney, 47 Neb. 149, 66 N. W. 280; Pollock v. Smith, 49 Neb. 864, 69 N. W. 312; Wilson v. Hundley, 70 Va. 837; B. and L. Ass'n v. Cameron, 48 Neb. 124, 66 N. W. 1109; Snow v. Alley, 144 Mass. 555, 11 N. E. 764; A. B. & L. A. v. Rainbolt, 48 Neb. 434, 67 N. W. 493.

There was no contract of agency. Larsen v. Newman, 121 N. W. 202, N. D.; Martine v. Life Ins. Society, 13 Am. Rep. 529, N. Y.

In an action for damages growing out of deceit and fraud by which plaintiff was induced to part with his land, the measure of plaintiff's damages is the difference in value between what plaintiff received and retained as a consideration for his said land and the fair market value of his said land at the time he parted with it. Ritko v. Grove, 113 N. W. 629, Minn.; Mattauch v. Walsh Brothers, 113 N. W. 818, Ia.; Butler v. Anderson, 107 S. W. 656, Tex.

In an action by the plaintiff against the defendants for fraudulently obtaining and wrongfully converting to defendant's own use the property of plaintiff the measure and the limit of plaintiff's recovery would be the difference in value between what plaintiff received and retained for a consideration for his said land and the value of what defendants and their associates received for said land when they sold it. Ritko v. Grove, 113 N. W. 629, Minn.; Mattauch v. Walsh Bros., 113 N. W. 818, Ia.

Every pleading must be construed strictly and most strongly against the pleader, and when a material fact is not alleged by a party pleading, such fact is presumed not to exist. Murray v. S. C. D. & P. Ry. Co., 3 N. M. 586.

The allegations and the evidence must correspond.

Greenleaf on Evidence, sec. 51, 13th ed.; Murray v. S. C. D. & P. Ry. Co., 3 N. M. 594.

When a party ratifies a contract with full knowledge of all the facts he must ratify it as a whole, that is, if he elects to hold and retain the fruits of the contract which are beneficial to him, the law requires him to stand by those parts of the contract which are to his disadvantage or detriment. Baum Iron Co. v. Berg, 66 N. W. 8.

When a party has the right to rescind a contract, and elects to rescind it, he must rescind it as a whole and puts the parties in statu quo. Alfree Mfg. Co. v. Grape, 59 Neb. 777-82, N. W.

Mileage of voluntary witness living outside of the Territory, should not have been taxed against the losing party. Stern v. Herren, 8 S. E. 221; Haines v. McLaughlin, 29 Fed. 70.

EDEN & BOWERS for Appellee.

Exception too general to warrant review by appellate court. Cavellaro v. Texas, etc., Ry. Co., 110 Cal. 348, 42 Pac. 918; Cevada v. Miera et al. 61 Pac. 125.

"Granting or refusing a motion for a new trial rests in the sound discretion of the court, and is not alone assignable as error." Schofield v. Territory, 56 Pac. 306.

The jury having passed upon the questions of fact submitted to it by the court, the verdict will not be disturbed on appeal if there is any evidence to support it. C. L. 1897, sec. 2685; Kingston v. Walters, 93 Pac. 700.

In cases of a fiduciary nature as where an agent sells the property of his principal for a sum greater than he reports, the measure of damages is the difference between the reported price and the real price without remuneration to the agent. Jeffries et al. v. Robbins and authorities there cited, 71 Pac. 852.

There is no law that requires a witness to be subpoenaed in order to claim mileage for attendance. 30 Am. and Eng. Enc. of Law, 2d ed., page 1173, and cases there cited; Cevada v. Miera, 61 Pac. 125; Supreme Court rule No. 18.

An action on account of fraud and deceit may be brought within four years. C. L. 1897, sec. 2916.

STATEMENT OF THE FACTS.

The appellee (plaintiff below) alleged in his amended complaint that for some time prior to July 20, 1907, he was the owner of certain land in Chaves County, and had placed same in the hands of the appellants, as his agents, for sale; that on July 20, 1907, the appellants informed him that they had a purchaser for said land, one M. C. Swinney for the sum of $5,400.00, when in truth and in fact said purchaser had agreed to pay and did thereafter pay the appellants the sum of $6,840.00 for said land; that the said appellants falsely and fraudulently, concealing the fact from him, that they had found a purchaser at $6,840.00 the appellee relying on their said representation that $5,400.00 was the best price they could get for him, accepted said sum and paid them a commission of $270.00 thereon; that the appellants converted the difference in price to their own use, and for that difference, together with the commission paid them appellee demanded judgment against said appellants.

The appellants answered, denying that they had ever been plaintiff's agents for the sale of said land, and that they had ever sold it for $6,840.00, or any other sum, or that they had ever received or converted to their own use any sum of money belonging to the appellee, and further answering, by way of new matter, they allege that they bought the said property of the appellee for themselves and on their own behalf for the sum of $5,130.00 and exhibited a contract dated July 27, 1907, executed by the appellee by which he agreed to transfer said real estate to appellants, or whoever they might name, for the sum of $5,130.00 upon payment to him of $3,000.00 cash and the balance by note executed by appellants and secured by a mortgage back.

To this answer the appellee filed an amended reply denying the allegations of new matter, but admitting the execution of the contract therein set forth, but alleged that he had executed the same upon false and fraudu-

lent representations of the appellants, that they could only obtain the sum of $5,400.00 for said land, when they had at the time already sold the same for $6,840.00 and that said statements were made for the purpose of defrauding appellee. It appeared in evidence at the trial, that the appellants did sell said land for the sum of $6,840.00 and that they received therefor the sum of $200 in cash and the balance of $6,640.00 in unsecured notes, and that at the time of the trial there remained due of the balance of the purchase price represented by notes, the sum of $4,000.00.

A trial was had to the court and a jury, and a verdict returned in favor of the appellee for the sum of $1,710.00, interest and costs, which sum represents the full amount prayed for by him. Motions for a new trial were made and overruled and this appeal was taken.

OPINION OF THE COURT.

MECHEM, J.—1. It is claimed by counsel for appellants, that the evidence in this case, clearly shows that the relation of principal and agent did not exist be-
1 tween them and appellee. We have carefully examined the evidence in the record, and are of the opinion that it was sufficient on the question of agency to support the verdict of the jury, so that the same will not be disturbed, nor the judgment for that reason reversed. Green v. Brown & Manzanares Co., 11 N. M. 658, 72 Pac. 17.

2. The court instructed the jury that the limit of appellee's recovery, if they found him entitled to recover, would be the difference between the price that he received for the property and the price that the appellants received for the same, but the appellants claim this to be a wrong measure of their liability, and say that it should have been the difference, between the value of what appellee received for the land, and a fair market value of the land at the time he parted with it, citing cases in support thereof, which we have examined, and find them all to be cases, wherein a vendor had parted with his property in exchange for other property, the condition, quality and value of which had been fraudulently represented by the purchaser.

and the vendor electing not to rescind the contract, sued for damages. In those cases the courts held that the measure of damages, would be the difference, in value of what the vendor received in trade and the fair market value of the property that he gave in exchange therefor. The rule is entirely different where a principal sues his agent
2 for money had and received by the agent from a sale of the principal's property. The value in such cases is quite immaterial, for the reason that the agent is not employed with regard to the value of the property, but by the terms of his employment he is charged with the duty of selling it at a price fixed by his principal, irrespective of its value, and the law places upon the agent his duty to account to his principal for any advantage which he may secure in the line of his employment, that is, even if
3 the property it placed in the agent's hands to sell at a certain price, and he receives a greater price, he is bound to account for it. Collins, et al. v. McClurg, 29 Pac. 299; Bassett v. Robers, et al., 43 N. E. 180; Hellberg v. Nichol, et al, 37 N. E. 63.

3. The appellants contend that the appellee is not entitled to recover the sum, for which he received judgment, because, it is shown in the evidence, that they sold the land on time; that at the date this case was tried there remained due and unpaid on their sale to Swinney the sum of $4,000.00; that the appellee had received the sum of $3,000 in cash, being more than they had received in cash, and that if he did not elect to rescind the contract, he necessarily elected to ratify it and should abide by it, and that therefore they not having received cash, but notes, it was the duty of the appellee to prove the value of those notes, and his recovery is limited to that value, and that the court should have so instructed.

It will be observed that by the pleadings, the appellants did not raise this question, that they did not make a tender of the notes, and this we take it being clearly a matter of defense on their part, they should have seen to it that their pleadings provided therefor. They stood on the sole proposition that they were not the appellee's agents and that they purchased the land for themselves. If

they failed to disprove their agency, then the fact being uncontroverted that they sold the land at a certain price represented by money and unconditional contracts to
4 pay money, the court below is not in error in failing to instruct the jury, as appellants contend should have been done, when there was no evidence introduced as to the value of the notes, received by appellants in consideration of the sale of the land. In the absence of such evidence it would be presumed, of course, that the notes were worth their face value.

4. It is complained also that there is a variance between the allegations and proof, for the reason, that the appellee alleged that the appellants received $6,840.00 for the land, and converted the difference between that sum and $5,400.00 to their own use and benefit, when by the evidence it was shown that they did not receive money, but received unsecured promissory notes, and counsel for appellants in their brief argue, that the law does not permit a party to allege conversion of money, and prove the conversion of promissory notes, or anything else except money. It was proven by several witnesses, both for the appellee and the appellants, that the latter sold the land for the sum of $6,840.00 and of this sum they received $200.00 in cash and the balance in unsecured promissory notes. To this evidence the appellants made no objection, neither did they, after the trial, demur to the same. It was in evidence that appellants still owned the notes which were at the time of the trial, deposited in a bank with the contract of sale, that they had made with Swinney. The appellee, it is true, alleged the conversion of money and the evidence showed the conversion of unconditional contracts to pay money, which contracts were held by his agents.

If advantage be not taken, of a variance between the pleadings and the allegations, at the trial, such variance will be treated as waived. Wasarch Mining Co. v.
5 Crescent Mining Co., 148 U. S. 295; Grayson v. Lynch, 163 U. S. 468.

The trial court's attention was first called to the alleged variance by a motion for a new trial, at which time

the objection was not available, because it should have been made before the case went to the jury.

The appellants sold the land for money and received promissory notes in lieu thereof. If they did not account to the appellee for the notes they should account for the equivalent of the notes, and proof that they received the notes as money will sustain the action. Gordon v. Camp, 2 Fla. 422; Hill v. Kennedy, 32 Ala. 523; Bank of Missouri v. Benoist, 10 Mo. 520.

The allegation of money had and received is supported by evidence that the appellants received something belonging to the appellee, which under the circumstances ought, as between the parties, be regarded as money. Mathewson v. Eureka Powder Works Co., 44 N. H. 289.

5. Error is assigned to the action of the court in "overruling appellants' motion for a new trial because appellee neither alleged nor proved that he would have accepted M. C. Swinney as his purchaser for his said land, upon the terms and conditions which said M. C. Swinney was able and willing to buy his said land."

There is hardly a better established rule of practice, or one more uniformly adhered to by this court, than that the granting or refusal of a motion for a new trial, **6** being addressed to the sound discretion of the trial court, will not unless it plainly appears that such discretion has been abused, be reviewed on appeal. Archibeque v. Miera, 1 N. M. 160; Territory v. Romero, 2 N. M. 474; Coleman v. Bell, 4 N. M. 21, 12 Pac. 657; Buntz v. Lucero, 7 N. M. 220, 34 Pac. 50; Schofield v. Territory, 9 N. M. 526, 56 Pac. 306.

The appellants were not entitled to a new trial on the showing made in this motion. It is not the office of a motion for a new trial to raise any questions not re- **7** lied upon at the hearing. 2 Thomp. on Trials, Sec. 2710.

6. Appellants insist that the judgment rendered is erroneous because it allows the appellee to ratify every part and element of both contracts, made with reference to the sale of his land, which are to his advantage, and allows him to rescind, without making restitution, every part

and element in both said contracts, which are to his disadvantage, and in support of this position cite cases holding that when a party elects to rescind a contract or ratify it, he must do so as a whole, and further argue that as appellee rescinded the contract between him and the appellants he should have placed them in *statu quo* by a tender of the $3,000.00, and if he ratified the contract with Swinney he must accept all of its terms.

These questions were not raised before or at the trial, either by pleading or exceptions to the evidence, nor by asking an appropriate instruction calling the attention of the court and jury to them, nor as a specific ground for a new trial, nor do the assignments or the argument in the brief hint, at any mention of these questions antedating the filing of the assignments of error themselves.

The judgment is assigned as error.

"It is fundamental that when the judgment of a court is challenged in error, its rulings alone are open to consideration. Of course if the trial court had no jurisdiction, that is a matter which is always open, and the attention of the court of last resort may be called thereto in the first instance." Montana Railway Company v. Warren, 137 U. S. 348.

"It does not appear that either of these points was raised or insisted upon at the trial, and we are therefore of the opinion that they cannot be presented and
8 urged before us. The general rule that only such assignments of error can be presented to the appellate court, as were brought to the attention of the trial judge, is strengthened in this Territory by the statutory provision that 'no exceptions shall be taken in an appeal to any proceeding in the District Court, except such as have been expressly decided in that court.'" Chaves v. Lucero, 13 N. M. 368, 85 Pac. 233; Crabtree v. Segrist, 3 N. M. 500; 6 Pac. 202; Sec. 37, Chap. 57, Laws 1907.

7. The allowance of mileage to the witness Grace Duncan was proper, although she was a non-resident and voluntarily appeared at the trial. The amount al-
9 lowed her only covered the distance she necessarily traveled in the Territory, going to and returning

from the place of trial. Burrow v. Kansas City, Ft. S. & M. R. Co., 54 Fed. 278; 30 Am. & Eng. Ency. (2nd Ed.) 1175.

The judgment of the court below is affirmed.

[No. 1291, February 28, 1910.]

S. J. WEAVER, Appellant, v. A. M. WEAVER, Appellee.

SYLLABUS (BY THE COURT.)

When the question of the court's jurisdiction to entertain an appeal necessarily involves the consideration of the validity of the proceedings complained of, the disposition of a motion to dismiss the appeal will be postponed to the hearing on the merits.

JONES & ROGERS for Appellant.

The lower court was without jurisdiction to disturb decree of divorce and its order and decree attempting to vacate the same was null and void as well as final and therefore appealable. Barnett v. Barnett, 9 N. M. 205; 18 Ency. Pl. & Prac. 1012; Gray v. Moore, 7 Gray 215; 9 Enc. Pl. and Prac. 684, 7 Id. 145; Gray v. Earl, 13 Iowa 188; Knox v. Smith, 4 Howard 298; Noonan v. Lee, 2 Black U. S. 499; Voorhees v. Bonesteel, 16 Wallace 16; Very v. Levy, 13 Howard 345; Patton v. Taylor, 7 Howard 132; C. L. 1897, secs. 905, 2875; Bronson v. Schulten, 104 U. S. 415; Phillips v. Negley, 117 U. S. 665; Bank v. Hawley, 50 Fed. 319; Maynard v. Perault, 30 Mich. 161; Allen v. Wilson, 21 Fed. 882; Terry v. Commercial Bank of Alabama, 92 U. S. 454; Laws of 1905, chap. 26; Post v. Wallace, 20 Atl., Pa. 409; Mich. Ins. Co. v. Whittemore, 12 Mich. 311; The People v. Ferris, 33 N. Y. 220; Hume v. Bowie, 148 U. S. 246; 2 Enc. Pl. and Prac. 109; Octgen v. Ross, 36 Ill. 335; Guthrie v. Guthrie, 30 N. W., Ia. 779; Spencer v. Thistle, 13 N. W., Neb. 214; Wm. Deering Co. v. Creighton, 38 Pac., Or. 710.

STEPHEN B. DAVIS, Jr., for Appellee.

The only judgments or decisions of the District Court from which appeals may be taken to the Supreme Court are such as are final. Organic Act, sec. 10, Sepember 9, 1850; Laws of 1907, ch. 57, sec. 1; Jung v. Myer, 68 Pac. 933; Cutter & Neilson Co. v. Hinman, et al., 89 Pac. 267; Harrison v. Perea, 11 N. M. 505, 70 Pac. 558; Machen v. Keeler, 68 Pac. 937; Board of Co. Com. v. Blackington, 68 Pac. 938; Lodge v. Tirell, 135 U. S. 232; M. K. & P. Ry. Co. v. Dinsmore, 108 U. S. 30; Bostwick v. Brinkerhoff, 106 U. S. 3; In re Norton, 108 U. S. 237; Winthrop Iron Co. v. Meeker, 109 U. S. 180; St. Louis I. M. & S. Co. v. So. Exp. Co., 108 U. S. 24; Grant v. Phoenix Mutual Life Ins. Co., 106 U. S. 429; Bent v. Miranda, 8 N. M. 78; Huntington v. Moore, 1 N. M. 471; Bucher v. Thompson, 7 N. M. 599; Territory v. Las Vegas Grant, 6 N. M. 87; Jung v. Myer, 68 Pac. 933.

An order opening a decree and allowing further litigation in the case in the court below is an interlocutory and not a final order. Territory v. Las Vegas Grant, 6 N. M. 87; Hume v. Bowie, 148 U. S. 245; Wade v. McLeyer, 63 N. Y. 318; Miller v. Tyler, 58 N. Y. 477; Davis v. Borst, 58 N. Y. 669; Higgins v. Brown, 5 Colo. 345; Owen v. Going, 7 Colo. 85; Felt v. Cook, 87 Pac. 1092; Everett v. Jones, 91 Pac. 360; Rauer's Law & Collection Co. v. Stanley, 84 Pac. 214; Sengfelder v. Powell-Sanders Co., 82 Pac. 931; Connor v. Peugh, 18 How. 394; Phillips v. Negley, 117 U. S. 665; Staab v. A. & P. R. R. Co., 3 N. M. 606.

Courts of equity have inherent power to set aside and vacate judgments or decrees obtained through fraud or rendered without jurisdiction. This is a power not depending upon any statute but inherent in the very nature of the court. Black on Judgments, Volume 1, Paragraph 321; Edson v. Edson, 108 Mass. 590; Johnson v. Clemen, 23 Wis. 452; Crauch v. Crauch, 30 Wis. 667; Holmes v. Holmes, 63 Main 420; Adams v. Adams, 51 N. H. 388; Rawlins v. Rawlins, 18 Fla. 345; True v. True, 6 Minn. 458; Young v. Young, 17 Minn. 181; Allen v. McClellan, 12 Penn. 328; Boyd's Appeal, 38 Penn. St. 241; Whit-

comb v. Whitcomb, 46 Ia. 437; Everett v. Everett, 18 N. W. 637.

The District Courts of this Territory sitting as courts of equity are always in session and the session is continuous. C. L. 1897, sec. 2875; Nelson v. Meehan, 155 Fed. 1; Fowler v. Equitable Trust Co., 141 U. S. 384; Stockleger v. United States, 116 Fed. 590.

STATEMENT OF FACTS.

The appellant, S. J. Weaver, sued for divorce. The marriage which it was sought to dissolve occurred in the State of New York and the parties had never resided together in New Mexico. The cause proceeded on constructive service. The defendant did not appear, and on November 1, 1905, plaintiff secured a decree as prayed.

On October 8, 1908, the defendant filed her motion to set aside the decree. This motion was sustained and the cause re-opened. She thereupon filed a demurrer to the complaint, which is still pending in the trial court. The plaintiff then appealed from the order vacating his decree of divorce. A motion is made to dismiss the appeal on the ground that the appeal is not from a final judgment.

OPINION OF THE COURT.

POPE, J.—[After making the foregoing statement of facts:] It is the law of this Territory that appeals lie only from final judgments. Indeed, the organic act prohibits entertaining appeals from any other class of decisions. Jung v. Myer, 11 N. M. 378; De Harrison v. Perea, 11 N. M. 505; Cutler v. Hinman, 14 N. M. 62.

Upon this basis appellee contends that the appeal should be dismissed because the order vacating the original decree was discretionary and was not a final judgment. The appellant does not contest the proposition that only final judgments are appealable, but contends that the order complained of was for purposes of appeal, a final judgment for the reason that the court below was without jurisdiction to make it. To support this contention Phillips v. Negley, 117 U. S. 665, is cited. It was held in that case that an order vacating

a judgment rendered at a preceding term was appealable and this upon the ground that under the facts of that case the judgment had passed beyond the control of the court. We agree with the appellant, following the case just cited, that if the court below exceeded its power in sustaining a motion to vacate, such decision is appealable. But how are we to determine whether the court did exceed its power save upon an examination of the grounds upon which it proceeded? And how are we to examine those grounds if we dismiss the appeal? The mere fact that the original decree was vacated at a term subsequent to the term of its entry does not of itself establish that the court acted without jurisdiction. Circumstances are conceivable under which such action even at a subsequent term would be within the power of the court. We deem it anticipating the present case to discuss what might constitute such circumstances. It is sufficient to say that they may exist, and to determine that they do not exist so as to dismiss this appeal we would have to examine the grounds of the motion to vacate. In other words, in order to determine whether we had jurisdiction to decide the case, we would in effect have to consider it and decide it.

We deem this situation within the reasoning of Michigan Insurance Company v. Whittemore, 12 Mich. 310, where, in overruling a motion to dismiss the appeal, it is said: "But it is stated that the granting of the motion was discretionary in the court below. Conceding it to be so, how is this court to determine that question without looking into the nature and merits of the motion on which the order appealed from was made, and how can it do this on a motion to dismiss the appeal without inquiring into the merits of the appeal itself? There may be no ground for appeal, but that does not go to the right to appeal."

So in Phillips v. Negley, *supra,* it was said:

"The question of our jurisdiction is necessarily included in the question of the validity of the proceeding itself."

Following the practice in the cases just cited we conceive it to be proper in cases such as this to postpone a

motion to dismiss to the hearing on the merits, and in this case it is so ordered.

Mechem, Justice, who was absent, did not participate in this decision.

[No. 1273, February 28, 1910.]

E. J. PRING and RACHAEL PRING, Appellants, v. M. B. GOLDENBERG COMPANY, Appellee.

SYLLABUS (BY THE COURT.)

1. The judgment of the District Court that the plaintiff have specific performance of the defendant's written agreement to convey certain land to it, is not, strictly, open to reversal by this court, since it is based on substantial evidence; but even if it were so open, the weight of evidence would require the same judgment.

2. The amount of the judgment for damages rendered in the District Court is not warranted by the evidence, and the cause is remanded for the correction of the judgment in that particular.

Appeal from the District Court for Quay County before E. A. MANN, Associate Justice. Affirmed upon remititur.

C. C. DAVIDSON for Appellants.

Referee having made no findings and witnesses not having been before the lower court, appellants request appellate court to examine evidence. Laws of 1907, ch. 57, sec. 38.

The means employed and the agencies invoked to drive an unconscionable bargain established those material facts upon which it is the natural doctrine of equity to refuse specific performance. Warden v. Waffle, N. Y. 6 How. 145-151; Words and Phrases, vol. 45, 4404-4407; Hall v. Grayson Co. National Bank, 81 S. W. Rep. 762; Watson v. Molden, 79 Pac. 503; Weise v. Grove, 123 Iowa

585, 99 N. W. 191; Jesse French Piano & Organ Co. v. Nolan, 85 S. W. 821; Trimble v. Reed, 31 S. W. 861; Cooper v. Schlesinger, 111 U. S. 248 28 L. ed. 382; Words and Phrases, vol. 3, 2670; Cavvot v. Christy, 42 V. 121, 1 Am. St. 313; U. S. v. Beang, 71 Fed. 160; Jeremy Equity, B. Pl. 2, p. 358; Words and Phrases, vol. 29, 2944; Ellis v. Andrews, 56 N. Y. 83; Heath v. Schroer, 96 S. W. 313; Bowman v. Irons, 2 Bibb. 551; Carberry v. Taunschill, 1 Hart & John. 224; Louisville N. A. & C. Ry. Co., v. Rodenschatz Bedford Stone Co., 141 Ind. 251, 39 N. E. 703; Clarksaddon v. Kennedy, 40 N. J. Eq. 259; Sargent v. Kansas Midland R. Co., 48 Kan. 672, 29 Pac. 1063; Ratliff v. Vandikes, 89 Va. 307, 15 S. E. 864; Grand Tower & C. G. R. Co. v. Walton, 150 Ill. 428, 37 N. E. 920; Brown v. Pitcairn, 148 Pa. 387, 24 Atl. 52, 33 Am. St. 834, 30 Wkly., Note Cas. 35; Wiley v. Clements, 79 Pac. 850; Kelly v. Kendall, 118 Ill. 650, 9 N. E. 261; Fitzpatrick v. Beatty, 6 Ill., 1 Gilman 454; Plummer v. Keppler, 26 N. J. Eq. 481; Bird v. Logan, 35 Kan. 228, 10 Pac. 564; Hicks v. Turch, 86 Mich. 214, 49 N. W. 44; Marsh v. Buchan, 46 N. J. Eq. 595, 22 Atl. 128; Davis v. Reed, 37 Fed. 418; Merrit v. Wassenich, 49 Fed. 785; Hartmen v. Interstate Building & Loan Assn., 62 N. E. 64, 10 Am. Rep. 62; Pom. Eq. Jur., 2nd ed., sec. 876; 2 Story Eq. Jur. 750; 2 Kent Com. 491; Pom Eq. Jur., vol. 6, sec. 785; 4 Bauv. Inst. 167; Union Pac. Ry. Co. v. Barnes, 64 Fed. 80; City Nat'l. Bank v. Kusworn, 91 Wis. 166, 64 N. W. 843; Willink v. Vandever, 1 Barb. 509; Porter v. Beattie, 88 Wis. 22, 59 N. W. 499; Page on Contracts, vol. 3, sec. 624; McCabe v. Matthews, 155 U. S. 550, 39 L. ed. 256; 177 U. S. 376, 44 L. ed. 312, 116 Fed 590; Hennessy v. Woolworth, 128 U. S. 438, 32 L. ed. 500; Willard v. Tayloe, 8 Wall. 557, 19 L. ed. 501; Holt v. Rogers, 8 Pet. 420; Pratt v. Carroll, 8 Cranch, 471; Marr v. Shaw, 51 Fed. 860; Pom. Eq. Remedies, vol. 6, sec. 787; Friend v. Lamb, 34 Am. St. 672; Cuff v. Dorland, 25 Atl. 577; Wollums v. Horsley, 20 S. W. 781; Pope Mfg. Co. v. Gormully, 144 U. S. 224, 36 L. ed. 414; Cathcart v. Robinson, 5 Pet. 264, 8 L. ed. 120; Matlock v. Buller, 10 Ves. Jr. 292; Day v. Newman, 2 Cox. Ch.

Cas. 77; Leicester Piano Co. v. Front Royal Riverton Imp. Co., 55 Fed. 190; Wells, et al. v. Houston, 69 S. W. 183; Wigmore on Evidence, secs. 1057, 1064, 2588; White v. Smith, 46 N. Y. 418.

HAWKINS & FRANKLIN for Appellee.

The question of damages and what shall constitute damages are matters to be ascertained by the court in its discretion. American-English Encyclopaedia of Law, 2nd ed., vol. 26, p. 86; Worrall v. Munn, 38 N. Y. 138; Ashhurst v. Peck, 101 Ala. 499, 14 So. 541; and other cases cited, Am. Digest, vol. 48, p. 578.

The appellate court will not review the decision of the trial court when the same is founded on conflicting evidence, and where there is evidence to support it and it is supported by the pleadings. Newcomb v. White, 5 N. M. 435; Lynch v. Grayson, 7 N. M. 27; Torlina v. Trorlicht, 5 N. M. 149; Jarilla v. Barela, 6 N. M. 239; Brown v. Lockhart, 12 N. M. 10; Carpenter v. Lindauer, 12 N. M. 388; Marquis v. Land Grant Company, 12 N. M. 445; Ortiz v. Bank, 12 N. M. 519.

It is only when an oral agreement is clearly and satisfactorily proved by testimony above suspicion and beyond reasonable doubt that it will be enforced to establish rights in land at variance with the muniments of title. Moore v. Crawford, 130 United States 134; Lalone v. United States, 164 United States 257; Ives v. Hazzard, 67 American Reports 504; Farrar v. Churchill, 135 United States 615; Baltzar v. R. R., 115 United States 645; Atlantic, etc., v. Brady, 107 United States 203; Howland v. Blake, 97 United States 626; Western R. R. v. Babcock, 6 Metcalf 352; Eyre v. Potter, 15 Howard 42; United States v. Hancock, 133 United States 197; Kent v. Lasley, 24 Wisconsin 654; English Equity Reports, vol. 7, p. 254.

The mere fact that defendant entered into a losing bargain or one where plaintiff will reap great gain is clearly never a ground to refuse specific performance. Ready v. Noakes, 29 N. J. Equity 499; Crouse v. Holman,

19 Ind. 38; Rou v. Seiderberg, 104 N. Y. S. 798; Hammond v. Decker, 102 S. W. 455; Pittsburg, etc., R. Co. v. Rose, 74 Pa. St. 369; Sharpe v. United States, 112 Federal 879; Cathcart v. Robinson, 5 Peters 271; Franklin Telephone Co. v. Harrison, 145 U. S. 472; Whitted v. Fuquay, 37 Southeastern 141; Lee v. Kirby, 104 Massachusetts 428; Southern Ry. Co. v. Franklin & P. R. Co., 32 S. E. 490; Ayres v. Baumgarten, 15 Illinois 447; Pomeroy's Equity, vol. 6, p. 1312, 3d edition; Searle v. Lackawanna & Bloomsburg Railroad Company, 9 Casey 57; East Pennsylvania Railroad Company v. Heister, 4 Wright 53.

STATEMENT OF THE CASE.

This is an action to obtain specific performance of a written agreement for the conveyance of certain land at Tucumcari, in Quay County, between the plaintiff, the M. B. Goldenberg Company, here the appellee, and the defendants, E. J. Pring and Rachael W. Pring, husband and wife, here the appellants, and for damages for the failure of the defendants to perform their said agreement.

In addition to denying ownership of the property in question and the execution of the alleged agreement, the defendants answered that they were induced by fraud, deceit and misrepresentation to sign the agreement; that one Floersheim represented to them that the land in question was being purchased by one M. B. Goldenberg, as the agent of the Chicago, Rock Island and El Paso Railroad Company, and that said company desired to purchase the same for shop and terminal facilities, and that said Floersheim represented that if said railroad company could procure the same it would greatly enhance the value of the remainder of appellants' land lying between said railroad land and the main portion of the town of Tucumcari; and that, relying upon such representation, the said appellants entered into said agreement, and that thereupon the said appellants executed the agreement sued on; that said Pring, one of the apellants, was almost totally blind and could not read said contract, and that said contract was misread to appellants as a contract between appellants and

M. B. Goldenberg as agent for said railroad company, and not as a contract between appellants and appellee, and to describe eighty acres of land adjoining the homestead of one Wertheim, as said company should designate, and that appellants signed said contract believing it to be an agreement between them and said railroad company. They also allege that the sum of $2500.00 which was paid to them for said land, was a wholly inadequate price for it, unless it was actually to be sold to said railway company, and the value of their remaining land enhanced thereby, and that upon the discovery of the fraud, which they say had been practiced upon them, they tendered the $2500.00 which they had received to the plaintiff. The plaintiff replied, denying the fraud and misrepresentation alleged.

The case was sent to a referee, who took the evidence, and reported it to the court, which found the issues for the plaintiff, ordered the defendants to make conveyance in accordance with the terms of the agreement, and that they should pay to the plaintiff, as damages, six hundred dollars, from which order and judgment the defendants appealed.

OPINION OF THE COURT.

ABBOTT, J.—We notice, first, the claim of the appellants that the failure of the plaintiff to deny the allegation of their answer, in relation to inadequacy of consideration, left it judicially admitted, and they were not bound to offer proof of it. That question was not raised in the trial court, nor was it there suggested that inadequacy of consideration was not well pleaded, although the conditional form in which it is put, to say the least cast doubt on it. Both parties, however, in the trial seem to have assumed that inadequacy of consideration was a defense alleged in the case and to have introduced evidence on that assumption, without objection, on the ground that such was not the case. That objection cannot be made here for the first time, and we must treat the question of inadequacy of consideration as being before this court for review on the findings and evidence.

Taking up now the main issue in the case, that of

the fraud which the appellants allege was practiced upon them, we have first to consider what force shall be given to the finding of the trial court on that point. While it is true, as counsel for the appellants suggest that the court did not hear the witnesses but based its conclusion on the evidence as reported to it by the referee, it is also true that this court does not ordinarily sit to try questions of fact, and will not, even in such a case as the one at bar, disturb the findings of the trial court on questions of fact, unless it is very clear that wrong has been committed. Counsel for the appellants ask us to examine the case in accordance with the provisions of Chapter 57, Section 38, of the Session Laws of 1907, and that, of course, it is our duty to do. But while it is there provided that this court shall base its judgment in a case coming to it by appeal or writ of error "on the facts contained in the record alone", it is also provided that "it shall review said cause," namely, one tried by the court without a jury, "in the same manner and to the same extent as if it had been tried by a jury." And in Lynch v. Grayson, 7 N. M., p. 26, this court said: "It was not the intention of the territorial legislature, by the Act of January 5, 1889, section 4, providing that in cases where a jury has been waived, and the cause tried by the court, 'the Supreme Court' 'shall review said cause in the same manner, and to the same extent, as if it had been tried by a jury,' that the Supreme Court should pass upon the weight of the evidence introduced in the court below, but upon the sufficiency of the facts as found to support the conclusions of law." The language there considered is identical with that of the statute called to our attention bearing upon the question to be determined. The findings of the trial court in this cause therefore rest on the same legal basis as would the verdict of a jury, and that this court will not disturb the verdict of a jury which rests on evidence legally sufficient to sustain it, is too well settled to be open for discussion.

From the examination we have given the evidence in this case, however, we are convinced that even if the law were much more favorable to the appellants than it is in that particular, their evidence would not measure up to

its requirements. As the authorities cited for the appellee abundantly show, the evidence of fraud "upon which to found a verdict or decree must be clear and convincing." Lalone v. United States, 164 U. S. 257. See also, Farrar v. Churchill, 135 U. S. 615; Moore v. Crawford, 130 U. S. 134. It falls far short of the standard thus established, in the case at bar, alike on the question of deceit and that of inadequacy of consideration, assuming the latter to be before this court. The value of the testimony of E. J. Pring as an accurate and reliable account of the events with which it deals, is much impaired through other evidence in the case whose veracity there is no apparent reason to doubt, and even by comparison of some of its parts with each other. Thus, he testified that Mr. Moore offered him $100.00 per acre for land, but on cross examination he said: "The other day I said to Moore, 'Will you give me one hundred dollars per acre for my land: He said he wanted some': That is the offer he made." He also testified that Dr. Nichols offered him one hundred dollars per acre, and that he had expected to have him as a witness, but he was away. Afterwards, against his objection, the case was re-opened before the referee, for the introduction of the testimony of Dr. Nichols who had been away but had returned. He testified that he had made no offer whatever for the land. The evidence of Mrs. Pring is somewhat discredited by the fact that she obtained the written agreement on which the suit is founded from the plaintiff for the purpose of examining it, and then attempted to destroy it. Even if she believed that it was procured by fraud, she should have been willing, in fairness, to have it used as evidence for what it was worth. If she thought it proper to destroy that most important piece of evidence, it is only a fair inference that she was ready, perhaps under a feeling that she and her husband had been wronged, otherwise to take from or add to the evidence in the case without strict regard to facts. 16 Cyc. 1058-9. There is a great discrepancy between the sworn statements of the Prings in their answer and their testimony on material points. They alleged that the original misrepresentation was made to

them by Floersheim to the effect that M. B. Goldenberg wished to buy their land for use by the Chicago, Rock Island & El Paso Railroad Company, when they three were by themselves at the residence of the Prings; that they said they would sell to Goldenberg for that purpose; that Floersheim then telephoned Goldenberg, who came to the house, drew up the agreement, said he was representing the railroad company, and read the agreement to them as one between them and himself as the agent of the railroad company. The agreement was in evidence, and was between them and the Goldenberg Company, without any mention of any railroad company. Floersheim and Goldenberg both testified that while they and the appellants were together about the matter, there was nothing said about any railroad company, that the agreement was correctly read by Goldenberg and that Mrs. Pring then read it, her husband being unable from blindness, to read. The appellants testified later, but neither ever testified that on the occasion last referred to there was anything said about any railroad company, or that Goldenberg did not read the agreement to them as it was written, or that Mrs. Pring did not herself read it. This failure to substantiate the sworn statements in their pleadings as to matters peculiarly within their knowledge, by testimony, as witnesses, must weigh somewhat against them. Moore v. Crawford, *supra*. Besides, it seems almost or quite incredible, if Floersheim had, as they say, made to them the misrepresentation on the strength of which they agreed to sell their land, namely that Goldenberg wanted it for a railroad, which would use it and enhance the value of their remaining land, that they should immediately thereafter sign an agreement written by Goldenberg in their presence, in which not a word was said about a railroad, and should even allow him to go away with the agreement, without so much as speaking of a railroad.

The conclusion of the district court that the plaintiff was entitled to specific performance by the defendants

of their agreement to convey the land in question to
1 it, is fully sustained by the evidence in the case.

As to the award of damages to the amount of six hundred dollars against the defendants, we find no evidence to warrant a finding of so much as that sum.
2 There is evidence that the plaintiff had paid six hundred dollars as counsel fees in the cause, and it seems probable that the judgment of the court was based on that, as there was no other evidence of damage to that amount; but that cannot be said with certainty, as no findings of fact were made or requested. The attorneys for the appellee admit however, that attorneys' fees are not recoverable in this case. There is, however, evidence of the value of the use of the land for the time it had been detained from the plaintiff, although not of a very clear and definite nature. As we understand the evidence for the plaintiff on that point, it is that the rental value of the land, when broken, was five dollars per acre for the season, and that it cost two dollars and fifty cents per acre to break it. It did not clearly appear that any of the land had been broken prior to the agreement in question.

We think, therefore, that while there is evidence to sustain a judgment of two hundred dollars, damages, that is, of two dollars and fifty cents per acre, for eighty acres, one for a larger amount is not warranted.

If the appellee shall, within thirty days, here remit four hundred dollars of the amount found as damages by the District Court, the judgment will thereupon be affirmed, otherwise it will be reversed and the cause remanded.

Associate Justice Mechem did not participate.

[No. 1257, July 26, 1910.]

M. G. PADEN, et al., Appellants, v. AMERICAN PLACER CO., et al., Appellees.

SYLLABUS.

A citation is one of the necessary elements of an appeal taken after the term, and if it is not issued and served before

the end of the next ensuing term of this court, and not waived, the appeal becomes inoperative.

Appeal from the District Court for Lincoln County before EDWARD A. MANN, Associate Justice. Motion to dismiss sustained.

GEORGE W. PRICHARD for Appellants.

HEWITT & HUDSPETH for Appellees.

No briefs filed.

OPINION OF THE COURT.

PER CURIAM:—In this cause the appellees move to dismiss the appeal entered in this court, October 29th, 1908, on the ground that the citation provided for by Sec. 2, Ch. 57, Session Laws of 1907, was not issued or served. From the record before us it appears that such was the case. It also appears that the appeal was not taken in open court at the term at which the case was tried but was granted later on motion, without any hearing in which the appellees participated, or of which so far as appears appellees had notice.

In Jacobs v. George, 150 U. S. 415, Chief Justice Fuller, speaking for the court said: "It must be regarded as settled that: (1) Where an appeal is allowed in open court, and perfected during the term at which the decree or judgment appealed from was rendered, no citation is necessary; (2) Where the appeal is allowed at the term of the decree or judgment, but not perfected until after the term, a citation is necessary to bring in the parties; but if the appeal be docketed here at our next ensuing term, or the record reaches the clerk's hands seasonably for that term, and legal excuse exists for lack of docketing, a citation may be issued by leave of this court, although the time for taking the appeal has elapsed; (3) Where the appeal is allowed at a term subsequent to that of the decree or judgment, a citation is necessary, but may be issued properly returnable, even after the expiration of the time for

taking the appeal, if the allowance of the appeal were before; (4) But a citation is one of the necessary elements of an appeal taken after the term, and if it is not issued and served before the end of the next ensuing term of this court, and not waived, the appeal becomes inoperative."

It is true that the court has sometimes overruled such motions on terms permitting the citation to be served later than the time prescribed, as in Dayton v. Lash, 94 U. S. 112, and Railroad Company v. Blair, 100 U. S. 661. But in the former case it appeared that "some attempt was made to serve the citation which the appellants may have supposed was actually completed"; and in the latter, that the appellee had been represented in court on the hearing of the motion to grant an appeal and the court said the appellant was warranted in assuming that the appellee waived service of the citation.

This court has also fully considered the question in the case of Baca v. Anaya, 14 N. Mex. 20, 26, and based its conclusion as to the power of the court principally on the two cases last cited.

As the court stated in Baca v. Anaya, the Supreme Court of the United States has "uniformly held that the court might in its discretion permit a citation to be issued and served at any time before the end of the next ensuing term," that is, the term of the appellate court to which it was properly returnable. But no case has been called to our attention in which it has been permitted later than that or unless for good cause shown. But in this cause there is nothing in the record to indicate that the appellees ever knew there had been an appeal.

There has been granted by this court on motion of the appellants a writ of certiorari for the completion of the record but the appellees were not represented or so far as appears notified in the matter. Nearly two years have passed since the appeal was allowed and no cause whatever is shown why the appellants did not apply to the clerk of the district court for the requisite citation and have service made on the appellees as required by law.

While we are reluctant to dispose of any cause except upon the merits of the questions involved, we cannot with-

out ignoring the plain and explicit provisions of the statute do otherwise than sustain the motion to dismiss, and it is so ordered.

[No. 1283, July 26, 1910.]

JOHN W. PRICE, Appellant, v. THE PECOS VALLEY & NORTHEASTERN RAILWAY COMPANY, Appellees.

SYLLABUS (BY THE COURT.)

1. The implied invitation to any one having business with a railroad company to go upon the premises where it transacts such business with the public, does not extend to portions of the premises which are obviously not adapted to, or used, or necessary for the transaction of the business for which such person is on the premises; and if he goes to such places he puts himself outside of the protection of his invitation and the railroad is not responsible for injuries he may receive unless it inflicts them purposely or wantonly.

2. On the evidence in the case, the negligence of the appellant contributed to the injury he received, and in the absence of evidence of any more than ordinary negligence on the part of the appellee, from which the appellant would not have suffered if he had exercised ordinary care, he is precluded from the recovery of damages against the appellee.

Appeal from the District Court for Eddy County before W. H. POPE, Associate Justice. Affirmed.

BUJAC & BRICE and JOHN W. ARMSTRONG for Appellant.

If upon any construction which the jury was authorized to put upon, or any inference they could draw from, the evidence, a verdict for the appellant could have been justified, the court below erred in directing a verdict for the appellee. Sioux City, etc., Ry. Co. v. Stout, 17 Wal-

lace 657; Grand Trunk Ry. Co. of Canada v. Ives, 144 U. S. 408; Railroad Co. v. Pollard, 22 Wall. 341; Railroad v. Converse, 139 U. S. 469, 11 Sup. Ct. Rep. 569; Thompson v. Railway Co., 57 Mich. 300, 23 N. W. Rep. 820; Railway Co. v. Miller, 25 Mich. 274; Railway Co. v. Van Steinburg, 17 Mich. 99, 122; Gaynor v. Old Colony & Newport Ry., 100 Mass. 208, 212; Marietta, etc., Railroad Co. v. Picksley, 24 Ohio St. 654; Railroad Co. v. Olger, 35 Pac. 60; Robinson v. Cone, 22 Vt. 213; Jamison v. Railroad Co., 55 Cal. 593; Redf. R. R., 5th ed., sec. 133, par. 2; 16 Amer. & Eng. Enc. Law, tit. 'Negligence,' 402, and authorities cited in note 2.

If the appellant went upon appellee's premises by invitation, whether express or implied, he was not a bare licensee. Bennett v. Ry. Co., 102 U. S. 577.

Railway companies are bound to keep in safe condition all portions of their platforms and approaches thereto, to which the public do or would naturally resort, and all portions of their station-grounds reasonably near to the platforms, where passengers, or those who have purchased tickets with a view to take passage on their cars, would naturally or ordinarily be likely to go. 1 Thompson on Negligence, secs. 993, 1002, 1003.

Actionable negligence is the failure to exercise such due care and diligence as a reasonably prudent person would ordinarily exercise under the circumstances. 1 Thompson on Negligence, secs. 215, 23, 24; Union P. R. Co. v. McDonald, 152 U. S. 262, 33 Cyc. 808; 2 Thompson on Negligence, sec. 1594; Willis v. Ry. Co., 38 So. 892, 115 La. 53; Haney v. Pittsburg, C., C., C. & St. L. Ry. Co., 18 S. E. 750.

By proximate cause is meant the efficient cause. 1 Thompson on Negligence, secs. 44, 49, 59.

Appellant's negligence to bar a recovery must have been the proximate cause of the injury. 1 Thompson on Negligence, secs. 57-58, 169, 216; Poling v. Ry. Co., 18 S. E. 782; Washington & R. G. Co. et al. v. Tobriner, 147 U. S. 83.

Even though the appellant was guilty of the want of ordinary care in taking the position he did on appellee's

platform which contributed to his injury, yet this will not prevent him from recovering damages from the appellee if the appellee might nevertheless have avoided the injury by the exercise of ordinary care on its part. Bias v. Ry. Co., S. E. 243; Inland, etc., Co. v. Tolson, 139 U. S. 551; Grand Trunk Ry. Co. v. Ives, 144 U. S. 408; Baker v. Ry. Co., 24 S. E. 415; Bogan v. Ry. Co., 39 S. E. 808; Body v. Ry. Co., 39 S. E. 715; 1 Thompson on Negligence, sec. 232.

The degree of negligence was a matter to be determined by the jury. Wabash Ry. Co. v. Brown, 152 Ill. 484, 39 N. E. 273; Evansville & C. R. Co. v. Wolf, 59 Ind. 89; Johnson v. Castleman, 32 Ky., 2 Dana 377; Needham v. Ry. Co., 85 Ky. 423, 3 S. W. 797; Louisville & N. R. Co. v. Mitchell, 87 Ky. 347, 8 S. W. 706.

Defendant company was guilty of gross negligence. Inland, etc., Co. v. Tolson, 139 U. S. 551; Sioux City & P. R. Co. v. Stout, 17 Wallace 567; Union P. R. v. McDonald, 152 U. S. 262; Toledo, etc., Ry. v. Maine, 67 Ill. 298; Savannah, etc., Ry. Co. v. Slater, 17 S. E. 350; Kansas P. R. Co. v. Ward, 4 Colo. 30; Summers v. Ry. Co., 44 Am. Rep. 419; Chicago & A. R. Co. v. O'Neil, 50 N. E. 216; Sullivan v. Ry. Co., 4 Am. St. Rep. 239; Breen v. Ry., 16 N. E. 60; M. K. & T. Ry. Co. v. Scarborough, 68 S. W. 196; 1 Thompson on Negligence, secs. 232, 238, 239, 1327, 354; Houston & T. C. R. Co. v. Gee, 66 S. W. 78; Chesapeake & O. Ry. Co. v. Davis, 58 S. W. 698; C. L. 1897, sec. 3217; Hanlon v. Missouri Pac. Ry. Co., 16 S. W. 235; Spencer v. Milwaukee, etc., Ry. Co., 84 Am. Dec. 758; Murray v. McShane, 36 Am. Rep. 367; Bodie v. Charleston, etc., Ry. Co., 39 S. E., S. Ca. 715; 7 Enc. Law, 2 ed., pp. 383-385; Virginia M. Ry. Co. v. White's Adm'r., 5 S. E. 573; Garner et al, v. Trumbull, 94 Fed. 321; Bennett v. Railroad Company, 102 U. S. 577; Baker v. Wilmington & W. R. Co., 24 S. s. 415; Carriso v. West Va. Cent. & P. Ry. Co., 14 S. E. 13; Baltimore & O. R. Co. v. Anderson, 85 Fed. 413; Seigel v. Eisen, 41 Cal. 109; Hanlon v. Ry. Co., 104 Mo. 381; Judson v. Powder Co., 107 Cal. 549, 48 A. S. R. 146; Southern Ry. Co. v. Fisk, 159 Fed. 373; Chi-

cago, etc., Ry. Co. v. Hanber, 162 Fed. 668; Tutt v. Railway Co., 104 Fed. 741; Cahill v. Ry. Co., 74 Fed. 285; Garner, et al. v. Trumbull, 94 Fed. 321; Anderson v. Hopkins, et al. 91 Fed. 77; Baltimore, etc., Ry. Co. v. Anderson, 85 Fed. 413; Connell v. Railway Co., 91 Fed. 466; Louisville, etc., Ry. Co. v. Morlay, 86 Fed. 240; Craft v. Railway Company, 69 Fed. 124.

HENRY L. WALDO of Counsel, R. E. TWITCHELL and W. C. REID for Appellee.

Appellant was a trespasser or bare licensee. Oatts v. Cincinnati, etc., R. Co., Ky., 22 S. W. Rep. 330; Gulf, Colorado & Santa Fe Ry. v. Bolton, Indian Territory, 6 American Negligence Reports 493; Diebold v. Pa. Ry. Co., N. J., 14 Atl. Rep. 576; 29 Cyc. 452.

A railway company owes no duty to one upon its tracks, yards or grounds without invitation to be at said places, by doing or refraining from acts which will facilitate the trespass or render it safe. 1 Thompson on Negligence, secs. 945, 1705, 1723; Cleveland, etc., R. Co. v. Tartt, 64 Fed. 823, 12 C. C. A. 618; Candelaria v. A. T. & S. F. Co., 6 N. M. 266, 27 Pac. Rep. 497; Toomey v. Southern Pacific R. R. Co., Cal., 10 L. R. A. 139; Railway Company v Bennet, 69 Fed. 525.

When the undisputed evidence is so conclusive that the court will be compelled to set aside a verdict drawn in opposition to it, the court may withdraw the case from the consideration of the jury and direct a verdict. Railway Co. v. Houston, 95 U. S. 697; Schofield v. Chicago M. & S. P. Railroad Co., 114 U. S. 615; Del. Lackawana, etc., Railroad Co. v. Converse, 139 U. S. 469; Aerkfetz v. Humphreys, 145 U. S. 418, 150 U. S. 246; Randle vs. Railroad Co., 109 U. S. 482; Kane v. Railway Company, 128 U. S. 94; Tucker v. Baltimore and O. R. Co., 59 Fed. 968; Candelaria v. A. T. & S. F. Ry. Co., 6 N. M. 266; Heisch v. Bell, 11 N. M. 523.

Plaintiff was guilty of contributory negligence. 1 Thompson on Negligence, secs. 1606, 1638, Railway Co. v. Houston, 95 U. S. 697; 29 Cyc. 507; Pa. Ry. Co. v.

Bell, 122 Pa. St. 58; Mathews v. The Pa. Ry. Co., 148 Pa. St. 491; Jones v. Grand Trunk R. R., 16 Ontario App. 37, 39 A. & E. R. R. cases 487.

Where it is shown that the injured person's negligence was the proximate cause of his injury, it is proper for the court to direct a verdict. Mitchell v. R. R. Co., 146 U. S. 513; Tucker v. Baltimore & Ohio Ry. Co., 59 Fed. 968; Bancroft v. R. R., 97 Mass. 278; Railroad Co. v. Houston, 95 U. S. 702; Kane v. North Central Ry. Co., 128 U. S. 94; Randall v. Baltimore & Ohio R. R., 109 U. S. 478; Goodlet v. Louisville & Nat. R. R., 122 U. S. 391; District of Columbia v. Moulton, 21 U. S. Supreme Court Reporter 840; Lane v. Lewiston, 91 Me. 292, 39 Atl. 999; Dyerson v. Union Pac. R. R. Co., Kan., 87 Pac. 680, 7 L. R. A., N. S.; Dunworth v. Grand Trunk West. Ry. Co., 62 C. C. A. 227, 127 Fed. 309; Chicago & N. W. Ry. Co. v. Andrews, 64 C. C. A. 408, 130 Fed. 74; Northern Pacific Ry. Co. v. Jones, 75 C. C. A. 210, 144 Fed. 52.

STATEMENT OF THE CASE.

The defendant company, here the appellee, was operating a railroad in this Territory at the time of the injury complained of in this cause and at the station at Hagerman on said road. The plaintiff, here the appellant, called to make inquiry for cars for the shipment of horses. He was told by the station agent that no cars such as he required were there, but that in a few minutes they would know whether there were such cars on the local freight train, which was about coming in. The station at Hagerman was used for freight and passenger business, and was a wooden building, having a platform about four feet above the ground extending completely around it. There was at the southeast corner of the platform a flight of steps leading south from it to the ground, and from the top of the steps there was a railing near the edge of the east side of the platform running north about eleven feet, and north of the point where the railing ended the platform was used for the purpose of unloading freight from the cars which were run close to it on the tracks, and there a railing would have been an obstruction to the work of unloading the cars

upon the platform. It did not appear that there was any barrier to separate the portion of the platform used for passengers from the part used for unloading freight, or anything to indicate such a separation, except the termination of the railing, and the relative locations of the freight-room and the waiting room. The side tracks nearest the platform were at such a distance that freight cars passing on them were near the edge of the platform for convenience in unloading freight, the distance between the edge of the platform and the nearest rail being four feet. East of the side-track was the main track, its west rail being about eleven feet from the east rail of the sidetrack. The door leading into the ticket office in the station was on the south side. The tracks were on the east of the platform. Passengers could not board trains from the platform but in going from the ticket office had to pass down the flight of steps named and go to the cars. In the room in the station where tickets were obtained there was a table at which the station-agent did a part of his work, and there were a few seats there for passengers, or others having business with the defendant company. After the plaintiff had been told by the station-agent what has been stated, he went out on the platform to a point north of the railing, sat down on the edge of the platform with his legs hanging down outside of it toward the tracks to watch for the cars he hoped might come in for him. While he was in that position the freight train, or a portion of it, which had been cut off from the rest, was backed in on the side-track next to the platform. Several cars had passed the plaintiff and for a moment before and at the time of the accident, he was looking at some of the cars which had passed, and in the opposite direction from the coming cars, one of which was a refrigerator car whose door was partly open and swinging out and in from the motion of the car. It cleared the platform as it passed, but when it reached the plaintiff there was not space for it to pass his legs, and one of them was caught and crushed between it and the platform. There was no evidence that any employee of the defendant knew that the door of the refrigerator car was not fastened, or knew the position of the plaintiff,

except that some of them were where they could and naturally might have seen the swinging door and the plaintiff seated on the edge of the platform; but all such employees testified that they did not in fact see or know of the swinging door or the position of the plaintiff. The trial court held that the plaintiff was, at most, merely a licensee at the place where he was on the defendant's premises; that the defendant owed him no duty other than not to injure him knowingly or wantonly; that there was no evidence of such injury, and directed a verdict for the defendant.

OPINION OF THE COURT.

ABBOTT, J.—(After stating the facts)—The plaintiff originally went on the premises of the defendant for the purpose of transacting with it business of the kind which it undertook to do with the public and was, therefore, there by its implied invitation, and according to the evidence was remaining by its direct invitation, or suggestion of the station-agent, when he received the injury for which he seeks to hold the defendant liable. The defendant claimed, and the trial court held, that he went outside of the protection of his invitation in placing himself as he did, when he received the injury.

Obviously, there must be some limit to what would be included in an invitation which is not expressed but only implied from the fact that the business of a common carrier of passengers and freight is transacted on the premises. At most of the railway stations in this country there is nothing to prevent the public from going upon the tracks of the railroad from the offices, waiting rooms and platforms. It is assumed to be, and is, we think, matter of common knowledge that it is highly dangerous to go upon or close to tracks where engines and cars too heavy to be stopped at a moment's notice, are passing with more or less regularity and frequency. This general knowledge of the danger is relied on to a great extent at the smaller and less frequented railway stations to prevent people who are there on business from going upon the tracks except as it may be necessary in taking trains,

or doing such other business, as they may have at the stations. At such times as they are necessarily upon the tracks for their business, the railroad company which has impliedly invited them there for the purpose, is held to the degree of responsibility for their safety which the circumstances impose. But, in this case it was in no wise necessary or even more convenient for the transaction of the plaintiff's business with the defendant company, that he should go near the tracks. He could have seen empty cars as well,—one would suppose better,—from a safe place on the platform, than with a part of his person projecting into the space marked by the edge of the platform and the rails as that reserved and presumably deemed necessary for the passage of the trains, even if the implied invitation of the defendant, or the express invitation of its representative, the station-agent gave the plaintiff the right to go wherever he pleased on the platform. It cannot be
1 that he was thereby authorized to go beyond it, when there was no occasion for him to go for any purpose connected with his business there. Oatts v. Cincinnati, N. O. & T. P. Ry. Co., (Ky.) 22 S. W. Rep. 330; Gulf, Colo. & S. F. Ry. v. Bolton, 6 Am. Negligence Rep. 493; Diebold v. Pennsylvania R. R. Co., 50 N. J. L., 478; 14 Atl. Rep. 576; 29 Cyc. L. & P., p. 452, and cases cited.

The only duty of the defendant toward the plaintiff, under the circumstances, was not to injure him wantonly or unnecessarily after his presence where he was, was known to its employees. Thompson on Negligence, Secs. 1705, 1723; Railway Co. v. Bennett, 69 Fed. Rep. 525.

There was no evidence that the culminating act of negligence on the part of the appellant that he was looking from instead of toward the approaching cars when he was injured, was known to any employee of the appellee, and only slight evidence compared with that to the contrary, that any employee noticed him as he was seated. If, however, it should be held, as we think it cannot, that the invitation of the appellee went so far as to warrant the appellant in seating himself on the edge of the platform with his legs projecting beyond it toward the tracks,

we think the evidence shows, beyond question, that
2 he was guilty of contributory negligence at the time of the injury. He saw cars approaching on the tracks nearest him, and while there was room for them to pass him, with little to spare, if he remained as he was and the cars kept to the rails and nothing projected from them, it was little short of recklessness to incur the risk needlessly that he might be accidentally thrown forward from behind by some passing truck or other object, or that the cars might leave the rails, or that some article might be projecting from a car, as so frequently happens, from the jolting of its load. He had no right thus to adventure his person beyond the edge of the platform into the space thus plainly marked off and reserved for the passage of cars. And, as if to emphasize his challenge to disaster, he allowed his gaze to be directed to the direction in which the cars were going instead of keeping it fixed on them as they approached. Even that precaution would, probably, have availed to save him from the deplorable injury which occured to him. That precaution, so clearly necessary to one in his position, he failed to take, and we find no warrant in law for requiring the defendant to bear any of the consequences of his negligence. Thompson on Negligence, Secs. 1606, 1638; 29 Cyc. p. 507 et seq.; Railway Co. v. Houston, 95 U. S. 697; Pennsylvania Ry. Co. v. Bell, 122 Pa. St. 58.

Although the trial court did not expressly base its direction to the jury to return a verdict for the defendant on the contributory negligence of the plaintiff, we think it might properly have done so on that additional ground. Mitchell v. Ry. Co., 146 U. S. 513; Tucker v. Baltimore & Ohio Ry. Co., 59 Fed. 968; Railway Co. v. Houston, 95 U. S. 702; Bancroft v. Railroad Co., 97 Mass. 278.

The judgment of the District Court is affirmed.

[No. 1296, July 26, 1910.]

TERRITORY OF NEW MEXICO, Appellant, v. JOHN S. BEAVEN, Appellee.

SYLLABUS.

1. The effect and not the form of the law determines its character as to whether it is general or local and special.

2. Chapter 45, Laws of 1907, insofar it put the county classification into effect in Class A and suspending it as to the other classes, was special legislation.

Appeal from the District Court for Bernalillo County before IRA A. ABBOTT, Associate Justice. Affirmed.

GEORGE S. KLOCK, District Attorney, for Appellant.

The appellee violated the conditions of his bond. Laws 1907, ch. 45, sec. 3; Laws 1905, ch. 60, sec. 11.

Laws 1907, ch. 45, sec. 6, not special legislation. Matter of N. Y. Elevated R. R. Co., 70 N. Y. 327; Ferguson v. Ross, 126 N. Y. 459; Verges v. Milwaukee Co., Wis., 93 N. W. Rep. 44; State ex rel. v. Cooley, 56 Minn. 540, 58 N. W. 150; State ex rel Skinner v. Bogert, Collector, 42 N. J. L. Rep. 407; Parker-Washington Co. v. Kansas City, Kansas, et al, 85 Pac. Rep. 781; 1 Lewis Sutherland Construction, 2 ed., p. 357; Hanlon v. Board of Co. Com., 53 Ind. 123; State v. Reitz, 62 Ind. 159; Clem v. State, 33 Ind. 418; Codlin v. Kohlhousen, 58 Pac. 499, 9 N. M. 565; State ex rel. the Attorney General v. The Judges of the Court of Common Pleas, 21 Ohio St. Rep. 1; City of Mount Vernon v. Evans & Howard Fire Brick Co., Illinois, 68 N. E. Rep. 208; City of Belville v. Wells, Auditor, 88 Pac. Rep. 49; Constitution, Article 2, sec. 17; Seabolt et al. v. The Commissioners of Northumberland Co., 187 Pa. St. Rep. 323; Harwood v. Wentworth, 162 U. S. 546; 2 Lewis Sutherland's Statutory Construction, 2 ed., sec. 497, p. 926; Ogden v. Saunders, 12 Wheat. 270.

MARRON & WOOD for Appellees.

Act of March 18, 1907, Chapter 45, making that act apply at once to Class A counties, as thereby created and postponing its effect upon the remainder of the Territory until the expiration of the terms of the then existing officers, constituted the act local and special as to such counties, and therefore within the prohibition of the Act of Congress. People v. Chautauqua Co., 43 N. Y. 10; Sutherland on Statutory Construction, secs. 1275, 1276; 26 Enc. 683, 697 and cases cited; Matter of Henneberger, 155 N. Y. 421; Ferguson v. Rose, 126 N. Y. 464; 26 Enc. 683; Henderson v. Koenig, 57 L. R. A. 659; Maricopa Co. v. Burnett, Ariz., 71 Pac. 908; New Jersey v. Somers Point, 6 L. R. A. 57; Appeal of Ayers, Pa., 2 L. R. A. 577; Davis v. Clark, 106 Pa. St. 377; Codlin v. Kohlhousen, 58 Pac. 499; City of Scranton v. Silkman, Pa., 6 Atl. 146; State v. Wood, 49 N. J. L. 88; People v. Cooper, 83 Ill. 588; ex parte Westerfield, 55 Cal. 552, 36 Am. Rep. 47; Harwood v. Wentworth, 162 U. S. 547; Gillson v. Ruch Co. Coms., Ind., 11 L. R. A. 835; Gibbs v. Morgan, 39 N. J. Eq. 126; In re Church, 92 N. Y. 1; Miller v. Kistern, 8 Pac. 813; Cooley on Constitutional Law 391; People v. Johnston, 6 Cal. 673; Omnibus R. Co. v. Baldwin, 57 Cal. 165; French v. Teschemaker, 24 Cal. 544; Christy v. Board of Sup'rs., 39 Cal. 3; Divine v. Cook Co., 84 Ill. 590; Nance v. Anderson, S. C., 39 S. E. 5.

STATEMENT OF FACTS.

By an act entitled "An Act to regulate the Classification of Counties and fixing the Salaries of Certain County Officials," Chapter 45, Laws of 1907, the legislature of the Territory of New Mexico divided all the counties of the Territory into five classes, designated as Classes "A", "B", "C", "D" and "E" respectively, with respect to the fees and percentages to be allowed county treasurers and assessors.

1. Before the passage of this Act the county treasurers were allowed fees to the amount of 4 per cent of the sums collected by them each year as their compensation. The Act of 1907 substituted a sliding scale of percentages and fees by which the treasurers of the counties of Class

"A" being all counties in which $200,000, or more should be collected, were to receive 2 per cent instead of 4 per cent; and in Class "B" counties which was to include all counties in which less than $200,000 and more than $150,000 should be collected, said officer was allowed 2½ per cent instead of 4 per cent as formerly and so on.

Besides classifying the counties, the Act further provided: "That in case the fees and compensation of assessors and treasurers as provided for in this Act shall exceed the sum of forty-five hundred dollars ($4500) for any one year, the excess over and above such amount shall be paid to the credit of the General School Fund."

Each year's classification was to be based upon the collections of the previous fiscal year, which year in this Territory ends on December 31st.

The Act by its terms did not go into effect until January 1st, 1909, the date of the expiration of the terms of all the county officers throughout the Territory, but contained the following proviso: "Provided that as to Counties of Class "A" this Act shall be in full force and effect from and after its passage," so that as to Counties of Class "A" the Act became a law on the date of its approval by the Governor, March 18th, 1907.

The appellee was the duly elected and qualified treasurer of the County of Bernalillo at the time the law was passed, his term of office beginning January 1st, 1907, and ending December 31st, 1908.

The appellee retained the amount of fees and percentage he would have received under the law as it stood previous to the Act of 1907. The excess of this amount over and above his compensation as fixed by the latter act, the appellant brought this action to recover.

The appellee defended on the ground that the proviso making the Act immediately applicable to Class "A" was null and void because contrary to the Act of Congress, July 30th, 1886, which prohibits the territories of the United States from passing local and special laws "creating, increasing or decreasing fees, percentages or allowances of public officers during the term for which said officers were elected or appointed."

By the record it is shown that Bernalillo County was the only county in the Territory falling within Class "A" as fixed by said act, for the years 1907 and 1908.

Also that during the year 1906, there were four counties in the Territory other than Bernalillo County, in which county treasurers received fees and percentages in excess of $4,500.00 as follows: Grant, $4,975; Chaves, $5,728; Colfax, $5,532, and San Miguel, $6,092.

The court below held with the appellee and entered judgment dismissing the action of the appellant, from which judgment this appeal is taken.

OPINION OF THE COURT.

MECHEM, J.—(After making the foregoing statement of facts, delivered the opinion of the court.)

The question presented here for determination is, did the legislature by the proviso contained in the Act of 1907, legislate locally and specially as to the treasurer of the County of Bernalillo? If this question is to be answered in the affirmative, then the proviso is null and void and of no effect, as coming within the prohibition enacted by Congress, against the passage of local and special laws by territorial legislatures, decreasing the fees and percentages of a public officer during his term of office.

The following facts appeared from public records at the time the act was passed:

(a) That the County of Bernalillo was the only county in the Territory which would fall within Class "A" for the year 1907.

(b) That by the law as it stood the treasurer of Bernalillo County would receive an annual compensation for the year 1907 more than $4,500.00.

(c) That by the Act of 1907 as put in immediate effect as to Class "A" the fees and percentages of the treasurer of Bernalillo County would be decreased during the term of office to which he was elected.

(d) That the county treasurers of the Counties of Grant, Chaves, Colfax and San Miguel would during the year of 1907 receive fees and percentages in excess of $4,500.00 and that their compensation would not be af-

fected by said proviso contained in the Act of 1907 aforesaid.

The effect and not the form of the law determines
1 its character as to whether it is general or local and special. 26 Am. & Eng. Ency. 687.

The effect of this Act was that it was applicable to the County of Bernalillo and could be only applicable to said county, for the year 1907.

A local act is defined to be "one operating only within a limited territory or specified locality." People v. Chautauqua County, 43 N. Y. 10.

"Where a statute applies to and operates only in a certain locality in a state, it may be said to be both special and local. Local because it is confined in its operation to a particular locality; and special, both because it is confined in its operation to that locality and to the people of that locality." Sutherland on Statutory Construction, Sec. 1275.

The act by making the collections of 1906, then ascertained, the basis of the classification, and that classification so that no other county but Bernalillo could fall within Class "A" for the year 1907, and the proviso making the law immediately applicable to Class "A," the law could then operate only in the County of Bernalillo and was confined in its operation to that county and to the treasurer and assessor of that county.

Had the proviso contained the name of Bernalillo County instead of "Counties of Class 'A'" it could not have more clearly singled out that county as the one county in the Territory in which the law was alone to take effect; neither does it make any difference that the proviso made the act applicable to Counties of Class "A" as such. This for the reason that in making the limitation of $4,500.00 per annum applicable to the compensation of all the county treasurers, the legislature in effect disavowed any classification, for it is evident that if there were several counties in which treasurers had received and would receive compensation in excess of $4,500.00 yearly, the legislature in fixing the maximum of compensation in all of such counties could only have done so on the ground that none

of such counties were possessed of those distinguishing characteristics calling for different legislation; or to put it differently, that such counties by their similarity of relation to the legislative purpose were subjects of general and not special legislation. 26 Am. & Eng. Ency. 683.

II. As to the classification contained in the body of the act, it is not necessary, in view of the case we take, to decide whether as a classification it was good or bad.

We are concerned with the proviso making that general classification apply to one county.

The legislature was evidently of the opinion that in eleven out of the twenty-five counties of the Territory, the treasurers were being overpaid and by the classification the compensation of the treasurers in said eleven counties was reduced from 50 per cent to 10 per cent, but the proviso reduced the compensation of the treasurer of Bernalillo County by 50 per cent and as to the other over-paid county treasurers, the act was suspended until their terms of office should expire.

This court in the case of Codlin v. Kohlhousen, 58 Pac. 499, 9 N. M. 565, speaking through Justice McFie said: "There must be a substantial distinction, having reference to the subject matter of the proposed legislation, between the places excluded. The marks of distinction on which the classification is founded must be such, in the nature of things, as will, in some reasonable degree at least, account for or justify the restriction of the legislation."

Measured by this rule we find that: "the subject matter of the legislation" was a reduction of the fees and percentages of almost half of the county treasurers of the Territory. That there were no marks of distinction between the classification of counties of "A" and "B" class-
2 es except in the amount of reduction made; such a distinction, however would not account for or justify putting the classification into effect in Class "A" and suspending it as to the other classes. In other words, there was no distinction "so marked as to call for separate legislation." Lewis Sutherland Stat. Cons. 369.

The Supreme Court of California in Miller v. Kester,

8 Pac. 813, dealt with what appears to be the question now under consideration. A law was passed classifying the counties of the state into forty-eight different classes with respect to the salaries of county officers, and like our statute, suspended the operation of the law in forty-five of the classes until after the expiration of the terms of the three county officers, but put it into immediate effect in three of the classes. The court held the sections of the Act which put it into immediate operation in three specifield classes to be a special law as to the counties included therein.

The judgment of the lower court is right and is affirmed.

Justice Wright having been appointed since the submission of the case did not participate in this decision.

[No. 1297, July 26, 1910.]

SIEGFRIED GRUNSFELD, Appellee, v. BOARD OF COUNTY COMMISSIONERS BERNALILLO COUNTY, Appellant.

Appeal from the District Court for Bernalillo County before IRA A. ABBOTT, Associate Justice. Affirmed.

GEORGE S. KLOCK for Appellant.

See brief in preceding case, No. 1296.

The District Court was without power to award a money judgment in favor of appellee against appellant. C. L. 1897, secs. 671, 672.

Laws 1907, chapter 45, was not special legislation. In re Application of Church, 92 N. Y. Court of Appeals.

JULIUS STAAB and JOHN A. WHITE for Appellees.

The proviso of Sec. 6, Chapter 45, Laws of 1907, singles out Class A and makes it effective and in force

alone for the two years 1907 and 1908, and is therefore special and local legislation. A. & E. Enc. of Law, 2 ed., vol. 26, pp. 683, 687; Dibrell v. Lanier, 12 L. R. A. 70, 79, 89 Tenn. 534; Joe Sutton v. State of Tennessee, 33 L. R. A. 589, 592; State ex rel Randolph v. Wood, 49 N. J. L. 85, 7 Atl. R. 286, 287; McCarthy v. Com., 110 Pa. 243; Edmunds v. Herbrandson, N. Dak., 14 L. R. A. 725; State v. Boyd, 19 Nev. 43, 5 Pac. R. 735; State v. Hoagland, 51 N. J. L. 62-68, 16 Atl. R. 166; State v. Scott, 50 N. J. L. 585, 1 L. R. A. 86; State Bd. of Assessors v. Central Ry. Co., 48 N. J. L. 148 and 278; State v. Mullica Twp., 51 N. J. L. 412; Lewis Sutherland Statutory Construction, vol. 1, p. 369; State v. Hermann, 75 Mo. 340; State v. Pugh, 43 Ohio St. 98, 1 N. E. 439; State v. Gaddis, 44 N. J. L. 365; Morrison v. Bachert, 112 Pa. 322, 5 Atl. 739; Territory of New Mexico v. Newman, 13 N. M. 98, 102; A. & P. Ry. Co. v. Mingus, 7 N. M. 360; Gibbs v. Morgan, 39 N. J. Eq. 126; Davis v. Clark, 106 Pa. 385; City of Topeka v. Gillet, 4 Pac. Rep. Kans. 800; Henderson v. Koenig, 168 Mo. 356, 57 L. R. A. 659; McAunich v. Miss. etc. Ry. Co., 20 Iowa 338; Ayar's App. 2 L. R. A. 577, 122 Pa. 266; State v. Tolle, 71 Mo. 645; Com. v. Patton, 88 Pa. St. 258; State v. Ellet, 47 Ohio St. 90; 21 Am. St. Rep. 772; State v. Anderson, 44 Ohio St. 247; 6 N. E. 571; States v. Mitchell, 31 Ohio St. 592; sec. 2; ch. 114, L. 1909, art. 1, sec. 10 of Constitution of U. S.; Act of Congress, Sept. 9, 1850, sec. 17, Organic Act.

The legislation in question was not only special but it was also local. Mugler v. Kansas City, 123 U. S. 623, 663; People v. Cooper, 93 Ill. 585, 594; Devine v. Cook Co. Comrs., 84 Ill. 592; State v. Wood, 49 N. J. L., p. 88; Codlin v. Kohlhousen, 58 Pac. 499, 9 N. M. 565; Miller v. Kister, 68 Cal. 142, 8 Pac. R. 813; Cooley, Constitutional Laws 391; People v. Johnson, 6 Cal. 673; Omnibus R. Co. v. Baldwin, 57 Cal. 165; French v. Teschemaker, 24 Cal. 544; Constitution, article 4, sub-div. 29; Van Riper v. Parsons, 11 Vroom 125.

Section 1 of the Fourteenth Amendment prohibits discrimination in class legislation. Gulf Colo. & S. F. R. Co. v. Ellis, 165 U. S. 150; Cotting v. Goddard, 183 U. S.

79, 107-109; Magoun v. Ill. Trust & Sav. Bank, 170 U. S. 283; State v. Loomis, 115 Mo. 307, 314, 21 L. R. A. 789.

OPINION OF THE COURT.

MECHEM, J.—It is agreed that this case, involving similar facts and the same legal questions, should be considered on the briefs filed by appellee herein and by appellant in case of Territory of New Mexico v. Beaven, No. 1296, decided at this term, and the opinion rendered by the court in said case, should be decisive in this case.

Judgment of the District Court is affirmed.

Justice Wright having been appointed since the submission of the case in this court did not participate in its decision.

[No. 1266, July 27, 1910.]

CORDELIA IRWIN, Appellant, v. SOVEREIGN CAMP OF THE WOODMEN OF THE WORLD, Appellee.

SYLLABUS (BY THE COURT.)

1. Where the defendant admits liability and advises and requests plaintiff to bring suit in order to dispose of the conflicting claims of a third party and for no other purpose, he will not, after plaintiff has begun suit and incurred costs, be permitted to deny liability.

Appeal from the District Court for Chaves County before WILLIAM H. POPE, Chief Justice. Reversed.

REID & HERVEY for Appellant.

The application of Estes for membership in the defendant order should have been admitted in evidence. 29 Cyc. 67 citing A. O. U. W. vs. Jessee, 50 Ill. App. 101; Association vs. Hand, 29 Ill. App. 73; Association v. Bloom, 21 Ill. App. 159; Page on Contracts, vol. 2, sec. 1126 and cases cited; Insurance Co. v. Dutcher, 95 U. S.

273; Sattler v. Hallock, 160 N. Y. 291, 73 A. St. Rep. 686; Pratt v. Prouty, 104 Ia. 419, 65 American State Rep. 472; Wyatt v. Larimer Co., 18 Col. 298, 36 American State Rep. 280.

The term parent includes a person standing in loco parentis. Texas Penal Code, art. 490; Walter v. Association, Minn., 44 N. W. 557; Snowden v. State, 12 Tex. App. 105-107, 41 American Rep. 667; Ferguson v. Jones, 17 Ore. 204, 20 Pac. Rep. 842, 3 L. R. A. 620, 11 Am. St. Rep. 808; Hurley v. O'Sullivan, 137 Mass. 86; Bolton v. Gile, 50 Wis. 614, 7 N. W. 561; Schunck v. G. W. & W. F., 44 Wis. 369; Erdmann v. Ins. Co., 44 Wis. 376; Sheehan v. Association, 142 Cal. 489, 76 Pac. 238; Abbott's Law Dictionary, art. "Child"; Aetna Insurance Co. v. Martin, 73 Me. 25.

"Where a holder of a certificate in a mutual benefit society desires to change the beneficiary therein, and does all that he is required to do by the laws of the society, and then dies before the change is completed, a court of equity will decree the payment of the money the same as if the desired change had been fully completed in the lifetime of the assured." Heydorf et al. v. Courack, 52 Pac., Kan. 700; Conclave v. Coppella, 41 Fed. 1; Section 4015, Laws of Nebraska; Barton v. Provident, etc., Ass'n, 63 N. H. 535; Richmond v. Johnson, 28 Minn. 447; Masonic etc. Society v. Burkhart, 110 Ind. 193; Am. Legion of Honor v. Perry, 140 Mass. 580; Manning v. A. O. U. W., 5 S. W. 385.

In the absence of fraud, the provisions of a certificate or policy of insurance will prevail over any mere by-law with which it may conflict. Morrison v. Insurance Co., 59 Wis. 162, 18 N. W. 13; McCoy v. Association, 92 Wis. 577, 583, 66 N. W. 697, 47 L. R. A. 68; Davidson v. Society, 39 Minn. 303, 39 N. W. 803, 1 L. R. A. 482; Ins. Co. v. Keyser, 32 N. H. 313, 64 Am. Dec. 375; Ledebuhr v. Wis. Trust Co., Wis., 88 N. W. 607; Grand Lodge A. O. U. W. v. McKinstry, 67 Mo. App. 82, 87; Poor v. Hudson Ins. Co., 2 Fed. 432; Hogg v. Lobb's Ex'r, 32 Atl. 631; Wilson v. Cochran, 31 Tex. 677, 98 Am. Dec. 553; Good v. State, 16 Tex. App. 411; Ferbrache v. Grand Lodge, 81 Mo. App.

268; Hofman v. Grand Lodge, B. L. F., 73 Mo. App. 47; Coulson, et al. v. Flynn, 180 N. Y. 62, 73 N. E. 507; Tepper v. Royal Arcanum, 61 N. J. Eq. 638, 47 Atlantic 460; 88 American State Rep. 449; Carmichael v. Ass., 51 Mich. 494, 16 N. W. 871; Lodge v. McKinstry, 67 Mo. App. 82.

Upon the general question of waiver and estoppel see Alexander v. A. O. U. W., Ia., 93 N. W. 508; Storey v. Association, 95 N. Y. 474, Lindsley v. Society, Ia., 50 N. W. 29; Seivel v. Association, Wis., 68 N. W. 1009; Alfsen v. Crouch, 115 Tenn. 352, 89 S. W. 329; Ledebuhr v. Wis. Trust Co., 112 Wis. 657, 88 N. W. 607; Bloomington Mut. Ben. Assn. v. Blue, 120 Ill. 121, 11 N. E. 331, 60 Am. Rep. 558; Tramblay v. Supreme Council, C. B. L., 90, N. Y. App. Div. 39; West v. Grand Lodge A. O. U. W., Tex., 37 S. W. 966; Gruber v. A. O. U. W., Minn., 81 N. W. 743.

The phrase "person or family dependent upon him," in the constitution of a life association providing that the benefits were to be paid on behalf of a member or such member or members of his family or persons dependent upon him as he should direct or designate by name was considered not to include any persons who were not actual relatives or standing in the place of relatives of the same relation, or some actual dependent upon the member. Duval v. Hart, 43 Fla. 15 S. R. 876; Supreme Lodge K. of H. v. Marian, 60 Mich. 44, 26 N. W. R. 826.

D. W. ELLIOTT for Appellee.

When a mutual benefit certificate in which plaintiff was a beneficiary, was surrendered by the assured in his life time and a new certificate issued to another beneficiary, the original certificate became *functus officio*. Coulson v. Flynn, 73 N. E. 507; Baldwin v. Begley, 56 N. E. 1065; Luhrs v. Supreme Lodge, etc., 7 N. Y. Supp. 487; Fisk v. Equitable Aid Union, 11 Atl. 84.

The constitution of the order controls. Ins. Co. v. Dutcher, 95 U. S. 273; Bacon's Benefit Soc., secs. 245, 252.

Plaintiff was not dependent of deceased. Hoffman v.

Grand Lodge, etc., 73 Mo. App. 47; Dalton v. Knights of Columbus, 11 A. & E. Ann. Cas. 568; Supreme Lodge Order of Mutual Protection v. Dewey, et al., 7 A. & E. Ann. Cas. 681 and note page 684; Alexander et al. v. Parker, 114 Ill. 355; Caldwell v. Grand Lodge, etc., Calif., A. & E. Ann. Cas. 356, and note on page 358; Grand Lodge O. H. v. Elsner, 26 Mo. App. 108; Bower v. Supreme Lodge, etc., 87 Mo. App. 614; Bacon's Benefit Societies & Life Ins., Sec. 261.

STATEMENT OF FACTS.

This action was brought by the appellant against the appellee to recover the sum of $1,000.00, the amount of the beneficiary certificate issued by the appellee to one Thomas F. Estes, a member of the appellee order. Shortly before his death, the said Estes had made a change of beneficiary by which the appellant was named in the place of one Rita Diaz. The record shows that appellant had regularly adopted the said Estes as her son and she was named in the beneficiary certificate as foster-mother and dependent of the said Estes. Due proofs of the death of Estes were made to the company according to the rules and regulations, and proof also of the relationship of the appellee with deceased. Thereafter, the appellee issued its warrant for the amount of the beneficiary certificate payable to appellant. The appellant deposited the same in the Citizen's Bank of Roswell, New Mexico, for collection. Upon presentation to appellee, payment was refused by it for the reason that Rita Diaz had in the meantime asserted a claim to the fund.

Thereafter some correspondence was had with the chairman of the Sovereign Finance Committee of the Appellee, the said committee being empowered by the by-laws of appellee, to pass upon and approve all claims made against it, in which the said chairman explained to the clerk of the local lodge, to this appellant and to her attorneys, that said committee considered her, the appellant, as the rightful beneficiary for the reason that she had adopted Estes as her son, that had it not been for the adverse claim of Rita Diaz she would have been paid, and further wrote

to the counsel commander of the local lodge at Roswell to see if he could not get the attorney of Rita Diaz to withdraw his objections so that the appellant could be paid or to see that "suit is brought against the order by one party or the other to recover the amount of the certificate, and we will interplead the money into court and let that tribunal settle the matter. It does seem too bad that a part of this certificate should have to be used up in attorney and court fees to determine the rightful beneficiary. I hope the officers of your camp can bring such influence to bear upon these parties to see that Mrs. Irwin is not made to go to court to recover the amount of this certificate. We hope that you will see Attorney Gatewood and if he does not bring suit against the order we will not allow any unnecessary delay to keep us from making the payment of this claim, as we desire to pay our claims promptly." Later, on January 10, 1908, in a letter to the attorneys of the appellant, the same officer informed them that "our committee have been notified by Attorney W. W. Gatewood, representing Rita Diaz, to withhold the payment of this claim from any party excepting her. This you will see makes contesting claims under this certificate, and we feel that we should protect the order in this matter. We presume that it will be necessary for one of the contesting parties to bring suit against the order, and we can interplead the money into court, unless they can settle it between themselves as to who is the rightful beneficiary."

Suit was then brought by appellant in the District Court of Chaves County, in which suit the said Rita Diaz intervened and set up her claim. The case was tried by jury. The appellee defended on the ground that the contract was *ultra vires* and void. The court directed a verdict in favor of appellee and rendered judgment therein against both the appellant and Rita Diaz, from which judgment this appeal was prosecuted. Rita Diaz has not appealed.

OPINION OF THE COURT.

MECHEM, J.—From the view we take of this case it will be unnecessary to discuss the numerous assignments of error, for the judgment of the lower court must be re-

versed and judgment entered for the appellant. In Moore v. Beiseker, 147 Fed. (C. C. A.) 367 (Eighth Circuit) the court said:

"In the Kansas Union Life Insurance Company v. Burman (C. C. A.) 141 Fed. 835, where an insurance agent for the insurance company, under a salary contract and for certain commissions, sent in his resignation specifying certain grounds therefor, which did not include the objection that the insurance company had failed to renew its license in the state where the agent was operating under the contract, and in his suit to recover damages for a breach of the contract for employment he assigned, *inter alia,* such failure to renew the license as a ground for recovery, it was held that he was estopped from alleging such ground as the cause of his resignation. The court said:

"It is a wholesome rule of law, instinct with fair play, expressed by Mr. Justice S. W. Anye, in Railway Company v. McCarthy, 96 U. S. 267, 24 L. ed. 693, that 'where a party gives a reason for his conduct and decision touching anything in a controversy, he cannot, after litigation has begun, put his conduct on another and different consideration. He is not permitted thus to mend his hold. He is estopped from doing it by a settled principle of law.' This principle has been applied in the following instances: Davis v. Wakallee, 156 U. S. 690, 39 L. ed. 578, where a bankrupt obtained his discharge, claiming that the judgment against him was not affected by it, it was held that he could not, in a subsequent action on the judgment deny its validity. In Davis, etc., Company v. Dix, 64 Fed. 411, where it was held that the purchasers of a creamery repudiating the contract on the ground of fraudulent representations, could not thereafter set up an interpolation in the contract. In Harriman v. Myer, 45 Ark. 40, where it was held that the defense that a tender was not made in ready money was not admissible where the prior objection was to inadequacy of price, etc., etc."

Also in Farmers' Milling Co. v. Mill Owners' Mutual Ins. Co., Iowa, 103 N. W. 207, where it is said: "After distinctly and definitely resting denial of liability upon the ground that the policy was suspended and cancelled because

of non-payment of assessments, the defendant cannot be permitted, after suit has been brought and costs incurred by the plaintiff, to mend its hold and assert some other ground of defense."

And in the case of Continental Insurance Company v. Waugh, (Nebraska) 83 N. W. 81, the rule is applied as follows: "Having assigned as a reason for refusal to pay the alleged failure of the assured to preserve his books of account, and presenting that objection alone as a justification for disavowing its liability under its contract of indemnity, it cannot after litigation is begun, be heard to urge other and additional grounds for refusing the payment for the loss sustained."

See also Supreme Tent K. of M. of the World v. Volkert, Ind., 57 N. E. 203 and cases cited.

This general rule is laid down in 16 Cyc. 786, in the following language: "So where a person has acted or refrained from acting in a particular way upon the request or advice of another, the latter is estopped to take any position inconsistent with his own request and advice, to the prejudice of the party induced to act."

The appellee having admitted the validity of appellant's claim, and having refused payment solely for the reason of a contesting claim by Rita Diaz, and having
1 advised appellant and her counsel to bring suit, which was to be friendly and uncontested by it as far as appellant was concerned, and for no other purpose than to dispose of the claim of Rita Diaz, appellee will not be permitted, after appellant has begun suit and incurred costs, to interpose another defense.

The judgment of the lower court is reversed and remanded with directions to the court below to reinstate the case upon the docket and enter judgment in favor of the appellant, Cordelia Irwin, for the amount due on the beneficiary certificate sued on, with such interest and costs as the law provides. And it is so ordered.

Associate Jusice Wright, who was appointed after the submission of this case, did not participate.

[No. 1330, July 27, 1910.]

A. E. MACY, Appellee, v. F. H. SUNDERMAN and WILLIAM L. HEITMAN, Appellants.

SYLLABUS (BY THE COURT.

1. The waiver and relinquishment of a preference right to enter a certain tract of the public domain, which preference right has been obtained as the result of a contest before the United States land office, is a good and valid consideration for a note given in payment therefor.

Appeal from the District Court for Chaves County before WILLIAM H. POPE, Chief Justice. Affirmed.

R. D. BOWERS for Appellants.

The right conferred on a successful contestant for the preference right to file on public land is a personal right which cannot be transferred to another. Act May 14, 1880, sec. 2; Welch v. Duncan, 7 Land Dec. 186; Kellem v. Ludlow, 10 Land Dec. 561; Dameron v. Dingee, 29 Pac., Colo. 307; Meyers v. Croft, 13 Wall., U. S. 291, 20 L. ed. 562.

NISBET & NISBET for Appellee.

The waiving of a preference right to file on land and the giving of a relinquishment to said land back to the government, in order that the defendant might file on same, and ultimately procure the title to the land, which he otherwise could never have done is sufficient consideration to support a written promise to pay. Stubblefield v. Branson, 20 Mo. 301, 302; Palmer v. March et al., 24 N. W. 374; Thompson v. Hanson, 11 N. W. 86; Spry v. Sleepy, 15 Iowa, 411; Clark v. Shulz, 4 Mo., 147; Kellem v. Ludlow, 10 Land Dec. 561; Pellham v. Service, 26 Pac. 29; Moore v. McIntosh, 6 Kas. 32, 45; Bell v. Parks, 18 Kas. 152; Lapham v. Head, 21 Kas. 245; 32 Cyc. 1079, 1080.

STATEMENT OF THE CASE.

The appellee brought suit in the District Court of Chaves County to enforce the payment of the balance due

on a promissory note for $600.00 signed by the appellants and payable to one Julius R. Thamsen, and by him endorsed to the appellee. A payment of $300.00 was alleged and admitted to have been made thereon in December 1905. Appellants answered denying that said note was given for a valuable consideration, and further answered, by way of new matter, that there was a failure of consideration for said note for the reason that same was given in payment of the sale of a certain preference right of homestead entry previously obtained by the appellee as the result of a contest before the United States Land Office; that in the negotiations for the sale of said preference right, Julius R. Thamsen acted as the agent of the appellee and that said note was made payable to him as such agent; that said agreement to sell was illegal and void and no consideration for said note, being an agreement and attempt to sell a personal right not subject to sale and transfer, and contrary to law and contrary to public policy.

To that part of the answer setting up new matter, the appellee demurred on the ground that such matter constituted no defense. The demurrer was sustained and the appellants refused to plead further. The court thereupon took the proofs of the appellee and rendered judgment for the appellee as prayed in the complaint.

To the action of the trial court in sustaining said demurrer and rendering judgment, the appellants duly excepted and an appeal to this court was allowed.

It further appears from the record in this case and the admissions in the briefs filed herein, that in pursuance of said agreement by the appellee to sell his preference right of entry, the appellee waived and relinquished the same to the United States.

OPINION OF THE COURT.

WRIGHT, J.—The appellants assigned four grounds of error. They are all to the same effect, and raise but one question for this court to decide, and that is whether the waiver and relinquishment of a preference right to enter a certain tract of public domain, which preference right has been obtained as the result of a contest before the United

States Land Office, is a good and valid consideration for a note given in payment therefor.

It must be taken as established from the record and the admissions in the briefs filed herein that the agreement for the sale of said preference right of appellee was consummated by the waiver and relinquishment thereof by the appellee, to the United States. Such being the facts, upon the analogy of the decisions holding that the waiver and relinquishment of a homestead entry is a good and valid consideration for a note given in payment therefor, we must answer the question in the affirmative, and hold

1. that a waiver and relinquishment of the preference and relinquishment of a *homestead entry* is a good and valid consideration for a note given in payment for such waiver and relinquishment.

The courts have, without exception, held that the waiver and relinquishment of a homestead entry, and also an agreement so to waive and relinquish such homestead entry, is a good and valid consideration for a note given in payment therefor. Pelham et al. v. Service, 26 Pac. 29; McCabe v. Caner, 68 Mich. 182, 35 N. W. Rep. 901; Olson v. Orton, 18 Minn. 36, 8 N. M. Rep. 878; and 32 Cyc. pages 1079-1080 and cases cited.

The reasoning of the above cited cases applies to the case at bar. In either case the possessor of such homestead or preference right in surrendering what may become, or may be at the time, an extremely valuable property right, and such surrender by the one having such right is unquestionably a valuable consideration for a note given in payment therefor.

In Dameron vs. Dingee, 1 Colo. App. 436, 39 Pac. 305, cited by the appellee, it appears that the defendant entered into an agreement with plaintiff, whereby, in consideration of money advanced by plaintiff to defendant, the defendant was to institute and prosecute in her own name, the necessary proceedings before the United States Land Office for the cancellation of a certain homestead entry, and that upon the cancellation of said homestead entry and the granting of a preference right to enter the same, to the defendant, the defendant was to waive and

relinquish all right to make entry thereof and allow plaintiff to make such entry. The contest was carried to a successful termination by the defendant and preference right to enter was duly awarded to defendant. Thereafter plaintiff made demand upon defendant to relinquish said preference right according to agreement. Defendant refused so to relinquish, and plaintiff brought suit for specific performance. Same was refused by the court.

In the case at bar there was no such contract. The only agreement is a present contract to waive and relinquish a certain preference right already obtained as the result of a previous contest. So far as the record in the case at bar shows, the appellants, at no time prior to the actual waiver and relinquishment, had knowledge of or were parties to any agreement or contract to initiate or prosecute the contest, as a result of which, appellee obtained the preference right so waived and relinquished.

The courts might well refuse to enforce such a contract as that set out in the Colorado case above cited, as contrary to public policy. It is plain upon the face of the same that the entire transaction was speculative from start to finish. No such condition exists in the case at bar, and, in the absence of fraud or misrepresentation on the part of the appellee, of which the appellants make no complaint, the waiver and relinquishment of his preference right to enter a certain tract of land by the appellee, is a good and valid consideration for a note given in payment therefor, to the same extent as the waiver and relinquishment of the homestead which the appellee could have entered under his said preference right would have been a good and valid consideration for a note given in payment therefor.

The judgment of the District Court is affirmed.

[No. 1272, August 1, 1910.]

MELVILLE R. SUMMERS, Administrator, Appellee, v. BOARD OF COUNTY COMMISSIONERS, Sandoval County, Appellant.

SYLLABUS (BY THE COURT.)

1. A probate clerk who, upon the formation of a new county, makes transcripts of the property records of the old county for the use of such new county pursuant to Chapter 70 of the Laws of 1899, and in so doing uses printed forms of conveyances which he must compare and in many instances correct and interline, is entitled to the folio rate upon the printed folios as well as upon those written.

2. The administrator of the estate of such probate clerk cannot recover on behalf of such estate for work done by such administrator in connection with such transcripts and after the death of the probate clerk.

3. Such probate clerk having died in 1906 with the work only partially completed, the compensation which goes to his estate is fixed by Chapter 70 of the Laws of 1899 in connection with C. L., Sec. 1768, and not by the subsequently enacted Chapter 28 of the Laws of 1907, which latter as a part of the work compensated for imposes additional duties never performed by such probate clerk.

4. The present record affords no basis of fact upon which to entertain the suggestion that the probate clerk failed to certify each book prepared by him according to Sec. 2, of Chapter 70, of the Laws of 1899, nor for the contention that the claim as allowed will lead to a violation of the Springer Act, in so far as the latter controls the relation between the indebtedness of Sandoval County and the taxable property of such county.

Appeal from the District Court for Sandoval County before IRA A. ABBOTT, Associate Justice. Reversed.

GEORGE S. KLOCK, District Attorney, for Appellant.

When Sandoval County was created, a probate clerk was allowed but ten cents a folio for the transcription of records appropriate for the territory included within the new county. Laws 1899, ch. 70, p. 145; C. L. 1897, sec. 1768.

Chapter 70 of the Laws of 1899 imposes a duty upon a public officer, to-wit, the probate clerk. It does not provide for compensation to any person rendering service as an individual.

No valid claim can be made for comparing the copies with the original records and making indexes. Laws 1907, ch. 28; Laws 1899, ch. 70; Laws 1903, ch. 27; Laws 1905, ch. 10; Mechem on Public Offices, sec. 856, p. 577.

The records were not properly certified and therefore no claim can be made for compensation. Laws 1899, ch. 70, sec. 2.

Chapter 28 of the Laws of 1907, so far as the same attempt to bestow compensation for past services rendered by a public officer is void. Dillon on Municipal Corporations, vol. 1, 4 ed., sec. 233, p. 315; Laws 1899, sec. 70; 1 Hawkins, P. C., ch. 68, sec. 4.

If any error of omission or commission was made by the county commissioners of Sandoval County in either receiving and accepting the records in this case or in any subsequent action by such commissioners this court has power to send the case back to such commissioners for the correction of any errors in the claim as presented. Riding v. Johnson, 128 U. S. 212; Esthe v. Lear, 7 Peters, U. S. 130; U. S. v. Galbraith, 22 How., U. S. 89-96; Illinois Central R. R. v. Illinois, 146 U. S. 387.

The county should not be required to pay for the printed folios.

The indebtedness sought to be imposed upon Sandoval County by Chapter 28, Laws 1907, is in violation of Sec. 4, Act of Congress, July 30, 1886.

The legislature has no power to pass retroactive laws providing for the payment of fees and salary of county officers when the same has been fixed by law, or to impair obligations already incurred. Ogden v. Saunders, 12 Wheaton, U. S. 213, 257; Louisiana ex rel Nelson v.

Police Jury of St. Martin's Parish, 111 U. S. 716; Laws 1907, ch. 28; Thomas Mfg. Co. v. Lathrop, 7 Conn. 550; Jones v. Roland, 57 Md. 462; Louis Sutherland Statutory Construction, par. 641; Act of Congress, Sep. 9, 1850, sec. 17; Calhoun v. McLenan, 42 Ga. 405; Rusir v. William Tell Saving Fund Association, 39 Pa. St. 137; Greenough v. Greenough, 11 Pa. St. 489.

F. W. CLANCY and E. W. DOBSON for Appellee.

Laws of 1907, ch. 28, is valid. 110 U. S. 643; 11 Cyc. 496; Dillon on Mun. Corp., ch. 4, sec. 32; Cleveland v. Board, 38 N. J. L. 264, 265; Cooley on Const. Lim., 3d ed. 379; Dillon on Mun. Corp., sec. 44; Rader v. Township of Union, 39 N. J. L. 519, 520; Blanding v. Burr, 13 Cal. 351; Denie, J., 3 Kern 149; Creighton v. San Francisco, 42 Cal. 450, 451; Gaslight Co. v. Clark, 95 U. S. 652, 653; McMillen v. The County Judge, 6 Iowa 361; Thompson v. Lee County, 3 Wall. 331; New Orleans v. Water Co., 142 U. S. 88, 89; Guilford v. Supervisors, 13 N. Y. 149; Mount v. State, 46 Am. Rep. 192; Board v. McLandsborough, 36 Ohio St. 232; State v. Board, 38 Ohio St. 6; Satterlee v. Matthewson, 2 Pet. 412, 413; Brewster v. Syracuse, 19 N. Y. 117, 118; Thomas v. Leland, 24 Wend. 68; Blanding v. Burr, 13 Cal. 351; Bridge Co. v. Attica, 119 N. Y. 211; Duanesburg v. Jenkins, 57 N. Y. 189; Gas Light Co. v. Middletown, 59 N. Y. 231; Steele County v. Erskine, 98 Fed. 216.

STATEMENTS OF FACTS.

The present County of Sandoval was created by legislation in 1903 and 1905. From the year first named and continuously up to his death on Feb. 13, 1906, James A. Summers was probate clerk and ex-officio recorder of Bernalillo County. Upon the formation of the new county (taken largely from Bernalillo County) Mr. Summers proceeded under Chapter 70 of the Laws of 1899 to make transcript of all of his county records affecting property in the new county. This work had been completed at the time of his death only to the extent of copying and certify-

ing to fifteen record books, but was carried forward by his administrator who on June 3, 1907, turned over to the Board of County Commissioners the records completed by his intestate and six additional books containing indexes made by the administrator, all of which the board accepted, reserving, however, the question of the number of folios for which it should pay and the rate of compensation. The claim as finally made by the administrator to the board was for $12,068.99. The board, rejecting all printed folios and allowing compensation at the rate of ten cents per folio, finally approved the account for $7,916.66. The administrator appealed and the cause coming on *de novo* in the District Court under C. L., Sec. 672, that court, allowing for the work done by both Summers and his administrator and at the rate of fifteen cents per folio including printed folios, found the amount due to be $12,068.99, for which judgment was rendered. The case is here on appeal by the defendant board. The remaining facts sufficiently appear in the opinion.

OPINION OF THE COURT.

POPE, C. J.—(After stating the facts as above) The points made as to the claim pro and con may be classified as four. It is contended, first, that while the form of certificate made was sufficient, the fifteen books as certified to and delivered were not properly certified, in that no certificate was attached to each book as required by Section 2 of Chapter 70 of the Laws of 1899, and that decedent's estate is therefore entitled to no compensation whatever for the work done. We find nothing, however, in the record to sustain the claim that each book was not certified. Neither the findings of the trial court nor the stipulations supplementing such findings so state, nor does any inference properly deducible therefrom lead us so to conclude. On the contrary the presumption in favor of a compliance by a public official with a public duty, recognized as it is by the allowance of this claim at least in part by the county commissioners and its approval in its entirety by the District Court, leads us in

the absence of any proof to the contrary to sustain
4 the trial court upon this point and to reject as untenable a contention thus for the first time and without proper basis urged in this court.

It is in the second place contended that there was error in allowing for folios embodied in the printed forms of the instruments in the books delivered and that only the written portion of such copies should be compensated for. We regard this, however, as entirely too narrow a basis of payment. While it was true that the books as delivered were largely printed forms filled in with the data appropriate to each instrument, in order to deliver such, it became necessary for the copyist to compare the two forms, to note erasures and interlineations and finally by his
1 certificate to show that the form as certified to was a true and complete copy of the original. It is a matter of common knowledge that in this Territory the forms of conveyance differ considerably, the divergence being from a word or two in some instances to additions of sentences. The use of printed forms tends to the public convenience and for the work of comparison, correction and addition necessary to make the copies speak the truth, the probate clerk was in our judgment entitled to the same folio allowance as if he had extended the instrument in long hand instead of correcting and adopting a printed form.

Having thus indicated two respects in which the claim was properly treated by the trial court, we come now to two directions in which we deem it to have been erroneously considered. We are of the opinion first, that no compensation should have been allowed for work
2 done by decedent's administrator. Mr. Summers died on Feb. 13, 1906, three days after he had certified to fifteen of the books subsequently delivered to the county commissioners. After that his administrator made six books of indexes which, with those just mentioned made as we have seen the total of twenty-one, delivered by the administrator on June 3, 1907. The trial court allowed not only for the fifteen books, copied and certified to and thus completed by the deceased, but also for indexes made after his death by his son and administrator. We

cannot approve this conclusion. The direction given by Chapter 70 of the Laws of 1899, is that upon the
3 creation of new counties "it shall be the duty of the probate clerk" of the old county to transcribe the records pertaining to real or personal property transferred to the new county and that such officer shall be paid therefor at the rate allowed by law for making copies of such records. It is manifest that this is a duty imposed by law upon a public officer and the rate of compensation goes to him as such. Upon his death the duty, with the emoluments, ceases, and it is not within the power of his administrator to carry forward the work as his and demand the fees. All such a personal representative may do is to proceed to the collection of the amount due for his intestate's work up to the date of the latter's death. The allowance for anything occurring subsequent to Mr. Summers' death was therefore improper.

We are further of the view that the trial court erred in allowing fifteen cents per folio. As just indicated the work up to Mr. Summers' death was done under the statute of 1899, which provides as payment for transcribing the rate then allowed by law for making copies of such records. This under Comp. Laws, Sec. 1768, was ten cents per folio of a hundred words. By the Act of March 16, 1907 (C. 28), probate clerks were allowed fifteen cents per hundred words for "copying, comparing, indexing and certifying" such transcripts. The latter act provided a higher rate of compensation but imposed the additional and important duty, not found in the Act of 1899, of indexing the records thus copied. This latter was a duty of no little laboriousness, evidenced here by the fact that six index books were found by the administrator necessary for fifteen copied volumes. The increased rate must therefore be deemed referable to the fact that under the new law the clerk was not only to copy the records but after having done so to make the minute re-examinations of them necessary to accurate indexes. The work imposed was an entire one and the rate was based upon it as such. Since the officer died a year before the Act of 1907 was passed, and since he performed none of the new duties it imposed, his estate

cannot be deemed entitled in any event to the increased compensation provided by it, and any payment allowed must be upon the basis afforded by the law in force when his work was performed, compensating that class of work. Under the view which we take of the matter we find it unnecessary to determine the question argued at the bar as to the power of the legislature to increase, after one has rendered service to a county, the compensation for such service. It is sufficient for us to observe that the service here properly chargeable against Sandoval County was not performed according to the terms of the Act of 1907 and cannot be paid for according to that Act.

There is also a suggestion made that the indebtedness sought hereby to be imposed upon Sandoval County will be violative of Sec. 4 of the Act of Congress of July 30, 1886, known as the Springer Act, upon the idea that it will cause the county indebtedness to exceed four per centum of the value of the taxable property of such county. We need only say, however, that this question was not raised below, nor was that court nor are we possessed of knowledge from the record or otherwise as to the existing indebtedness or the taxable property of Sandoval County so as to be able to pass upon the question.

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The judgment of the trial court is reversed and the cause remanded with directions to ascertain the number of folios (both printed and written matter) in the fifteen books completed and certified to previous to Summers' death, and, having ascertained these to enter judgment in favor of appellee therefore at the rate of ten cents per folio, (the costs of this court to be equally divided.)

[No. 1225, August 2, 1910.]

UNITED STATES OF AMERICA, Plaintiff in Error, v. OLIVER M. LEE, et als., Defendants in Error.

SYLLABUS.

1. Irrigation systems may be constructed and rights of way acquired upon unsurveyed land, without first seeking the consent of the Secretary of the Interior. This consent,

however, would be necessary in case of parks and reservations where permanent rights cannot be acquired.

2. Injunction will not lie in favor of the government against defendants to enjoin them from going upon unsurveyed public lands and taking possession of them for the purpose of acquiring a right-of-way over the unsurveyed public lands of the United States for irrigation purposes without first filing maps and obtaining the approval and permission of the Secretary of the Interior so to do.

Error to the Sixth Judicial District Court before EDWARD A. MANN, Associate Justice. Affirmed.

W. H. H. LLEWELLYN and D. J. LEAHY for Plaintiff in Error.

Can a person acquire a right of way for a canal, ditch, reservoir or pipe line on the unsurveyed public lands of the United States without first obtaining the permission of the Department of the Interior? is to be determined from Congressional legislation upon the subject and the construction to be given such legislative acts. 26 Stat. L. 1101, 1102, 6 Fed. St. Ann., pp. 508-510; Whitemore v. Pleasant Valley Coal Co., 27 Utah 284; 28 Stat. L. 635, 6 Fed. Stat. Ann. 510; 29 Stat. L. 120, ch. 179, 6 Fed. Stat. Ann. 510, 511; 30 Stat. L. 404, 6 Fed. Stat. Ann. 512; Town of Delta, 32 L. D 144; Denver, etc., Ry. Co. v. Hydro. Electric Power Co., 32 L. D. 452; 25 L. D. 344; South Platte Canal & Reservoir Co., 20 L. D. 154; Chaffee County Ditch & Canal Co., 21 L. D. 63; 31 Stat. L. 790, 6 Fed. Stat. Ann. 513; 26 A. & E. Enc. Law, 2 ed. 619, 730, 744; Nelden v. Clark, 20 Utah 382; Sutherland Stat. Con., 2 ed., vol. 1, pp. 461, 463; U. S. v. Claflin, 97 U. S. 546, 551; Grivenner v. Lehigh, etc., Ry. Co., 55 Pa. St. 126; ex parte Joffee, 46 Mo. App. 360, 367; King v. Trustee, 5 B. & Ad. 978; Curtis v. Gill, 37 Conn. 49; Sutherland Stat. Const., 2 ed., vol. 1, pp. 472, 473; Lyddy v. Long Island City, 104 N. Y. 218, 10 N. E. 155; United States v. Tymen, 11 Wall. 88; Bracken v. Smith, 39 N. J. Eq. 169; Roche v. Jersey City, 40 N. J. Law 257; Winslow v.

Norton, 188 N C. 486, 491, 24 S. E. 417; Commonwealth v. Mann, 168 Pa. St. 290, 31 Atl. 1003; United States v. Raulett, 172 U. S. 133; Henrietta M. & M. C. v. Gardner, 173 U. S. 123; Mersereau v. Mersereau, N J. Eq., 26 Atl. 682; Anderson v. City Council, N. J., 33 Atl. 846; Rogers v. Watrous, 8 Tex. 62; City and County of Sacramento v. Bird, 5 Cal. 284; Pierpont v. Crouch, 10 Cal. 315; Wood & State, 47 Ark. 488, 1 S. W. 709; State v. Studt, 31 Kan. 235, 1 Pac. 635; 34 L. D. 229; 31 L. D. 14; 33 L. D. 389; Birdsall v. Clark, 73 N. Y. 73; Thomson v. Schermerhorn, 6 N Y. 92; Denver, etc., Ry. Co. v. Hydro Electric Power Co., 32 L. D. 452; Opinion 32 L. D. 597; McHenry v. Winston, 49 S. W. 4; 33 L. D. 389; 34 L. D. 230; 31 L. D. 14; Vestal v Young, 147 Cal. 715, 82 p. 381; Bliss on Code Pleading, 3 ed., sec. 418; Union River Logging Ry. Co., 19 Op. Atty. Gen. 546; Railway Co. v. Alling, 99 U. S. 463.

HAWKINS & FRANKLIN for Defendants in Error.

The United States does not have the right to enjoin one of its citizens from maintaining a ditch which has been constructed by such citizen for the purpose of irrigation over the unsurveyed public lands of the United States. 26 Stat. L. 1101, 1102; 18 Stat. L. 482; Jamestown & Northern Ry Co. v. Jones, 177 U. S. 125; Washington & I. R. Co. v. Coeur d'Alene R. & N. Co., 52 Fed. 765; 28 Stat. 635; 29 Stat. 120; 30 Stat. 404; 26 Stat. 1095; 21 A. & E. Enc. Law, 2 ed., 1012; State v. Gilmore, 11 S. W. 621; United States v 1150½ lbs. of celluloid, 82 Fed. 625; Crystal Spring Dis't. Co. v. Cox, 49 Fed. 559; Western Grading & Improvement Co. v. Helmier, 111 Fed. 123; Newport News Co. v. United States, 61 Fed. 488; United States v. Mollie, 26 Fed. 1290.

STATEMENT OF THE CASE.

Plaintiff in error, hereafter referred to as plaintiff, filed its amended complaint on the 4th day of June, 1907, to which complaint a demurrer was filed by one of the defendants in error, Oliver M. Lee, challenging the suffi-

ciency of the amended complaint. The complaint alleged substantially that in the County of Otero, Territory of New Mexico, and upon unsurveyed lands of the United States of America, the defendants, or some of them, have been and are now unlawfully maintaining certain ditches, canals and pipe lines on the said public lands of the United States of America, which ditches, canals and pipe lines are being maintained in violation of the laws of the United States and the rules and regulations promulgated by the Department of the Interior; that the defendants, together with their agents, servants, and workmen have heretofore constructed, and are now unlawfully maintaining irrigating ditches, canals and pipe lines upon the public lands of the United States in the vicinity above described in the complaint, for the purpose of conducting waters from Dog Canon and San Andres Canon to certain lands now in the possession of the defendants; that in constructing and building said ditches, canals and pipe lines the said defendants are unlawfully appropriating public lands of the United States without authority from the said United States or the Secretary of the Interior to build or construct any such canals, pipe lines or ditches through or over the said public lands; that the plaintiff is informed that defendants give out and threaten to continue the building and constructing of said canals and ditches without authority of law and to maintain the same and appropriate the waters from the said Dog Canon and said San Andres Canon and conduct the said water through said pipe lines and ditches over the public lands of the United States; that upon parts of the lands through which said canals, ditches and pipe lines have been so constructed, bona fide settlers have settled upon certain lands with the bona fide intention of entering the same at the proper land office when said lands shall have been surveyed and thrown open to entry; and the plaintiff further alleges that the defendants, their agents and servants have no authority in law to go upon the public lands of the United States and construct any ditches, canals and pipe lines for the purpose of conducting water, or for any other purpose without express authority of the Secretary of the Interior as provided by law for the giv-

ing of such authority, and that the unlawful acts of the said defendants in so constructing such ditches and canals without authority, will cause great loss and damage to the plaintiff and that plaintiff has no adequate remedy except by injunction, which is prayed for, and a temporary writ of injunction was allowed.

In order that the acts of Congress vital to a decision of this case may be before the court at the outset, sections 18, 19, 20 and 21 of the Act of Congress of March 3, 1891, (6th Fed. St. Ann. pp. 508, 509 and 510) are set out in full.

"Sec. 18. (Right of way through public lands and reservations to canal or ditch companies for irrigation). That the right of way through the public lands and reservations of the United States is hereby granted to any canal or ditch company formed for the purpose of irrigation and duly organized under the laws of any state or territory, which shall have filed, or may hereafter file, with the Secretary of the Interior a copy of its articles of incorporation, and due proofs of its organization under the same, to the extent of the ground occupied by the water of the reservoir and of the canal and its laterals, and fifty feet on each side of the marginal limits thereof, also the right to take from the public lands adjacent to the line of the canal or ditch, material, earth and stone necessary for the construction of such canal or ditch. *Provided,* That no such right-of-way shall be located as to interfere with the proper occupation by the government of any such reservation and all maps of location shall be subject to the approval of the department of the government having jurisdiction of such reservation, and the privilege herein granted shall not be construed to interfere with the control of water for irrigation and other purposes under authority of the respective states or territories. (26 Stat. L. 1101.)

"Sec. 19. (Maps to be filed—grants subject to right-of way—damages to settlers.) That any canal or ditch company desiring to secure the benefits of this act shall, within twelve months after the location of ten miles of its canal, if the same be upon surveyed land, and if upon unsurveyed land, within twelve months after the survey

thereof by the United States, file with the register of the land office for the district where such land is located, a map of its canal or ditch and reservoir and upon approval thereof by the Secretary of the Interior the same shall be noted upon the plats in said office, and thereafter all such lands over which such rights of way shall pass shall be disposed of subject to such right of way. Whenever any person or corporation, in the construction of any canal, ditch or reservoir, injures or damages the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage. (26 St. L. 1102)."

"Sec. 20. (Applicable to existing and future canals, etc.—forfeiture for non-completion.) That the provisions of this act shall apply to all ditches, canals or reservoirs heretofore or hereafter constructed whether constructed by corporations, individuals or association of individuals, on the filing of the certificates and maps herein provided for. If such ditch, canal or reservoir has been or shall be constructed by an individual or association of individuals, it shall be sufficient for such individual or association of individuals to file with the Secretary of the Interior, and with the Register of the Land Office where said land is located, a map of the line of such canal, ditch or reservoir, as in case of a corporation, with the name of the individual owner or owners thereof, together with the articles of association if there be any. Plats heretofore filed shall have the benefits of this act from the date of their filing, as though filed under it. *Provided*: That if any section of said canal or ditch shall not be completed within five years after the location of said section, the rights herein granted shall be forfeited as to any incompleted section of said canal, ditch or reservoir, to the extent that the same is not completed at the date of the forfeiture. (26 Stat. L. 1102)

"Sec. 21. (Rights granted only for canal use,) That nothing in this act shall authorize such canal or ditch company to occupy such right of way except for the purpose of said canal or ditch, and then only so far as may be necessary for the construction, maintenance and care of said canal or ditch. (26 Stat. L. 1102).

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior be and hereby is authorized and empowered under general regulations to be fixed by him, to permit the use of rights of way through the public lands, forest and other reservations of the United States, and the Yosemite, Sequoia and General Grant National parks, California, for electrical plants, poles and lines for the generation and distribution of electrical power, and for telephone and telegraph purposes, and for canals, ditches, pipes and pipe lines, flumes, tunnels, or other water conduits, and for water plants, dams and reservoirs used to promote irrigation or mining or quarrying, or the manufacturing or cutting of timber or lumber, or the supplying of water for domestic, public, or any other beneficial uses to the extent of the ground occupied by such canals, ditches, flumes, tunnels, reservoirs, or other water conduits, or water plants, or electrical or other works permitted hereunder, and not to exceed fifty feet on each side of the marginal limits thereof, or not to exceed fifty feet on each side of the center line of such pipes and pipe lines, electrical, telegraph, and telephone lines and poles, by any citizen, association or corporation of the United States, where it is intended by such to exercise the use permitted hereunder or any one or more of the purposes herein named: *Provided,* That such permits shall be allowed within or through any of said parts or any forest, military, Indian or other reservations only upon the approval of the chief officer of the department under whose supervision such park or reservation falls and upon the finding by him that the same is not incompatible with the public interests; *Provided further,* that all permits given hereunder for telegraph and telephone purposes shall be subject to the provision of Title 65 of the Revised Statutes of the United States, and amendments thereto, regulating rights of way for the telegraph companies over the public domain; *and provided further,* that any permission given by the Secretary of the Interior under the provisions of this act may be revoked by him or his successor in his discretion, and shall not be held to confer any right, or easement, or interest in, to or

over any public land, reservation or park." Act Feby. 15th, 1901.

The demurrer to the amended complaint was argued by counsel and sustained by the court in an opinion rendered June 25th, 1907. The demurrer having been sustained on the 25th day of June, 1907, said cause was dismissed and on the 19th day of February, 1908, a *nunc pro tunc* decree to that effect was entered as of the date June 25, 1907. The cause is brought to this court by Writ of Error sued out on behalf of the plaintiff in the court below.

OPINION OF THE COURT.

McFIE, J.—There is but one question for determination in this case and that is whether or not the defendants, or Oliver M. Lee, the demurrant herein, could acquire a right of way for a canal, ditch, reservoir, or pipe line such as he contemplated constructing, or had partially constructed, on and over the unsurveyed public lands of the United States without first having obtained the permission of the Department of the Interior as provided by the statute in regard to surveyed public domain. In the lower court this seems to have been conceded to be the only question for the court's determination. In sustaining the demurrer, Justice Edward A. Mann, presiding judge of the Sixth Judicial District, in which this case arose, handed down a carefully considered opinion in which all of the statutes involved were examined and applied to the case at bar and in as much as the opinion rendered by the lower court, in our opinion, states the law of the case correctly, such portions of the opinion as are deemed necessary to a determination of the case in this court will be, in whole or in part, restated here.

It becomes necessary for us to refer to, and to some extent consider, the sections above quoted of the act of Congress of March 3rd, 1891, and also make reference to the act of Congress of February 15th, 1901, in-as-much as there is some contention in this case that the latter act materially modified or repealed those sections of the former act, and it is necessary for the court to ascertain

whether this contention of the plaintiff in error is correct or not. The act of March 3rd, 1891, is a very comprehensive act and governed the practice as to the obtaining of rights of way for canals, ditches and reservoirs for many years and it governed the obtaining of these rights of way over both surveyed and unsurveyed lands and clearly defined the mode of obtaining those rights of way, depending upon whether the lands were surveyed or unsurveyed.

Sec. 18, *supra,* contains a grant of right of way through the public lands and reservations of the United States to any canal or ditch company, duly organized, which shall file proof thereof, as prescribed, with the Secretary of the Interior for ditches, canals or reservoirs, including the right to take stone, earth or other material necessary for the construction of such canal, ditch or reservoir, from the adjacent lands for the construction thereof, and Sec. 20 makes these provisions applicable to individuals or associations. The language of this section is almost identical so far as the granting clause is concerned, with section 1 of the Act of March 3, 1875, granting rights of way to railroad companies over the public lands (18 St. L. 482, 6 Fed. St. Ann. 501), and this has been held by the Supreme Court of the United States to grant to a railroad company which has actually constructed its road, an absolute right of way over the public lands superior to the rights of any subsequent entry of the land, although the required profile maps had not been filed as provided by Sec. 4 of the act. Jamestown & Northern Ry. Co. v. Jones, 177 U. S. 125; W. & I. R. Co. v. Coeur d'Alene R. & N. Co., 52 Fed. 765.

In the case at bar the lands are unsurveyed lands and under the provisions of Sec. 19, *supra,* no maps or plats are required to be filed until within twelve months after the lands have been surveyed. It is alleged in the complaint, however, that the ditches, etc., of the defendants have already been constructed and are now being maintained, so that the same condition prevails as in Jamestown & Northern Ry. Co. v. Jones, *supra,* except that in the case here the lands are unsurveyed. In that case a distinction is drawn between constructed roads and pro-

posed roads desiring to acquire rights of way prior to construction on surveyed lands, and the actual construction of the road is held to answer the purpose of filing the profile maps by giving notice of the tract claimed as such right of way; but the court says, quoting from Sec. Vilas, in Dakota Central Ry. Co. v. Downey, 8 Ld. 115:

"As to the road way, the construction of the road fixes the boundaries of the grant and fixes it by the exact rule of the statute. * * * This must undoubtedly be the rule when the road is constructed over unsurveyed lands, because then that every condition necessary to the vigor of the present grant is complied with."

The act under consideration (Act March 3, 1875) contained an almost identical clause with reference to the filing of maps in case of unsurveyed lands within twelve months after the survey thereof by the United States.

The Department of the Interior, in its regulations concerning rights of way for canals, ditches and reservoirs, issued September 28th, 1905, (which it will be observed is after the passage of the Act of February 15, 1901, says at Sec. 16:

"Maps showing canals, ditches and reservoirs wholly upon unsurveyed lands, may be received and placed on file in the general land office and the local land office in the district in which the same is located, for general information, and the date of filing will be noted thereon; but the same will not be submitted to nor approved by the Secretary of the Interior, as the act makes no provision for the approval of any but maps showing the location in connection with the public surveys. The filing of such maps will not dispense with the filing of maps after the surveys of the lands and within the time limited in the act granting the right of way, which maps if in all respects regular when filed, will receive the Secretary's approval.'"

From this provision of the regulations issued as late as 1905, or about four years after the Act of February 15, 1901, was passed, the Interior Department recognizes that Congress intended that any person may go upon unsurveyed public lands of the United States, lawfully, and

construct irrigating ditches, canals or reservoirs whose main purpose is that of irrigation, filing his map or plat of the same twelve months after the survey of the lands by the government, for the approval of the Secretary of the Interior; and that the grant becomes fixed so far as the right of way is concerned, upon the construction of the ditch or canal, the approval of the Secretary afterwards being in the nature of a confirmation of the grant and a completion of the title thereof upon the records kept by the government.

But it is contended by the plaintiff in error that the Act of February 15, 1901, modifies the former act so that no right of way can be acquired upon the public lands of the United States, surveyed or unsurveyed, without first obtaining permission from the Secretary of the Interior. The Act of 1901, however, has received no such construction from the Department of the Interior. In fact, the Hon. Secretary in Sec. 47 of the circular of regulations, draws the distinction between the two acts in the following apt language:

"It is to be especially noted that this act (1901) does not make a grant in the nature of an easement, but authorizes a mere permission in the nature of a license, revokable at any time, and it gives no right whatever to take from the public lands, reservations or parks adjacent to the right of way, any material, earth or stone for construction or other purposes."

Sec. 46 of these regulations of the Interior Department of 1905, in construing the act of February 15, 1901, and providing regulations in pursuance of that act, provides:

"Although this act does not expressly repeal any provision of law relating to the granting of permission to use rights of way, contained in the act referred to, yet, considering the general scope and purpose of the act, and Congress having, with the exception above noted, embodied therein the main features of the former acts relative to the granting of a mere permission or license for such use, it is evident that, for purposes of administration the lat-

ter act should control in-so-far as the same pertains to the granting of permission to use rights-of-way for the purposes therein specified. Accordingly, all applications for permission to use rights-of-way for the purposes specified in this act must be submitted thereunder. Where, however, it is sought to acquire a right-of-way for the main purpose of irrigation, as contemplated by Sections 18 and 21 of the Act of March 3, 1891, and Sec. 2 of the Act of May 11, 1898, *supra,* the application must be submitted in accordance with the regulations issued under said acts."

It is clear that the Hon. Secretary of the Interior did not take the view that the Act of February 15, 1901, repealed or modified the Act of March 3, 1891, and Sec. 2 of the Act of May 11, 1898, the latter act being amendatory of the Act of March 3, 1891, making it plain that the Act of March 3, 1891, still applied to cases where the main purpose of the construction of ditches or canals was for irrigation and not to cases arising under the Act of February 15, 1901, which applied to parks, forest and other reservations and for the construction of electric plants, poles and lines for the generation and distribution of electrical power, and for telephone and telegraph purposes, as well as for canals, ditches, pipes and pipe lines, flumes, tunnels and other water conduits and for water plants, dams and reservoirs to promote irrigation, for it is very evident that the main purpose of the Act of February 15, 1901, was not to grant rights of way for canals, ditches and reservoirs for irrigation purposes mainly, but for many other purposes as well. It is quite significant that the Secretary in his regulations issued in 1905, construing the act of 1901, should use the language above quoted, indicating that the acts of 1891 and 1898 were still in force, where, in the construction of such canals, ditches and reservoirs, the main purpose of which, was, as in the present case, irrigation.

The term public lands, as used in the act of 1901, seems to be used in different sense than the same term is used in the act of 1891, in this, that the act, while using the term public land applies it to lands subject to use for

parks, reservations and other purposes by act of the United States, necessitating the granting of a permit or license only for right of way purposes, whereas under the former act, an easement attaches, which by the approval and confirmation of the Secretary of the Interior after survey may become permanent, as in the case of a railroad right-of-way, provided, that the right-of-way appropriated upon unsurveyed lands by the construction of canals, ditches or reservoirs has for its main purpose the irrigation of lands, as provided for in the act of 1891, as amended by the act of 1898. Lands covered by parks, reservations, etc., are still lands of the United States, but are not public lands in the same sense as when free from the limitations of such incumbrances. Thus it will be seen that there is no conflict between those laws; both of them may stand, and being construed together each may serve the purpose intended by Congress depending upon the conditions existing at the time.

It has long been the policy of the government to encourage irrigation in the arid and semi-arid west. Congress in its wisdom, has enacted such laws as will enable rights-of-way to be acquired for such irrigation works over the public lands and thus encourages the development of the country. The tendency has been toward more liberal laws in that regard, and it is a matter of common knowledge that in this Territory it has been the custom for years to enter on the unsurveyed public lands of the United States and construct such ditches, canals, pipe lines and reservoirs as were necessary to put the waters of the streams to a beneficial use for agricultural and kindred purposes.

Now, it is apparent, as regards the construction of ditches and canals for irrigation purposes upon unsurveyed land, that if the approval of the Secretary of the Interior must be had before any such construction can be made, it would be tantamount to saying that no such ditches, canals or reservoirs could be constructed upon unsurveyed public domain for the reason that Sec. 19 of the act of Congress of 1891 provides that

"Any canal or ditch company desiring to secure the benefits of this act shall, within twelve months after the

location of ten miles of its canal, if the same be upon surveyed land, and if upon unsurveyed land within twelve months after the survey thereof by the United States, file with the register of the land office for the district where such land is located, a map of its canal, ditch or reservoir, and upon approval thereof by the Secretary of the Interior the same shall be noted upon the plats of said office," etc., showing that corporations, associations or persons may lawfully enter upon unsurveyed public land and obtain a right-of-way for the construction of ditches, canals, etc., whose main purpose is for irrigation, and maintain the same until twelve months after the survey of the lands by the United States, at which time maps, plats, etc., must be filed in compliance with the Act of Congress. However, years might elapse before such surveys were made by the United States. The regulations of the Secretary of the Interior above referred to, provide for the filing of maps, plats, etc., within twelve months after the location of ten miles of a canal, provided the same be upon surveyed lands, but, as to unsurveyed lands, we find provisions indicating that the filing of such maps, plats, etc., and the approval of the Secretary of the Interior of such right-of-way is wholly unnecessary and, in fact, such approval could not be made by the Secretary.

"Maps showing canals, ditches or reservoirs wholly upon unsurveyed lands, may be received and placed on file in the general land office and the local land office of the district in which the same is located, for general information; and the date of filing will be noted thereon but the same will not be submitted to nor approved by the Secretary of the Interior, as the act makes no provision for the approval of any but maps showing the location in connection with the public surveys. The filing of such maps will not dispense with the filing of the maps after the survey of the lands and within the time limited in the act granting the right-of-way, which maps, if in all respects regular when filed will receive the Secretary's approval."

In the regulation just quoted, the Secretary of the Interior distinctly states that no such approval or permission as the law contemplates could be granted for a right-

of-way for irrigation purposes while the land remains unsurveyed, and it does not seem reasonable with the law and regulations above referred to providing for such right-of-way for irrigation purposes, that such approval and permission should be granted by the Secretary of the Interior as a condition precedent to the construction of irrigation enterprises upon unsurveyed lands, when the granting of such approval was impossible under the law. If such view is to obtain, an irrigation system could not be established even upon surveyed lands in the event that the line of ditch or canal traversed any portion of the unsurveyed public domain.

It would appear as a serious step backward to now hold that such irrigation systems could not be constructed and rights-of-way acquired upon unsurveyed land, without first seeking the consent of the Secretary of the Interior, thus involving long and tedious delays, which in such case would be absolutely unavoidable under the law. This consent would, of course, be necessary in cases of parks and reservations where permanent rights cannot be acquired, but only a license granted by the government; but it was never intended to apply to the open, unsurveyed public lands which will eventually be settled upon and improved.

The allegation of the complaint as to the intervening rights of settlers upon some of the public lands over which said ditches are, or may be, constructed, it is not necessary here to consider, for the reason that this action is brought by the United States and not by settlers who may or may not be injuriously affected by the construction of the canals and ditches involved in this litigation. Furthermore, there is a provision of law for the adjudication of the rights of settlers on the public lands of the United States when the same are injuriously affected by the construction of irrigation systems, Sec. 19 Act of Congress above quoted, and in a proper case damages may be awarded, but such damages could not, in any event, be awarded in this proceeding. The sole question here is the right of the government to enjoin the defendants from going upon unsurveyed public lands and taking possession of them

for the purpose of acquiring a right-of-way over the unsurveyed public lands of the United States for irrigation purposes, without first filing maps and obtaining the approval and permission of the Secretary of the Interior so to do.

We are of the opinion that injunction will not lie against the defendants under these circumstances, as the lands involved are unsurveyed lands of the United
2 States as to which the Secretary of the Interior would be required by law to decline either to grant such right-of-way or to approve of, the construction of such ditches, etc., if such maps were filed in his office.

There being no error in the rendition of the decree of dismissal in the court below, the decree is affirmed with costs. It is so ordered.

Chief Justice Pope, Frank W. Parker, Justice, John R. McFie, Justice, Ira A. Abbott, Justice, are the only members of the court as now constituted who heard this case.

DISSENTING OPINION.

ABBOTT, J., (Dissenting).—By the statute of February 15, 1901, 6 Fed. Stat. Ann. 513, Congress must, in my opinion, have intended to provide a complete system of governing the acquisition of rights-of-way over the public domain, for the several purposes specified in the act, and to supersede the system established by Act of Congress of March 3, 1891, 6 Fed. Stat. Ann. pp. 508, 509, 510, relating to irrigation only, under which the defendant claims.

The earlier act provides:

"That the right-of-way through the public lands and reservations of the United States, is hereby granted to any canal or ditch company, formed for the purpose of irrigation, and duly organized under the laws of any state or territory, * * * * to the extent of the ground occupied by the water of the reservoir and of the canal, and its laterals and fifty feet on each side of the marginal limits thereof, also the right to take from the public lands adjacent to

the line of the canal or ditch material, earth and stone, necessary for the construction of such canal or ditch."

The right thus obtained was a permanent easement; a property right in a strip of the public domain, of the width named and of indefinite length, with the right to take materials outside of it; all without obtaining the permission of any officer of the United States, or making any payment to the United States.

The later statute allows the granting of revocable licenses, only, by the Secretary of the Interior, permitting the use of rights-of-way through the public lands, forest and other reservations of the United States, and the Yosemite, Sequoia and General Grant National Parks, not only for "canals, ditches, pipes and pipe lines, flumes, tunnels or other water conduits, and for water plants, dams and reservoirs, used to promote irrigation," but for the various other uses which had come into being or assumed prominence since the statute of 1891 was enacted, some of which had been recognized by intervening enactments of Congress.

The consent of the Secretary of the Interior is a prerequisite to the acquisition of rights under it, and to him is given the power to revoke such a license in his discretion.

That provision, in my opinion, registers the change which had taken place in the public attitude, in the ten years which had elapsed since the enactment of the earlier statute on the question of conserving the natural resources of the country for the public, instead of allowing them to be appropriated at will for private gain.

It seems a thing incredible, that Congress so late as 1901, in making a law covering the subject, should have intended to leave the public lands of the United States open to the acquisiton of permanent easements, of such extent and probable value, as those obtainable under the earlier statute, without the payment of a dollar to the United States and without the consent, even against the objection, of its officers.

The canons of statutory construction do not require us to adopt a view so contrary to the well known policy of

the United States government, but, instead, as it seems to me, to hold that the later statute, in the language of Judge Shipman, in Kent v. United States, adopted by Mr. Chief Justice Fuller, in United States v. Ranlett and Stone, 172 U. S. 133, "is a complete revision of the subject to which the earlier statute related, and the new legislation is manifestly intended as a substitute for the former legislation, and the prior act must be held to have been repealed."

The fact that between 1891 and 1901, namely, in 1895, 6 Fed. Stat. Ann. 510; 1896, 6 Fed. Stat. Ann. 510-511; and 1898, 6 Fed. Stat. Ann. 512, statutes were enacted partially covering some of the subjects grouped in the statute of 1901, including an amendment of the statute of 1891, under consideration, is to my mind, an additional reason for holding that the statute of 1901 was meant to take the place of all those earlier statutes. See Sutherland Stat. Con. 2 ed., pp. 461, 463, 472, 473; United States v. Tynen, 11 Wallace 88; United States v. Ranlett, 172 U. S. 133-140; United States v. Claflin, 97 U. S. 546; Com. v. Mann, 168 Pa. St. 290; Roche v. Jersey City, 40 N. J. 257; ex parte Joffee, 46 Mo. App. 360-365.

[No. 1236, August 3, 1910.]

EMELIA M. PEREA, Appellee, v. THE STATE LIFE INSURANCE COMPANY OF INDIANAPOLIS, INDIANA, Appellant.

SYLLABUS.

1. Motions for continuance are ordinarily to be decided by the trial court, and his discretion, viewed from the facts, is not ordinarily to be reviewed.

2. The conduct of the insurance company in charging the premium to the agent and the act of the agent in taking a note to himself, operated as a transfer of the insured's indebtedness to the agent, and consequently as a payment to the company.

3. Evidence examined and held that anwers of insured at the medical examination were true. Affirmed.

CHARLES F. COFFIN, E. W. DOBSON and THOMAS K. D. MADDISON for Appellant.

Continuance should have been granted. C. L. 1897, secs. 2986-2989; Johnson v. Dinsmore, Neb., 9 N. W. 559; Smith v. Bates, Tex, 27 S. W. 1044; Waldrup v. Maxwell, Ga., 10 S. E. 597; Texas & P. Ry. Co. v. Yates, Tex., 33 S. W. 291; State v. Berkley, 92 Mo. 45; Murphy v. Murphy, 31 Mo. 322; Barnum v. Adams, 31 Mo. 532; Light v. Richardson, Cal., 31 Pac. 1123; Ogden v. Payne, 5 Cowen 16; Hooker v. Rogers, 6 Cowen 577; Peck v. Lovett, 41 Cal. 423; Lecesne v. Cottin, 9 Martin, La. 454; 4 Enc. P. & P. 824, 828, 829, 840 and cases cited; 3 Graham and Waterman on New Trials, 894; Light v. Richardson, 31 Pac. 1123; Smith v. Brand, 44 Ga 588.

Where the policy provides that it shall be forfeited upon the failure of the assured to pay the annual premium ad diem, or to pay at maturity his promissory note therefor, the acceptance by the company of the note, although a waiver of such payment of the premium, brings into operation so much of the condition as relates to the note. The failure to pay or tender the amount due on the note is fatal to a recovery on the policy. Thompson v. Insurance Co., 104 U. S. 252; Iowa Life Ins. Co. v. Lewis, 187 U. S. 335.

Where the evidence as to the truth of the statements in an application for insurance is conflicting or doubtful, it must be submitted to the jury, and the court can not direct a verdict. Mouler v. American Life Insurance Co., 101 U. S. 708; Texas & P. Ry. Co. v. Cox, 145 U. S. 593; Dunlap v. Northeastern Ry Co., 130 U. S. 649; Foot v. Aetna Life Ins. Co., 61 N. Y. 571; Caruthers v. Kansas Mut. Life Ins. Co., 108 Fed. 487; John Hancock Mut. Life Ins. Co. v. Houpt, 113 Fed. 572; N. Y. Life Ins. Co. v. Fletcher, 117 U. S. 519; In Leonard v. State Mutual Life Assurance Co., 51 Atl., R. I. 1048.

After a party has moved the court that the jury be

instructed to render a verdict in his favor, he must, if the court denies his motion, specifically request that there be submitted to the jury the questions of fact which he desires to have so submitted. Standford v. Magill, 38 L. R. A., N. D., 772; Sutter v. Vanderveer, 25 N. E., N. Y., 907; Buetell v. Magone, 157 U. S. 154; Empire State Cattle Co. v. A. T. & S. F. Ry. Co., 147 Fed. 457; Sigma Iron Co. v. Greene, 88 Fed. 210; McCormick v. Bank, 142 Fed. 132.

NEILL B. FIELD for Appellee.

The action of the court in refusing to delay the case is not subject to review. Territory v. McFarlane, 7 N. M. 425; 4 Enc. P. & P. 827; Territory v. Padilla, 12 N. M. 6; Territory v. Leary, 8 N. M. 187; Waldo v. Beckwith, 1 N. M. 185, 186; Thomas v. McCormick, 1 N. M. 371, 372; Pierce v. Engelkemeier, 61 Pac., Ok., 1048; Keegan v. Donnelly, 52 Pac., Colo., 292; Association v. Hitchcock, 4 Kan. 36; Adamek v. Mfg. Co., 64 Minn. 304, 66 N. W. 981; Condon v. Brockway, 41 N. E., Ill., 634; Baumberger v. Arff, 31 Pac., Cal., 53; Zelinsky v. Price, 36 Pac., Wash. 28.

The first annual premium on the policy sued on was paid in full to the company. Miller v. Life Ins. Co., 12 Wall. 285; Berliner v. Travelers' Ins. Co., 121 Cal. 451; Van Warden v. Assurance Society, 99 Iowa 621; Griffith v. Life Ins. Co., 101 Cal. 627; Lebanon Mut. Ins. Co. v. Hoover, Hughes & Co., 113 Pa. St. 591; Boehen v. Williamsburg City Ins. Co., 90 Am. Dec. 787, 35 N. Y. 131; Farnum v. Phoenix Ins. Co., 83 Cal. 246; Insurance Co. v. Block, 109 Pa. St. 535.

The court may withdraw a case from the jury altogether and direct a verdict for the plaintiff or defendant, as the one or the other may be proper, where the evidence is undisputed, or is of such conclusive character that the court, in the exercise of a sound judicial discretion, would be compelled to set aside a verdict returned in opposition to it. Marande v. Texas & Pac. Ry. Co., 184 U. S. 191; Insurance Co. v. Trefz, 104 U. S. 203; Empire State Cattle

Co. v. A. T. & S. F. R. R. Co., 28 S. C. R. 607; McGuire v. Blount, 199 U. S. 142; So. Pac. Co. v. Poole, 160 U. S. 438; Mutual Ben. Life Ins. Co. v. Robinson, 58 Fed. 723; Brown v. Metropolitan Life Ins. Co., 65 Mich. 306.

STATEMENT OF FACTS.

This is an action to collect the amount due upon a life insurance policy issued by appellant to Pedro Perea. The defense interposed was: (1) that in response to the question No. 16 by the medical examiner of the appellant, as follows: "Have you consulted a physician within the past two years for anything trivial or otherwise?" the said Perea answered as follows: "Once last year for malarial fever," and that said answer of the said Perea was false in this: that in the year, 1904, the said Perea consulted a physician for dyspepsia and indigestion; (2) that in response to the question No. 17 by the same medical examiner, as follows: "Have you ever had any of the following diseases; * * * dyspepsia, or indigestion"? the said Perea answered "No," and that said answer was false in this: that prior to the making of said application for a policy of insurance to the appellant, the said Perea had been afflicted with indigestion and had been treated for said disease by a well known physician; (3) that in response to question No. 18, by the said medical examiner, as follows: "State particulars of any illness, constitutional disease or injury you have had, giving date, duration and remaining effects, if any," said Perea answered: "Malaria in August, 1903, and July, 1904, slightly, no results," and that said answer was false in this: that in 1904 the said Perea was afflicted with, and received medical attention for, the disease of indigestion; (4) that in response to questions 18a and 18 b as follows: 18 a, "When did you last consult a physician?" 18b, "For what?" the said Perea to questions 18a answered: "July, 1904," and to question 18b, he answered, "Malaria," and that said answer to 18b is false in this: that the said Pedro Perea consulted a physician for indigestion in 1904; (5) and that the said Perea gave his promissory note for a large part of the first year's premium on said policy and that when

note became due, he failed, neglected and refused to pay the same, and that consequently, under the provisions of the policy, the said policy became null and void. Plaintiff replied, alleging the truth of the several answers of said Perea, and alleged that long before the death of the insured, the appellant had received without objection the first annual premium in full and the note had been paid. It appears that the date of the policy is July 30, 1905, and that the insured died January 11, 1906, of hemorrhage due to ulceration of the stomach. At the close of the trial both parties moved for verdict, and appellant in addition presented instructions relating to the facts adduced in proof. The court directed a verdict for appellee and judgment was awarded thereon.

OPINION OF THE COURT.

PARKER, J.—1. The first proposition presented is that the court erred in refusing to grant a continuance to a later day in the term. Appellant made a motion for continuance based upon two grounds: (1) Absence of leading counsel for appellant, who was familiar with all the facts, and upon whom local counsel relied for that reason; (2) absence of two witnesses in Santa Fe, physicians, whose knowledge of the insured's physical condition prior to the issuance of the policy had just come to the attention of counsel. A supplemental motion for a continuance to a later day in the term was filed on account of the absence of another witness, but this witness later appeared and testified. The court overruled the motion for a continuance.

It appears that thirty days prior to the term the case was noticed for trial by counsel for appellee by filing with the clerk notice to that effect. It does not affirmatively appear that this notice was served directly on counsel for appellant, but we conclude it was for the reason that the whole tenor and effect of the motion for continuance, and the affidavit in support thereof, as well as some colloquy between counsel and the court in discussing the motion, leaves one with the impression that counsel for appellant relied solely upon the exigencies of an ordinary term of

court and the fact of notice is not specifically denied in the affidavit. We have, therefore, a condition of case where counsel for appellant merely speculated on the probable course of events of the term, and where he took no means to have associate counsel present until on the first day of the term, when he undertook to obtain his presence by wire. This will not do.

In so far as the motion is concerned in regard to the witnesses in Santa Fe, it is sufficient to say that when the court asked if he desired a continuance until the next day to have them present, he declined to say he did. This case emphasizes the salutory rule that motions for continuance are ordinarly to be decided by the trial court,
1 and his discretion, viewed from the facts, is not ordinarily to be reviewed. Territory v. Padilla, 12 N. M. 6.

2. It appears that the insured gave his note to the insurance solicitor, the agent of the appellant, for a large portion of the first annual premium and that the appellant charged the part of the premium due to it to the agent at once and issued the usual receipt to the insured. The note was not payable to the appellant but to the agent personally. Appellee offered to show the date of payment of the note but the proof was excluded as immaterial. The policy contains the following provision: "If any note or other obligation given for the first year's premium, or any part thereof, on this policy shall not be paid when due, then this policy contract shall be and become null and void without any notice or action of the company notwithstanding any receipt which may have been given for such premium."

Appellant contends that this provision, together with the failure to pay the note at maturity, which it offered to prove, worked a forfeiture of the policy and all rights thereunder and cites Thompson v. Insurance Co., 104 U. S. 252, and Iowa Life Insurance Co. v. Lewis, 187 U. S. 335, in support of this contention. It appears that in each of these cases the note for the premium was given directly to the insurance companies and there were no circumstances surrounding the transaction showing a waiver

on their part. Appellee contends that in this case all of the facts show an absolute waiver if, indeed, the forfeiture clause in the policy has any application whatever. As above seen, this insurance company did not concern itself with the collection of the first premium of the insured at all. As soon as it issued a policy, it charged to its agent the part of the premium due to it, and it was immaterial to it how the premium was paid to the agent or whether it was paid at all. Defendant entrusted to its agents the discretion of collecting in advance or in giving such credit as they saw fit, holding them alone responsible for the premium. Under such circumstances, it may well be doubted whether the note in question was a note given for the first year's premium within the meaning of the forfeiture clause of the policy. The conduct of the insurance company in charging the premium to the agent and the
2 act of the agent in taking a note to himself, operated as a transfer of the insured's indebtedness to the agent, and consequently as a payment to the company. Fidelity Co. v. Willey, et al., 80 Fed. 497; Mutual Life Insurance Co. v. Logan, 87 Fed. 637; Griffith v. N. Y. Life Insurance Co., 101 Cal. 640; 25 Cyc. 827.

We, therefore, hold that the contention of appellant is not well founded.

3. The last contention of appellant is that the court erred in instructing the verdict for appellee. This is based upon the proposition that there was sufficient evidence adduced to support a finding by the jury that some of the answers of the insured to the medical examination were false and, consequently, that the contract of insurance was avoided. The questions and answers have been heretofore given. It is to be noticed that no question was raised by the answer of appellant as to the truthfulness of the answers of the insured in so far as they relate to the number of consultations with a physician and the frequency of illnesses. The answer relied in each instance upon the fact that the insured had consulted a physician and had been treated for dyspepsia and indigestion, which he had denied. The testimony upon this point, consists wholly, as we view it, of the testimony of Dr. Richard Lund,

the medical examiner of appellant, and the physician who attended the insured from time to time both prior and subsequent to the time of the issuance of the policy. We have carefully examined his testimony and believe the substance and effect of the same to be as follows: That the insured never suffered from the *disease* of dyspepsia or indigestion; that the manifestations of indigestion
3 were symptomatic and the result of malarial poisoning; that the manifestations were of an acute form, passing away in a few days, and were in no sense a disease and led to no impairment of health. The physician also testified that according to the best of his knowledge and belief, that the answers of the insured were true. It is true he does state that in one instance the insured had acute indigestion without malarial symptoms, but throughout his testimony he adhered to the proposition that malaria was the disease present and indigestion in an acute form the result and the accompanying symptom.

Another physician, Dr. P. G. Cornish, was called as a witness for the purpose of establishing the falsity of the insured's answers. He was called into consultation by Dr. Lund, the previously named witness, during the insured's last illness, and testified that he diagnosed his condition as hemorrhage due to an ulceration of the stomach. It was sought to show by him that the condition which he found must have existed for a long time prior and must have been present at the time the answers were given, and was caused by indigestion. A careful examination of his testimony, however, fails to give it that effect and he refused to say how long the trouble which caused the hemorrhage had prevailed, or what, in his opinion, caused it.

It cannot be said, therefore, that the evidence furnished any basis for the submission to the jury of the truth or falsity of the answers of the insured. It appears, on the other hand, that the answers of the insured were true. It follows that the action of the court in instructing a verdict for appellee was correct.

There being no error in the record, the judgment of the lower court will be affirmed; and it is so ordered.

[No. 1279, August 9, 1910.]

LEVI R. THOMPSON, Appellee, v. ALBUQUERQUE TRACTION COMPANY, Appellant.

SYLLABUS (BY THE COURT.)

1. An instruction to the effect that, "in the absence of any provision of law regulating the speed at which a street car may be run or operated, those who operate it are bound by the same rule of due care which governs others using vehicles in the public streets; that is when, as in this case, the street car was operated in a public street," correctly states the law applicable to the facts in this case and is not subject to an objection of uncertainty and indefiniteness.

2. "The right of the railway in the street is only an easement to use the highway in common with the public. It has no exclusive right to travel upon its track, and it is bound to use the same care in preventing a collision as is the driver of a wagon or other vehicle."

3. When a jury, in answering special interrogatories submitted to them at the request of the defendant, which interrogatories call for answers upon material facts in issue in the case, disregard the evidence in the case, and in answer to such interrogatories find a fact or facts wholly unsupported by the pleadings or the evidence, it cannot be presumed, in view of such answers, that the defendant had a fair and impartial trial.

4. Special findings, in order to support a general verdict, must correspond to the proofs and be within the pleadings.

5. "Although the general rule is that even if the defendant be shown to have been guilty of negligence, the plaintiff cannot recover if he himself be shown to have been guilty of contributory negligence which may have had something to do in causing the accident; yet the contributory negligence on his part would not exonerate the defendant, and disentitle the plaintiff from recovering, if it be shown that the defendant might by the exercise of reasonable care and

prudence have avoided the consequences of plaintiff's negligence."

6. The facts, and the inferences to be drawn therefrom, with reference to the contributory negligence of the plaintiff being doubtful, the question of proximate cause of the accident and the reasonable care of the defendant should be submitted to the jury for their determination under proper instructions from the court according to the circumstances of the case.

Appeal from the District Court for Bernalillo County before IRA A. ABBOTT, Associate Justice. Reversed and remanded.

A. B. MCMILLEN for Appellant.

The mere fact of killing or injury does not constitute any presumption of negligence. The specified negligent act complained of must be proved by the plaintiff. A. T. & S. F. Ry. Co. v. Walton, 3 N. M. 541; Jones on Ev., sec. 181, p. 393; Pollock on Torts, star p. 360; Savannah, etc., Ry. Co. v. Geiger, 21 Fla. 669; Chicago, etc., Ry. Co. v. Patchin, 16 Ill. 198; Great Western Ry. Co. v. Morthland, 30 Ill. 451; Indianapolis, etc., Ry. Co. v. Means, 14 Ind. 34; Perkins v. Eastern Ry. Co., 29 Me. 307, 50 A. D. 589; Locke v. St. Paul, etc., Ry. Co., 15 Minn. 350; Brown v. Hannibal, etc., Ry. Co., 33 Mo. 309; Burlington, etc., Ry. Co. v. Wendt, 12 Neb. 76; Wash v. Virginia, etc., Ry. Co., 8 Nev. 110; Terry v. N. Y. Cent., 22 Barb. 575; Pittsburgh, etc., Ry. Co. v. McMillan, 37 O. S. 554; Pittsburgh, etc., Ry. Co. v. Heiskell, 38 O. S. 666; Lyndsay v. Conn., etc., Ry. Co., 27 Vt. 643; Orange, etc., Ry. Co. v. Miles, 76 Va. 773.

When facts are undisputed or clearly preponderant negligence is a question of law. Central, etc., Ry. Co. v. Lawrence, 13 Ohio St. 66; Wallace v. St. Louis, etc., Ry. Co., 74 Mo. 594; Southern Pac. Ry. Co. v. Poole, 160 U. S. 440; Dist. of Columbia v. Moulton, 182 U. S. 579; Baltimore, etc., R. R. Co. v. Griffith, 159 U. S. 611; Texas,

etc., Ry. v. Gentry, 163 U. S. 368; Grand Trunk, etc., Ry. Co. v. Ives, 144 U. S. 417; Gardner v. Michigan Cent. Ry., 150 U. S. 361; Randolph v. Baltimore, etc., Ry., 109 U. S. 482; Blount v. Grand Trunk Ry. Co., 61 Fed. 375; Toledo, etc., Ry. Co. v. Barlowe, 71 Ill. 640; Plaster v. Illinois, etc., Ry. Co., 35 Ia. 449; Lafayette, etc., Ry. Co. v. Shriner, 6 Ind. 141.

While the special finding of the jury was not inconsistent with the general verdict, yet there was no evidence to support the special finding, and therefore no evidence to support the general verdict. Morrow v. County, 21 Kas. 352; A., T. & S. F. Ry. Co. v. McCandliss, 6 Pac. 587-590; Kas. Pac. Ry. Co. v. Peavy, 8 Pac. 780.

Wherever cattle are prohibited from running at large the owner is guilty of contributory negligence when they are injured while at large through his fault. Railroad Co. v. Skinner, 19 Pa. State 298; 59 Am. Dec. 654, and note; Tonawanda Ry. Co. v. Munger, 5 Denio 255, 49 Am. Dec. 239, and note, 4 N. Y. 349, 53 Am. Dec. 384; Central, etc., Ry. Co. v. Lea, 20 Kas. 353; Van Horn v. Burlington, 63 Ia. 57; 29 Cyc. 507; Williamson v. Barnett, 13 Howard 109; Ry. v. Pollard, 22 Wallace 347; Ry. v. Jones, 95 U. S. 452; Beach, on Contributory Negligence, secs. 14, 35; Dyerson v. Union P. R. R. Co., 7 L. R. A., N. S. 132; 55 L. R. A. 418; Smith v. Norfolk & S. R. Co., 114 N. C. 728, 25 L. R. A. 287, 19 S. E. 863, 923; Drown v. Northern Ohio Traction Co., Ohio, 81 N. E. 326; 10 L. R. A., N. S., 421, 424, 425; Damonte v. Patton, La., 8 L. R. A. 209.

A general denial and a plea of contributory negligence do not constitute inconsistent defenses. 29 Cyc. 582 and cases cited.

By the weight of authority a violation of a statute or ordinance imposed under the police power of the state is negligence per se. In all other cases it is held to be *prima facie* negligence. 29 Cyc. 436, 437 and cases cited; 2 Am. & Eng. Enc. of Law 363; Spring Co. v. Edgar, 99 U. S. 654; Kotila v. Houghton, Mich., 96 N. W. 437; Jewett v. Gage, 55 Me. 538; 92 Am. Dec. 615; Shipley v. Colclough, 81 Mich. 624; 21 A. S. R. 546; Bott v. Pratt,

33 Minn. 323; 53 A. S. R. 47; Fallin v. O'Brien, 12 R. I 518; 34 A. R. 713, 715; Marshland v. Murray, 148 Mass. 91; 12 A. S. R. 520; Mosier, et ux v. Beale, 43 Fed. 358; Hardiman v. Wholley, 70 A. S. R. 292.

The evidence in a negligence case must be limited to the issues made by the pleadings, and a different cause of the injury than the one alleged cannot be proved; nor will a special finding not supported by the pleadings uphold the verdict. 29 Cyc. 583, 584, and cases cited; A. T. & S. F. Ry. Co. v. Owens, Kansas, 50 Pac. 962; Pittsfield v. Pittsfield, 71 N. H. 522, 53 Atl. 807, 60 L. R. A. 116; Healey v. Patterson, 123 Iowa 73, 98 N. W. 576; Brown v. Chicago, etc., Ry. Co., Kan., 52 Pac. 66; So. Kan. Ry. Co. v. Griffith, Kan., 38 Pac. 478; Lieuallen v. Mosgrove, et al, 33 Ore. 282; Rowe v. Such, 134 Cal. 573; 66 Pac. 862.

HICKEY & MOORE for Appellee.

Contributory negligence is a defense which confesses and avoids the plaintiff's cause of action as stated in the complaint. Watkins v. Southern Pac. Ry. Co., 4 L. R. A. 239, 241; M. K. & T. Ry. Co. v. Jamison, 34 S. W. 674; Ky. Cent. R. Co. v. Thomas, 79 Ky. 164; A. T. & S. F. Ry. Co. v. Walton, 3 N. M. 530; Anniston El. & G. Co. v. Hewitt, 139 Ala. 442, 36 So. 39; Robinson v. Louisville Ry. Co., 112 Fed. 484; Richard v. Sacramento V. R. R. Co., 18 Cal. 351, 358; Webbs Pollock on Torts 550.

Where the facts are disputed and the evidence conflicting as in this case, the question should always be left to the jury. Owens v. Hannibal & St. J. R. R. Co., 58 Mo. 386, 393; Detroit & M. R. Co. v. Van Steinberg, 17 Mich. 90, 124; Beers v. Housatonic, 19 Conn. 566; Ireland v. Oswego R. R. Co., 13 N. Y. 533; Johnson v. Bruner, 61 Pa. St. 58; Vinton v. Schwab, 32 Vt. 612; Langhoff v. Milwaukee, etc., R. R. Co., 19 Wis. 497; 2 Thomp. Negl. 1239; Sioux City & P. P. R. Co. v. Stout, 17 Wall. 657, 665, 21 L. ed. 745, 749; Richmond & Danville R. Co. v. Powers, 149, U. S. 44, 37 L. ed. 642, 643; Kane v. Northern Cent. R. Co., 128 U. S. 91, 32 L. ed. 339, 341;

Washington & Georgetown R. Co. v. McDade, 135 U. S. 554, 34 L. ed. 235, 241.

The right of the railway in the street is only an easement to use the highway in common with the public. Rascher v. East Detroit & G. Ry. Co., 90 Mich. 413, 51 N. W. 463, 464; Adolph v. Ry. Co., 65 N. Y. 555; Railway Co. v. Hanlon, 53 Ala. 87; Shea v. Railway Co., 44 Cal. 414, 428.

The question of negligence is peculiarly for the jury and where there is any evidence however slight, the court cannot interfere. Norfolk & W. Ry. Co. v. Spencer's Admx. 52 S. E. 310, Va.; Morien v. N. & A. T. Co., 46 S. E. 907, Va.

The rule is that the motorman is bound not to run his car at such a speed that he cannot stop within the distance he can see such animal on the track. Anniston El. & G. Co. v. Hewitt, 139 Ala. 442, 36 So. 39, 40; Robinson v. Louisville Ry. Co., 112 Fed. 484.

The burden of proving contributory negligence is on the defendant. Watler v. Chicago M. & St. P. Ry. Co., 31 Minn. 91, 16 N. W. 537, 538; Washington & Georgetown R. R. Co. v. Gladmon, 15 Wall. 401, 21 L. ed. 115; Indianapolis & St. L. R. Co. v. Horst. 93 U. S. 291, 23 L. ed. 898; Hough v. Texas & P. R. Co., 100 U. S. 213, 25 L. ed. 612; Northern P. R. Co. v. Mares, 123 U. S. 710, 31 L. ed. 296, 301.

If the defendant could, by the exercise of ordinary care have prevented the accident, it was its duty to have done so. Cincinnati & L. R. Co. v. Smith, 22 O. St. 227, 246; Stuke v. Milwaukee & M. R. Co., 9 Wis. 182, 194; Norfolk & W. Ry. Co. v. Spencer's Admx. 52 S. E. 310, Va.; Isbell v. The N. Y. & N. Haven R. R. Co., 27 Conn. 392, 393; Bemis v. Conn. R. Co., 42 Vt. 375; Davies v. Mann, 10 Me. & W. 545, 2 Thomp. Neg. 1105, 1157; Grand Trunk R. Co. v. Ives, 144 U. S. 408, 36 L. ed. 485, 493; Donohoes v. St. L. I. M. & S. R. Co., 91 Mo 357; Inland & S. Coasting Co. v. Tolson, 139 U. S. 551, 558, 35 L. ed. 270, 272; Pearson v. Milwaukee & St. P. R. R.

The evidence shows that plaintiff's cow escaped from the pasture through no fault of the owner and without

his knowledge; under such a state of facts the courts have repeatedly held that there was no negligence or want of ordinary care on the part of the plaintiff. A. T. & S. F. Ry. Co. v. Davis, 31 Kan. 645, 3 P. 301, 302; Pearson v. Milwaukee & S. P. R. R. Co., 45 Iowa 497, 500; Shea v. P. & B. V. R. R. Co., 44 Cal. 414, 428; Bulkley v. R. R. Co., 27 Conn. 479; Isbell v. N. Y. & N. Haven R. R. Co., 27 Conn. 392; Bemis v. Conn. R. Co., 42 Vt. 375; Richmond v. Sacramento V. R. Co., 18 Cal. 357, 358; Cincinnati & L. R. Co. v. Smith, 22 Ohio St. 244; Nelson v. The Great Northern Ry. Co., 52 Minn. 276, 53 N. W. 1129; Montgomery v. Breed, 34 Wis. 649; Stephenson v. Ferguson, 30 N. E. 714, Ind., App.; Julienne v. City of Jackson, 69 Miss. 34, 30 Am. St. Rep. 526; Coles v. Burus, 21 Hun. 246, 249; Reitter v. Henry, 20 N. E. 334, 335, Ohio.

STATEMENT OF FACTS.

The court adopts the statement of facts set out in appellant's brief and agreed to by appellee, which is as follows:

This suit was filed in the court below on the 26th day of May, 1908, for the recovery of $75.00, the alleged value of a cow owned by the plaintiff, and killed by a collision with an electric car of the defendant corporation operated on its tracks in the city of Albuquerque. The negligent acts by which the appellee seeks to charge the appellant are stated in the complaint as follows:

"That by the gross negligence and carelessness of the said defendant, its agents, employees and servants, on Twelfth street, in the city of Albuquerque, New Mexico, defendant did, on to-wit, the 27th day of August, 1907, with one of its electric street railway cars run into and collide with a certain cow belonging to the plaintiff herein, and by said negligence and carelessness killed said cow."

The defendant's answer was a general denial, and also alleged as a further defense "That the said plaintiff was guilty of negligence contributing to the injury alleged in said complaint, in that the said plaintiff permitted said

cow to be illegally at large within the corporate limits of the city of Albuquerque at the time of said accident."

There was no reply filed, but no point was made of that at the time of the trial.

At the close of appellee's evidence, the appellant made the following motion:

"The defense moves the court to direct a verdict for the defendant, for the reason that there is no evidence to show that the cow was killed by the negligent act of the defendant; and second, because the evidence shows that the cow was unlawfully at large and that the plaintiff is therefore guilty of contributory negligence in permitting the cow to be unlawfully at large; and third, because there is no evidence whatever sufficient to go to the jury to warrant a verdict for the plaintiff."

Which said motion was overruled.

At the close of all of the evidence, the appellant moved the court to direct a verdict for the appellant, stating, among other reasons, the same grounds as in the former motion.

The court overruled appellant's motion and submitted the case to the jury. Exception was duly taken by the appellant to certain of the court's instructions and also to the refusal of the court to give certain requested instructions.

The jury returned a general verdict for the sum of $75.00, and also the following answers to interrogatories propounded by the defendant:

Q. Was the collision between plaintiff's cow and defendant's car caused by the negligent act of the defendant?

A. Yes.

Q. If your answer is yes, then state also what particular employee or employees of defendant were negligent, and also state what negligent act or acts caused said collision.

A. Find the negligent acts of the Albuquerque Traction Company. Failed to furnish sufficient headlight for the motorman to see the cow in time to prevent from killing her. JOSEPH VAIO, Foreman.

The appellant thereupon moved the court for a new trial, which said motion was overruled and judgment rendered against the appellant, from which judgment, appeal was had to this court.

OPINION OF THE COURT.

WRIGHT, J.—Considering the assignments of error in the order discussed in both the brief for appellant and the brief for appellee, it appears that the first two assignments of error relate to the sufficiency of the evidence to go to the jury upon the question of negligence on the part of the defendant corporation. The first assignment of error alleges error on the part of the court in refusing appellant's motion to direct a verdict for appellant at the conclusion of appellee's case, while the second assignment alleges error in not granting a similar motion at the conclusion of the case and before argument.

A determination of these questions requires a careful examination of the record and testimony. In view, however, of the position taken by the court upon the fourth assignment of error, it is not necessary to discuss the first and second assignments further than to say that a careful examination of the record and testimony discloses that appellant's motion to direct a verdict in its favor was properly refused in both instances.

The third assignment of error discussed by the briefs relates to the third instruction given by the court, which reads as follows:

"3. Among the particulars in which the plaintiff claims the defendant was negligent is one which, perhaps, calls for some explanation and comment by the court. The plaintiff claims that the defendant was running the car which caused the death of the cow, at an improper rate of speed, and has offered evidence bearing on that question. The defendant has offered evidence tending to sustain its view of the same question. You are instructed that in the absence of any provision of law regulating the speed at which a street car may be run or operated,
1 those who operate it are bound by the same rule of due care which governs others using vehicles in the

public streets; that is, when, as in this case, the street car was operated in a public street.

"By that I do not mean to say that a street car might not properly be operated and run at a higher rate of speed than other vehicles. To illustrate: Street cars are larger than ordinary vehicles, they are usually painted in more conspicuous colors, they make considerable noise in running which serves as a warning to others who are using the streets, they are usually provided with headlights for use in darkness, and with bells which also serve to warn others that they are in the vicinity, and they run upon tracks which are plainly visible and from which they cannot deviate; all those circumstances, and very likely others, might serve to warrant those who are operating them in running at a higher rate of speed than would be proper for ordinary vehicles. But the rule of law is the same; they are bound to use due care, taking into account all the circumstances."

The appellant claimed that the foregoing instruction was indefinite and uncertain.

The courts of this country have very distinctly defined the rights of a street railway to the use of a public highway.

"'The right of the railway in the street is only an easement to use the highway in common with the public.

It has no exclusive right to travel upon its track and
2 it is bound to use the same care in preventing a collision as is the driver of a wagon or other vehicle."

Rasher v. East Detroit & G. Ry. Co., 90 Mich. 413, 51 N. W. Rep. 463, 464; Adolph v. Railway Co., 65 N. Y. 555; Railway Co. v. Hanlon, 53 Ala. 87; Shea v. Railway Co., 44 Cal. 414, 428; Amer. & Eng. Enc., 2d edition, vol. 27, pages 57 to 60 and cases cited.

Under the rule laid down in the above cited cases, we can see no error in this instruction.

The fourth assignment discussed in the briefs raises what appears to be the vital question in this case, and the one upon which this case must turn for affirmance or reversal.

The complaint alleges negligence on the part of the defendant corporation in the following words:

"That by the gross negligence and carelessness of the said defendant, its agents, employees and servants, on Twelfth street, in the city of Albuquerque, New Mexico, defendant did, on to-wit, the 27th day of August, 1907, with one of its electric street railway cars run into and collide with a certain cow belonging to the plaintiff herein, and by said negligence and carelessness killed the said cow."

No objection was taken to the form of the complaint by way of motion to make more definite and certain so that a liberal construction of the pleadings would permit the introduction of a very wide range of evidence as to the negligence of the railway company. The evidence introduced by the appellee in support of his allegations of negligence relates exclusively to the manner in which the motorman in charge of the car operated the same. In other words, the appellee by his evidence, limited the scope of his pleadings to the carelessness and negligence of the motorman. No evidence whatever as to any defective equipment was introduced by the appellee.

The appellant submitted special interrogatories to the jury in accordance with the practice in this jurisdiction. The jury returned a general verdict for the appellee with special findings under the interrogatories, as set out in the statement of facts herein.

The question raised by the fourth assignment of error then resolves itself into the determination of whether there is any evidence within the pleadings, to support the general verdict in view of the special findings of the jury on the question of the negligence of the defendant corporation.

An examination of the testimony shows that the appellee proceeded upon the theory that the accident and resulting injury were due to the negligence and carelessness of the motorman in running and operating the car of the defendant company, and in particular as to the speed at which the car was being run at the time the accident occurred. All of the evidence offered by the appellee was upon this theory of the case and he thereby invited and compelled the appellant to meet him upon that issue and that issue alone.

While it is true that the allegation of negligence in the complaint is so broad that it might have been construed to include:

"Failure to furnish sufficient headlight for the motorman to see the cow in time to prevent from killing her," as stated in the special findings of the jury, if any evidence of that character had been offered by the plaintiff below, it would appear to us, that the appellee, having by his own act limited the scope of his pleadings to the carelessness and negligence of the motorman in charge of the car, as to his manner of running and operating the same, would be precluded from taking any broader view of his pleadings on motion for new trial or appeal.

In the case of Gallegos v. Sandoval, 106 Pac. 373 (New Mexico) this court recognizes the general rule that where there is a fatal inconsistency between the general verdict and the special findings, that the latter must control. In the case at bar it is not an inconsistency between the verdict and special findings, but rather a complete failure of proof to sustain the special findings. An examination of the testimony discloses the fact that there was no evidence whatever introduced in this case to show that the headlight was defective in any particular. On the other hand, the evidence of the motorman—a witness introduced by the appellant,—was to the effect that he could see seventy-five feet ahead by means of the headlight and that he could stop his car within a distance of seventy-five or eighty feet. This evidence would tend to establish a finding just contrary to the special finding under discussion. Hence it appears that such special finding, not only relates to a question of negligence which must be considered as wholly outside of the pleadings, as limited by the case made out by the plaintiff in the court below, but also as wholly unsupported by any evidence in the case and directly contrary to the actual facts. Such being the case, as a matter of course, the general verdict cannot be sustained.

It is a well established rule in jurisdictions where special interrogatories may be submitted to the jury, as in this jurisdiction, that special findings, in order

4 to support a general verdict, must correspond to the proofs and be within the pleadings. A. T. & S. F. Ry. Co. v. Owens, 50 Pac. 962. So. Kan. Ry. Co. v. Griffith, 38 Pac. 478.

In the case of Waterbury v. C. M. & St. P. Ry. Co., 104 Iowa 32, upon this question the court said:

"The jury found specially that plaintiff could not, by the exercise of ordinary care, have seen the ice where he slipped and fell, and by such care have avoided the injury. This finding, as well as the seventh, that the plaintiff did not directly contribute to his injury by his own negligence, was clearly contrary to the evidence, and cannot be sustained. These facts were material and determinative
3 in character, and it cannot be presumed in view of the answers of the jury, that the defendant had a fair trial."

Also in Chicago K. & N. Ry. Co. v. Muncie, 56 Kan. 210, 42 Pac. 710, the court said:

"It is plain that these questions are not answered fairly, nor in accordance with the testimony. The questions incorrectly answered relate to a leading defense, and the facts involved in them were material to the controversy. For some reason the jury ignored undisputed evidence, and their findings indicate that the verdict was not the result of a fair consideration of the evidence, and that the defendant did not have an impartial trial."

The questions propounded by the attorney for the Traction Company were direct and called for a determination of facts most material to issues involved. There being no issue during the trial as to any defective headlight, and no evidence whatever upon which to base the special finding of the jury thereon, it cannot be said in this case that the defendant has had an impartial trial, and it was therefore error on the part of the trial court not to have set aside the general verdict and granted a new trial.

The remaining assignments of error relate to alleged error in the giving and refusing of certain instructions as to contributory negligence. The refused instructions were as follows:

"Request No. 6. If in said city the plaintiff's cow

escaped by breaking through or getting over the fence with which she was enclosed, such escape will be presumed to have been by reason of the fault or negligence of the plaintiff, unless it is proved that such fence was so constructed and kept in repair that such breaking through or getting over could not have been reasonably anticipated from the condition of the fence, or the size, activity and natural inclinations of said cow."

"Request No. 9. The law is that where the plaintiff so far contributes to the misfortune by his own negligence or want of ordinary care and caution that but for such negligence or want of care and caution on his part the misfortune would not have happened, then he cannot recover; and if you find that if said cow was at large because of the negligence of said defendant, and that she could not have been struck by the car if she had been kept within her enclosure, then you will find a verdict for the defendant."

The instruction to which appellant took an exception was as follows:

"6. You are further instructed that in-as-much as cattle are not allowed to run at large in the city of Albuquerque, the defendant company was not bound to anticipate that cattle would be then on the track, but it had a right to presume that the track was clear of cattle. Although you may believe from the evidence that there was contributory negligence on the part of the plaintiff in the fact that the cow was at large, still if you further believe from the evidence that by the exercise of due care on the part of the defendant, its agents and servants, the injury to the cow would have been avoided, notwithstanding the negligence of the plaintiff, then the plaintiff has a right to recover."

It seems from the evidence in this case that there was in effect at the time the accident occurred, a city ordinance prohibiting the running at large of live stock within the city limits. The evidence shows that the cow in question was kept in an enclosed pasture, which pasture was fenced by a four wire barb-wire fence; that at least twice before this particular occasion, certain cows belonging to

appellee had gotten out of this pasture. It further appears from the evidence that the appellant was not aware of this cow having escaped until after the accident occurred; that he immediately went in search of her for the purpose of returning her to the pasture as soon as he discovered that she had escaped. There was no other evidence offered by the appellant to show negligence on the part of the owner except an introduction of a copy of the ordinance, and the fact that the cow was upon the public street at the time the accident occurred.

A discussion of the issue raised by the above mentioned assignments of error involves the determination of the rule in effect in this jurisdiction upon contributory negligence. At the August, 1891, term of this court, in the case of Candelaria v. A. T. & S. F. Ry. Co., 6 N. M. 266, the court in discussing "what is contributory negligence" used the following words: "The more approved statement of the doctrine of contributory negligence is that the person cannot recover for an injury to which he contributed by his own want of ordinary care." An examination of the decisions upon the subject of contributory negligence discloses a peculiar condition. It appears that just prior to the handing down of the New Mexico decision above referred to, the United States Supreme Court had passed directly upon the point involved in the Candelaria case, in the case of Inland Seaboard Coasting Company v. Tolson, 139 U. S. 531. In this case the issue came up also on an instruction upon the question of contributory negligence, as in the case at bar. The instruction in question was as follows:

"There is another qualification of this rule of negligence which it is proper I should mention. Although the rule is that, even if the defendant be shown to have been guilty of negligence, the plaintiff cannot recover if he himself be shown to have been guilty of contributory neg-
5 ligence which may have had something to do in causing the accident; yet the contributory negligence on his part would not exonerate the defendant, and disentitle the plaintiff from recovering, if it be shown that the defendant might, by the exercise of reasonable care and

prudence, have avoided the consequences of the plaintiff's negligence."

Mr. Justice Gray, who delivered the opinion, said:

"The qualification of the general rule, as thus stated, is supported by decisions of high authority, and was applicable to the case on trial."

Within a few months after the handing down of the decision in the Candelaria case, the United States Supreme Court again passed upon this question of contributory negligence in the case of Grand Trunk Railway Company v. Ives, 144 U. S. 429, in the following words:

"The generally accepted and most reasonable rule of law applied to actions in which the defense is contributory negligence may be thus stated: Although the defendant's negligence may have been the primary cause of the injury complained of, yet an action for such injury cannot be maintained if the proximate and immediate cause of the injury can be traced to the want of ordinary care and caution in the person injured; subject to this qualification, which has grown up in recent years, (having been first enunciated in Davies v. Mann, 10 M. & W. 546) that the contributory negligence of the party would not defeat the action if it be shown that the defendant might, by the exercise of reasonable care and prudence, have avoided the consequences of the injured party's negligence." (See also Rose's notes on above case.)"

Mr. Thompson, the author of various works on negligence, in substance, states that the old rule on the subject of contributory negligence was, that no recovery could be had where by exercising ordinary care the party injured could have avoided the consequences of defendant's negligence. This seems to be the rule urged by the appellant in the case at bar. An examination of his citations indicates that he relied solely upon the old rule and formulated his requested instructions upon that theory. It is certainly an interesting fact that one leading case was decided by the United States Supreme Court a few months prior to the handing down of the Candelaria opinion by this court, and another leading case a few months after the handing down of the Candelaria opinion. This indicates that the court's

change in the rule as to contributory negligence was not noted by this court at the time of the Candelaria case. An examination of the facts as set out in the opinion of the Candelaria case, however, discloses the fact that in this case the court instructed the jury to find a verdict for the defendant. An examination of the evidence in that case further shows that it came within the rule announced by this court in the case of Gildersleeve v. Atkinson, 6 N. M. 250, to the effect that it is the duty of the court to direct the verdict where in the exercise of a sound judicial discretion it would be called upon to set aside a contrary verdict. In other words, that the evidence upon the question of contributory negligence of the plaintiff was plain and unequivocal and raised no issue to be submitted to the jury. Hence, the qualification of the old rule as to contributory negligence could under no circumstances have had any bearing or been applied by the court in the Candelaria case. The United States courts appear universally to have followed the rules laid down in the Tolson and Ives cases.

In the case of Turnbull v. New Orleans & C. R. Co., 120 Fed. 783, a case from the Fifth Circuit, Judge McCormick reviews the law of contributory negligence, citing and approving both the Tolson and Ives cases and the doctrine laid down therein. The doctrine laid down in these two cases has been further sustained and approved in the case of Dunworth v. Grand Trunk Western Ry. Co., 127 Fed. 307, and in the case of Netherlands-American Steam Nav. Co. v. Diamond, 128 Fed. 572. In this case the court said:

"In any event, questions of proximate cause and reasonable care, especially in cases involving the claim of contributory negligence are peculiarly for the jury, to be
6 determined under proper instructions from the court according to the circumstances of the particular case."

In the case of Dunworth v. Grand Trunk Western Ry. Co., 127 Fed. 307, Jenkins, Circuit Judge, said:

"If the facts, or the inferences to be drawn from them, with respect to contributory negligence, be doubtful, the case is one for the jury. But. if from the facts disclosed,

the conclusion follows as a matter of law that there can be no recovery in any proper view of the facts, it is the duty of the trial court to direct a verdict." Numerous other cases are cited.

In view of the above citations it would appear that the court did not err in its instruction on the subject of contributory negligence, or in refusing the requested instructions. The evidence of the case is conflicting. The witness, Miss Yates, testified that she was standing upon the corner waiting for the car; that the track was straight for several hundred yards; that the motorman in charge of the car made no effort to slacken the speed of his car, did not sound his gong, and after striking the cow, ran on without stopping some hundred feet or more to the point where she was waiting for the car. The motorman, on the other hand, testified that as he was coming on at this particular place, the street was rather dark and he was looking to the side of the street to see if there were any passengers, but when he looked back and saw the cow she was too close for him to stop. Such being the facts, we think that the question with respect to contributory negligence being the proximate cause of the accident, was doubtful and properly an issue to be submitted to the jury under proper instructions from the court according to the circumstances of the particular case.

The appellant discusses the question in his brief as to whether the violation of a statute or ordinance imposed under the police power of the state, (such as prohibiting cows from being upon streets and highways) is negligence *per se,* or *prima facie* evidence of negligence. Under the views we take as to the rule of contributory negligence this cannot be material to the issue in the case.

The judgment of the lower court is reversed and the case is remanded for a new trial.

Pope, C. J., I concur in the result upon the ground that there is no evidence to sustain the only special finding upon which the verdict rests.

[No. 1298, August 9, 1910.]

TERRITORY OF NEW MEXICO, Appellee, v. THOMAS M. HARWOOD, Appellant.

SYLLABUS (BY THE COURT.)

1. The penal provision of Chapter 31 of the Session Laws of 1876, (C. L. Sec. 1427), directed against the uniting of persons in marriage under age, were not repealed by Chapter 32 of the laws of the same session. (C. L. Sec. 1430.)

2. Alleged errors in the charge of the court not called to the latter's attention by motion for new trial will not be considered by this court.

3. Uniting in marriage a female under the age of fifteen is penalized by C. L. Sec. 1427 and knowledge by the officiating officer that such female is under such age is not a necessary element of the offense.

4. A written memorandum may not be used to aid or supplement the recollection of a witness unless its correctness when made is first established and a conviction based solely upon the contents of a memorandum which has not been so verified cannot be sustained.

Appeal from the District Court for Valencia County before IRA A. ABBOTT, Associate Justice. Reversed and remanded.

MODESTO C. ORTIZ and EDWARD A. MANN for Appellant.

Chapter 32, Laws of 1876, repeals the penal provision of Chapter 31, Laws of 1876. C. L., secs. 1427, 1430; 4 Words and Phrases 3748; 8 Words and Phrases 7332; Bishop on Marriage and Divorce, 6 ed., sec. 105; 1 Lewis Suth. Stat. Cons., 2 ed., sec. 251; Norris v. Crooker, 13 How. 429, 13 L. ed. 210; U. S. v. Tyner, 11 Wall. 88, 20 L. ed. 153; Nichols v. Squire, 5 Pick., Mass. 168; People v. Tisdale, 57 Calif. 104; State v. Massey, 103 N. C. 356; 9 S. E. Rep 632.

If there was no legal evidence to support the verdict

it will be set aside. Territory v. Pino, 9 N. M. 598; People v. AhLoy, 10 Cal. 301; Territory v. Edie, 6 N. M. 555; 2 Greenleaf on Evidence, sec. 363; Blackburn v. Crawford, 3 Wall. 175, 18 L. ed. 186; 2 Stark 612, 2 Lon. ed.; 1 Greenleaf Ev., sec. 493; Sitler v. Gehr, 105 Pa. St. 577, 51 Am. Rep. 207; Clark v. Trinity Church, 5 W. and S. 266; Clyatt v. U. S., 197 U. S. 207, 19 L. ed. 726; Wiborg v. U. S., 163 U. S. 632, 41 L. ed. 289.

In a statutory crime in which "knowingly" is made one of the elements, it must appear that the act was done with a guilty knowledge of its consequences. U. S. v. Claypool, 14 Fed. 127; Territory v. Cortez, 103 Pac. 264; U. S. v. Cassidy, 67 Fed. 698; U. S. v. Terry, 42 Fed. 317; U. S. v. Kirby, 7 Wall. 482, 19 L. ed. 278.

FRANK W. CLANCY, Attorney General, for Appellee.

No exception shall be taken on appeal to any proceeding in the court below except such as shall have been expressly decided in that court. C. L. 1897, sec. 3139; Laws, 1907, chapter 57, sections 37, 46; Territory v. Watson, 12 N. M. 422; Territory v. Yarberry, 2 N. M. 454; Territory v. Gonzales, 14 N. M. 31, 39; Territory v. West, 14 N. M. 557; Territory v. Caldwell, 14 N. M. 543; Padilla v. Territory, 8 N. M. 564.

Good faith and a lack of intention to violate the law constitutes no defense in this case. Territory v. Church, 14 N. M. 226, 234, 235.

Matters not raised by a motion for a new trial and made a matter of record by a bill of exceptions will not be considered upon appeal. Territory v. Christman, 9 N. M. 587.

This court will not pass upon any alleged errors in the court below unless opportunity was given to the trial court to correct any errors or supply defects. U. S. v. Adamson, 106 Pac. 653; U. S. v. Cook, 103 Pac. 305, 307; Territory v. West, 14 N. M. 554, 557; McKenzie v. King, 14 N. M. 381; Territory v. Gonzales, 11 N. M. 456; Territory v. Chaves, 9 N. M. 282; Territory v. Archibeque, 9 N. M. 404; Maxwell v. Tufts, 8 N. M. 400-1; Ford v.

Springer Ass'n., 8 N. M. 59; Railway Co. v. Saxton, 7 N. M. 305; U. S. v. Duran, 6 N. M. 175; Territory v. Baker, 4 N. M. 274; Palma v. Weinman, 13 N. M. 235-6; Territory v. Watson, 12 N. M. 421-2.

The appearance of a person is a matter of evidence competent and proper for the consideration of courts and juries in determining the matter of age. 1 Wigmore on Evidence, sec. 222, note 1; 2 Wigmore on Evidence, sec. 1168; State v. Arnold, 13 Ired. Law 192; Hermann v. State, 73 Wis. 250-1; State v. Robinson, 32 Oreg. 51, 52-3; People, ex rel. v. Justices, 10 Hun. 225-6; Comm. v. Hollis, 170 Mass. 435; Commonwealth v. Phillips, 62 Mass. 504.

The facts are stated in the opinion.

OPINION OF THE COURT.

POPE, C. J.—The defendant Harwood was indicted for unlawfully uniting in marriage a female under the age of fifteen years. From a sentence, following a conviction and the overruling of the usual motions, he has appealed.

The first assignment of error is that the indictment states no offense. This proceeds upon the contention that the penal provisions of the statute under which the proceedings were brought have been repealed. The indictment is under Chapter 31 of the laws of 1876 appearing as Comp. Laws, Sections 1426 to 1430. Sections 2 and 3 of that act (C. L. Sec. 1426 and 1427) are as follows:

"No person authorized by the laws of this Territory to celebrate marriages, shall unite in marriage, knowingly, any male under the age of twenty-one years, nor any female under the age of eighteen years without the consent of their parents or guardians under whose care and control such minor may be, and all marriages of any male under the age of eighteen years and of any female under the age of fifteen years, are absolutely invalid." C. L. Sec. 1426.

"If any person prohibited from contracting marriage by sections one thousand, four hundred and twenty-five and one thousand four hundred and twenty-six, shall violate the provisions thereof by contracting marriage contrary to the provisions of said sections, he or they shall

be punished by fine on conviction thereof, in any sum not less than fifty dollars; and every person authorized under the laws of this territory to celebrate marriages, who shall unite in wedlock any of the persons whose marriage is declared invalid by the previous sections of this act, on conviction thereof, shall be fined in any sum not less than fifty dollars." C. L., Sec. 1427.

Section 1426, it will be noted, prohibits knowingly uniting in marriage any male or female under the ages respectively of 21 and 18. In the case of males under 18 and females under 15 the prohibition is absolute and the marriage is declared invalid. In the case of others the marriage is permissible by consent of parents or guardians. It is thus seen that only in cases where the male is under 18 and the female under 15 is the marriage declared invalid, and as to these the act of uniting in marriage is made penal.

The same legislature by an act passed seven days after that above quoted, (L. 1876, C. 32, C. L. Sec. 1430) provides that "No marriage * * between or with infants under the prohibited ages shall be declared void except by a decree of the district court upon proper proceeding had therein."

The argument is that by this later act making such marriages not *ipso facto* void but simply voidable by decree of court there has been repealed the provision of Chapter 31 denouncing as penal the uniting in marriage of persons where marriage is declared invalid by that chapter.

1 We cannot, however, concur in that view. It will be noted that C. L. Sec. 1427 does not denounce the celebrating of invalid marriages but of marriages which are by the preceding sections "declared invalid." These latter are marriages within prohibited degrees of consanguinity (C. L. sec. 1425) and as we have seen the marriages of males under 18 and females under 15. When the legislature provided that such marriages should be declared void only by court decree, it left them none the less contrary to law and none the less among those "declared invalid" by the preceding act. The effect of the later act was simply to render less harsh the operation of the statute

upon the participants in such illegal marriage and their possible and innocent offspring. That the cohabitation of the former should not necessarily be concubinage and the status of the latter bastardy the legislature provided that the marriage should be declared void only by decree of court. But this was entirely apart from the penalties upon one who celebrated such a marriage. It was manifestly not intended that he should be absolved from punishment simply because a degree of consideration became expedient for those whom he had assisted into the predicament of a prohibited marriage. We therefore deem the earlier act still in force and the indictment founded upon it good against the attack upon it.

Complaint is also made of certain instructions of the court. It being the settled rule of this court that only such errors of this character as are brought to the
2 attention of and sought to be corrected in the trial court will be considered by us, we will confine our consideration of the criticisms upon the charge to what is stated in the motion for a new trial. This latter alleges as to the charge solely that the court erred "in giving the jury the following instructions attached to this motion and made part of this motion, conveying the idea to the jury to find the defendant guilty as he, the defendant, knowingly had violated the law when there was no evidence to warrant said charge." To the motion is attached the entire charge of the court. The criticism above set out is not clear. Whether construed as an attack upon the charge because there was no evidence to show knowledge of the age of the female, or because the definitions of "knowingly" were inaccurate, we deem it equally untenable for the reason that in our opinion the statute
3 does not make such knowledge an element of the offense. A reference to the language of the act above quoted will show that while there is a prohibition against knowingly uniting in marriage males and females under 21 and 18 respectively, when we reach the portions of the statute where the marriages therein declared invalid—i. e., marriages between relatives and of females under fifteen—are treated, the penalty is for simply "uniting in wedlock

any of the persons whose marriage is declared invalid." The reasons for a difference in the degree of legislative strictness in the cases of very youthful persons as compared with those who while minors are of more mature years, need no elaboration. We are of opinion that the marrying of a female under fifteen belongs to the class of statutory misdemeanors where knowledge of the person's age and an intent to marry one under age is not a necessary element of the offense. In a matter of such importance to the race the law imposes upon the officiating officer the duty of ascertaining at his peril the age of the persons marrying. We deem this case within the principle of Territory v. Church, 14 N. M. 226, where the authorities on this point were fully reviewed.

It is finally urged that the verdict below is without evidence to sustain it for the reason that there is no adequate proof of the age of the female. This contention we feel, upon a careful examination of the record, constrained to sustain. The only evidence upon this point is that of the priest who testified that he christened the girl in July, 1894, at which time she was eight days old. The marriage having been performed on June 24, 1907, this was for the moment a showing that she was when married under fifteen. The further examination of the witness showed, however, that he personally did not know the girl in question and that he had no recollection of her birth or the christening and that his only knowledge of the matter came from a memorandum made about the time, which latter however he failed to state was correct when made. This memorandum was in the form of a church record showing baptisms, which, while clearly and indeed confessedly not admissible as a church record under C. L. 3030, constituted a memorandum which upon the proper showing the witness was at liberty to consult to refresh his recollection. It was referred to once or twice by the witness while on the stand but was not offered in evidence.

The rule of course is that a witness may refresh his
4 recollection by consulting a memorandum known by him to be correct, and if after so doing he can testify to the facts, such testimony is competent evidence thereof.

If, however, such consultation fails to stimulate memory and to bring knowledge, the testimony is not necessarily lost. He may still—if he can—testify that the memorandum was made at the time when recollection was fresh and that when so made it spoke the truth. Then, according to the ancient practice, he might state or read its contents to the jury. State v. Brady (Ia.) 100 Iowa 191, 69 N. W. 290; Lipscomb v. Lyon, 19 Neb. 511, 522; Mims v. Sturdevant, 36 Ala. 636; Mason v. Phelps, 48 Mich. 126, 131; Mineral Company v. Keep, 22 Ill. 21; Haven v. Wendell, 11 N. H. 112; 1 Greenleaf, sec. 437. Or, according to the weight of modern authority, the paper might be introduced in evidence. 1 Wigmore on Evidence, sec. 754; Curtis v. Bradley, 65 Conn. 99, 48 A. S. R. 177; Haven v. Wendell, 11 N. H. 112; Bryan v. Moring, 94 N. C. 687; Nehrling v. Herold Co., 112 Wis. 558; Moots v. State, 21 O. S. 653. In the latter event the paper, in connection with the testimony of the witness as to its verity, becomes, to quote from the leading case of Acklin's Executor v. Hickman, 63 Ala. 498, 35 A. R. 54 "the equivalent of a present positive statement of the witness, affirming the truth of the contents of the memorandum." This question as to whether the memorandum itself may be admitted or whether the witness, having theoretically refreshed his recollection by consulting a paper that arouses no recollection, may simply read or state its contents to the jury, is left an open question in courts controlled by the federal decisions, by Bates v. Preble, 151 U. S. 154. The absurdity of perpetuating the latter legal fiction is impressively pointed out in Curtis v. Bradley, 65 Conn. 99, *supra,* and Mason v. Phelps, 48 Mich. 126, 131 *supra.*

In the present case, however, we are not called upon to determine the true rule on this point for the memorandum was not introduced and the witness without objection stated its contents to the jury. The sole question here is as to the sufficiency of the proof. Whether one or the other of the rules above outlined is followed or whether the memorandum is used simply to stimulate memory which thereupon becomes awakened thereby, it is an essential at the basis of the use of all memoranda that they

shall be shown to have been correct when made. 1 Wigmore on Evidence, sec. 747; Acklin's Ex. v. Hickman, 63 Ala. 498; Imhoff v. Richards, 48 Neb. 590; Nehrling v. Herold Co., 112 Wis. 558.

Without such proof the memorandum lacks all probative or auxiliary value and is available for no purpose. In the present case we find this fatal lack, in that nowhere in the record is there testimony to show that the memorandum consulted by the witness was correct when made. While the vocation of the witness and the purpose for which the memorandum was made are matters calling for judicial respect they do not supply the fact uniformly held essential to the use of a memorandum for any purpose, that its accuracy shall be guaranteed. The record in this condition presents the case of a conviction based solely upon the contents of a memorandum many years old, the correctness of which when made is in no wise legally established. This we cannot sustain.

The cause is accordingly reversed and remanded with directions for a new trial.

[No. 1303, August 9, 1910.]

THE COLORADO TELEPHONE COMPANY, Appellant, v. CHARLES G. FIELDS, Appellee.

SYLLABUS.

1. A grant to a public service corporation as well as a contract with it by a municipality, in case of ambiguity or doubt, are to be construed favorably to the rights of the public.

2. Where a contract as a whole discloses a given intention, if certain words or clauses taken literally would defeat the intention, it will be construed, if possible, so as to be consistent with the general intention.

3. In a contract between a public service corporation and a municipality, the municipality did not intend to prescribe maximum rental rates for only a portion of its inhabitants within the district mentioned in the contract. The

words "per annum" were therefore inserted in the contract as furnishing a mode of computation for a rental charge for all of the people and not merely for the people who would make an annual contract.

4. A public service corporation cannot adopt a regulation which will result in increasing a rental charge above what has been fixed by contract as a maximum charge.

5. The obligation to furnish telephone service at not to exceed a specified rental charge must include the installation of a usable appliance connected with a system.

Appeal from the District Court for Bernalillo County before IRA A. ABBOTT, Associate Justice. Affirmed.

MARRON & WOOD for Appellant.

The power to limit the charges of public service corporations, in order to be exercised by municipal authorities, must be expressly delegated to them by the legislature, and is not included in power to regulate the use of streets. 27 A. & E. Enc. 1020; St. Louis v. Bell T. Co., 96 Mo. 623, 2 L. R. A. 278; Macklin v. Home Tel. Co., 24 Ohio C. C. 446; State ex rel v. Sheboygan, Wis., 86 N. W. 657; C. L. 1897, sec. 2402, sub-secs. 3, 11; Oregon Ry. & N. Co. v. Oregon Ry. Co., 130 U. S. 1; Perrine v. C. & D. Co., 9 How. 172; C. & P. Tel. Co. v. Manning, 186 U. S. 238; Robbins v. B. R. & E. Co., Me., 1 L R. A., N. S. 963; Hacket v. State, 105 Ind. 250, 55 Am. Rep. 201.

Incident to and arising out of the obligation of public service corporations to serve all impartially, is their common law right to make all necessary rules and regulations governing that service, subject only to the provision that they must be reasonable, and to exact compliance with these rules and regulations from all applicants. 27 A. & E. Enc. 1021, 1037; Williams v. Mutual Gas Co., 52 Mich. 499, 50 Am. Rep. 266; W. U. Tel. Co. v. Harding, Ind., 3 N. E. 172; Hewlett v. Tel. Co., Tenn., 28 Fed. 181; W. U. T. Co. v. McGuire, Ind., 2 N. E. 201; 27 Enc. 1021, 1037; 14 A. & E. 930, notes 6, 7; Morris v. Atlantic

Ave. Ry., 116 N. Y. 552; B. C. T. Co. v. Turner, Neb., 19 L. R. A., N. S. 693; Jones on Telephone Cos., sec. 226.

HICKEY & MOORE for Appellee.

Contracts constituting a single transaction are construed together. Hanning v. Mueller, 82 Wis. 241, 52 N. W. 100; Beckman v. Beckman, 86 Wis. 659, 57 N. W. 1119; Joy v. St. Louis, 138 U. S. 1, 34 L. ed. 843, 845; Gildart v. Gladstone, 12 East. 633; Dubuque & P. R. Co. v. Litchfield, 23 How. 66, 16 L. ed. 500, 509.

The franchise should be strictly construed against the grantee. Oregon Ry. and Nav. Co. v. Oregonian Ry. Co., 130 U. S. 1, 32 L. ed. 837, 842; Charles River Bridge v. Warren Bridge, 36 U. S. 11 Pet. 420, 9 L. ed. 773; Dubuque & P. R. Co. v. Litchfield, 64 U. S. 23 How. 66, 16 L. ed. 500. Nothing passes but what is conveyed in clear and explicit language. Central Transportation Co. v. Pullman Palace Car Company, 139 U. S. 1, 35 L. ed. 65; Holyoke W. P. Co. v. Lyman, 82 U. S., 15 Wall. 500, 21 L. ed. 133; The Binghampton, 70 U. S., 3 Wall. 51, 75, 18 L. ed. 137, 143; Rice v. Minnesota & N. W. R. Co., 66 U. S. 1; Black 355, 380, 17 L. ed. 147; Northwestern Fertilizing Co. v. Hyde Park, 97 U. S. 666, 24 L. ed. 1038; Hannibal and St. Joe R. R. Co. v. Mo. River Packet Co., 124 U. S. 271, 31 L. ed. 735; Stein v. Rienville Water Supply Co., 141 U. S. 67, 80, 35 L. ed. 622; Perrine v. The Chesapeake & Delaware Canal Co., 9 How. 172, 13 L. ed. 97; Omaha Water Works Co. v. Omaha, 147 Fed. 1; 12 L. R. A., N. S. 736, 743; Indiana Ry. Co. v. Hoffman, 69 N. E. 398, 402; Muncie, etc., Gas Co. v. City of Muncie, 66 N. E. 436, 442; Joy v. City of St. Louis, 138 U. S. 1, 34 L. ed. 843, 854, 855; Charles River Bridge v. Warren Bridge, 11 Pet. 420, 544, 547, 548, 9 L. ed. 773, 822, 824; St. Clair Turnp. Co. v. Illinois, 96 U. S. 63, 68, 24 L. ed. 651, 652; Oregon R. & Nav. Co. v. Oregonian R. Co., 130 U. S. 1, 26, 32, L. ed. 837, 842, 9 Sup, Ct. Rep. 689, 691; Coosaw Min. Co. v. South Carolina, 144 U. S. 550, 562, 36 L. ed. 537, 542, 12 Sup. Ct. Rep. 689, 691; Slidell v. Grandjean, 111 U. S. 412, 438, 28 L. ed.

321, 330, 4 Sup. Ct. Rep. 475; Knoxville Water Co. v. Knoxville, 200 U. S. 22, 50 L. ed. 353, 359; 27 A. & E. Enc. 1020; St. Louis v. Bell T. Co., 96 Mo. 623; State ex rel v. Sheboygan, 86 N. W. 657; Macklin v. Home Tel. Co., 24 Ohio C. C. 446.

A municipal corporation has power to stipulate as to the maximum rates to be charged. Muncie Natural Gas Co. v. Muncie, 66 N. E. 436; Henry J. Boerth v. Detroit City Gas Co., 152 Mich. 654; Westfield Gas & Milling Co v. Mendelhall, et al., 142 Ind. 538, 41 N. E. 1033; Zanesville v. Zanesville Gas-Light Co., 47 Ohio State 1, 23 N. E. 55; Allegheny v. Millville E. & S. Street R. Co., 159 Pa. 411, 28 A. 202; Robins v. B. R. & E. Co., 1 L. R. A., N. S. 963; C. L. 1897, sec. 2402, sub-secs. 3, 11; People West Side Street R. Co. v. Barnard, 110 N. Y. 548; Detroit v. Detroit City R. Co., 37 Mich. 558; C. & P. Tel. Co. v. Manning, 186 U. S. 238; Gas & Electric Light Co. v. Gaines, 49 S. W. 462.

The company has no right or power to change or modify a public contract by any rules or regulations which it may adopt. Note: 10 Am. St. Rep. 131; State v. Bell T. Co., 23 Fed. 539; Cumberland T. & T. Co. v. Hobart, 42 S. 349; Gas Elec. Light Co. v. Gaines, 49 S. W. 462; Louisville Gas Co. v. Dulaney & Alexander, 36 L. R. A. 125; Cent. U. Tel. Co. v. Bradbury, 106 Ind. 1, 5, N. E. 721; Johnson v. State, 113 Ind. 143, 15 N. E. 217; Cent. U. Tel. Co. v. Falley, 118 Ind. 194, 10 Am. St. Rep. 114.

STATEMENT OF FACTS.

The appellant received from the City of Albuquerque a grant of a privilege and a license to erect in, upon, across and along and under all streets and alleys of the City of Albuquerque, such poles, wires and fixtures, and to construct such underground conduits as may be necessary for the operation of a telephone exchange in said city. Section 6 of the ordinance making said grant is as follows:

"Section 6. This franchise shall be null and void unless the said Colorado Telephone Company, its successors or assigns, shall within fifteen days from the date of the passage hereof, execute and enter into a contract with the

mayor and city council relative to conditions not provided for * * * * * *."

Appellant thereupon has entered into a contract with the City of Albuquerque, and, among other things, obligated itself "to maintain telephone rental rates, and not to exceed the following amounts within a radius of one mile of its central office in Albuquerque, * * * *; 1 party residence, $36.00 per annum."

Appellee, a resident of the City of Albuquerque, applied to appellant to install one of its phones in his residence for a term of three months, and pursuant to the request the appellant installed a set of its instruments at an expense of $2.50. Thereafter, appellee moved his place of residence to another locality in the city and applied to the appellant to move its instruments so supplied to him to his last place of residence and to install the same for a term of three months. The appellant, pursuant to the request, did remove the instruments and install them in the appellee's last named place of residence at an expense of $2.00. At the time appellee applied for the installation of the phone, and when he applied to have the same removed to his last place of residence, he was aware of the existence of a rule theretofore promulgated by appellant, to the effect that on all contracts for less than one year's rental, a charge of $2.50 would be made for installation and a charge of $2.00 for removal of instruments. Appellee refused to make a contract for one year's rental and refused to pay the installation and removal charges. Thereupon appellant brought its action for $4.50 against appellee. Appellee demurred to the complaint upon the ground that the complaint failed to state facts sufficient to constitute a cause of action, which demurrer was sustained by the court, and the appellant, electing to stand upon its complaint, the cause was dismissed at the cost of appellant. From this judgment appellant appeals.

OPINION OF THE COURT.

PARKER, J.—From the foregoing statement it appears that there is a single question involved in this appeal,

viz., What is a proper construction of the charter and contract of appellant?

Appellee contends in support of the judgment of the court below that in construing a grant of power to corporations of the class of appellant, it is to be strictly construed against the grantee and that nothing passes but what is conveyed in clear and explicit terms and cites in support of his proposition Oregon Ry. and Nav. Co. v. Oregonian Ry. Co., 130 U. S. 1; Central Transportation Co. v. Pullman's Palace Car Co., 139 U. S. 24, and many other cases from the Supreme Court of the United States. Appellant does not deny this proposition, but, on the other hand, expressly admits it as correct. Appellant, however, attempts to draw a distinction between the grant of a right of this nature and a contract made in pursuance of such grant, and as a condition therefor. He claims that a different rule of construction is to be adopted in regard to the contract. Counsel cites in support of this proposition C. & P. Tel. Co. v. Manning, 186 U. S. 238. We do not deem that case as applicable to the facts in this case. In that case the question was whether an act of Congress prohibiting a charge of "more than $50 per annum for the use of a telephone on a separate wire," included such additional equipment as a wall cabinet, auxiliary bells, etc. In view of those facts, the court said: "In other words, there is no presumption of an intent to interfere with the management of a private corporation of its property any further than the public interests require, and so no interference will be adjudged beyond the clear letter of the statute." On the other hand, appellee cites Omaha Water Works Co. v. Omaha, 147 Fed. 1, a case in the Circuit Court of Appeals for the Eighth Circuit, in which the court, after examining numerous cases, extracts from them the following rule, which we adopt, viz.: "Where the meaning of a grant or contract regarding any public franchise is ambiguous or doubtful, it will be construed favorably to the rights of the public. Where the grant or the contract is clear and plain it will be protected and enforced."

It thus appears that the true rule is that both the

grant and the contract, in case of ambiguity or doubt, are to be construed favorably to the rights of the
1 public, and we so hold.

In the consideration of this contract a certain other well known rule of construction is applicable. Where a contract as a whole discloses a given intention, if cer-
2 tain words or clauses taken literally would defeat the intention, it will be construed, if possible, so as to be consistent with the general intention. 2 Page on Con., Sec. 1113.

Another consideration entering into a proper construction of this contract is as to the proper definition of the words "per annum" in relation to the rental charge. The words "per annum", of course, usually mean by the year, but they have often been held to have a somewhat different meaning. Thus, in Ramsdell v. Hulet, 50 Kan. 440, the words "per annum" in a note were held to mean merely the rate of interest and had nothing to do with the time when the interest was to be paid. To the same effect, Cooper v. Wright, 23 N. J. L. 200, and Tanner v. Investment Co., 12 Fed. 648.

In State v. McFetridge, 64 Wis. 130, the court held, that in fixing the rate of license for railroads, "per annum" meant in the year preceding the date of fixing the license, Cassidy, J., strongly dissenting, and applying the same construction to the words "per annum" which we do in this case.

In Haney v. Caldwell, 35 Ark. 156, it was held that a contract to pay an engineer $2500 per annum salary was not an employment for a definite period, but that the words "$2500 per annum" were a mere measure of compensation.

In Stanford v. Varnish Co., 43 N. J. L. 151, a contract increasing the salary of an employee in the sum of $104 per annum merely increased the weekly salary and did not convert the contract into an annual one. The words "per annum" were used only as a mode of computation.

In view of what has been heretofore stated we may

approach the consideration and construction of this contract as follows:

A public service corporation is desirous of securing a charter authorizing it to use the streets of the City of Albuquerque for its purposes in the construction, maintenance and operation of a telephone system. The city council is desirous of protecting the people of the City of Albuquerque from unjust charges for telephone service, and consequently exacted from the public service corporation the contract in question. It is perfectly apparent that the city council did not intend to prescribe maximum rental rates for only a portion of its inhabitants within the district mentioned in the contract. It proposed to prescribe maximum rental rates for all of its people. It, therefore, did not contract merely for those people who would
3 make an annual contract for a telephone, but the words "per annum" were inserted in the contract as furnishing a mode of computation merely for a rental charge. This evidently was the sense in which the words were used by the city. To conclude otherwise would be to convict the city council of the grossest failure in duty.

In view of the rules of construction herein before noted, there seems to be no difficulty whatever in holding that this is the true construction to be placed upon this contract. It is clearly susceptible of such construction and the rules of construction seem to require it.

Appellant seeks to justify the charges for installation and removal on the ground that they are made in pursuance of a reasonable regulation on their part. We cannot understand, however, that a regulation can under any circumstances be adopted by a public service corpora-
4 tion which will result in increasing a rental charge above what has been fixed by contract as a maximum charge. This was attempted in Johnson v. State, 113 Ind. 143, and it was held to be invalid. And the obligation to furnish telephone service at not to exceed a specified
5 rental charge certainly must include the installation of a usable appliance connected with a system.

For the reasons stated the judgment of the lower court will be affirmed; and it is so ordered.

[No. 1307, August 9, 1910.]

IN THE MATTER OF THE APPLICATION OF FRED VANDERWORK, TERRITORY OF NEW MEXICO., INTERVENOR, Appellants, v. J. M. HEWES and E. A. DEAN, Appellees.

SYLLABUS.

1. Laws of 1907, chapter 49, sec. 12, relates to public and unappropriated waters within the Territory flowing in streams and water courses.

2. Section 1, chapter 49, Act of 1907, does not give the territorial engineer the power to grant application for seepage water.

3. Section 53, chapter 49, Laws of 1907, gives the territorial engineer power to grant permits for such seepage water only as comes from "constructed works" and this is true regardless of whether the owner of the land upon which the water appeared, applied for its appropriation or not.

4. "Constructed works" refers to constructed reservoirs and ditches.

5. An artesian well is not "constructed works" under chapter 49, Act of 1907.

6. Where seepage or percolating waters are from an unknown source the territorial engineer has no jurisdiction over such waters and no power to grant a permit to use them.

7. A small quantity of water percolating to the surface and forming a small basin and coming from a source unknown is part of the land and each land owner can do with it as he chooses.

8. The owners of such land and such waters need not apply to the territorial engineer for a permit to appropriate the water and the applying of this water to their lands is an appropriation thereof.

9. The Act of 1907, chapter 49, does not empower the

territorial engineer to authorize another applicant to go upon lands held in private ownership, construct ditches and appropriate seepage water or waters from snows, rain or springs, not traceable to or from a stream or water course. or from constructed works.

10. If any surplus exists, after owner of land on which seepage water exists, has appropriated all he desires to a beneficial use, and such seepage water is permitted to enter the land of another, that other has a perfect right to appropriate it also to a beneficial use, but his rights are subject to the prior right of first owner to apply all of the water to a beneficial use on his own lands.

11. Any surplus which may exist beyond the necessities of the owners indicated above, would not be subject to appropriation and distribution under chapter 49, Laws of 1907, but if subject to appropriation at all without the consent of the owners, it would be governed by the general law of prior appropriation which is applicable to the lands of the arid West.

12. It is not necessary for owner of lands on which there is seepage water not from "constructed works," to make application to the territorial engineer for appropriation of it, and failure to make such application does not warrant another to make application for its appropriation.

Appeal from the District Court for Eddy County before W. H. Pope, Chief Justice. Affirmed.

Frank W. Clancy, Attorney General, and W. C. Reid for Appellants.

Seepage water of all kinds is subject to appropriation. Laws 1907, chapter 49, secs. 1, 53, 54; Samuel C. Weil on Water Rights in Western States, secs. 43, 102, 142, 360, 372; Millhiser v. Long, 10 N. M. 99; Civil Code California, sec. 1410; Katz v. Walkenshaw, 141 Cal. 166, 99 American St. Rep. 35; 70 Pac. 663; 74 Pac. 766; Cohen v. LaCanada Water Co., 76 Pac. 47; Cohen v. LaCanada

Water Co., 91 Pac. 584; ex parte Elam, 91 Pac. 811; Barclay v. Abraham, 64 L. R. A. 255; 100 American St. Rep. 365; Erickson v. Crookston Water Works, 111 N. W. Rep. 391, 8 L. R. A. New Series 1250; Kelly v. Natoma W. Co., 6 Cal. 108; Conger v. Weaver, 6 Cal. 557; 65 Am. Dec. 528; Eddy v. Simpson, 3 Cal. 253, 58 Am. Dec. 408; Hill v. Newman, 5 Cal. 446, 63 Am. Dec. 140; McDonald v. B. R. & A. W. Co., 13 Cal. 233.

"The question of riparian ownership is to be determined by state law." St. Anthony Water Falls Power Co. v. St. Paul Water Commissioners, 168 U. S. 366; Townsend v. State, 147 Ind. 624; Ohio Oil Co. v. Ind., 177 U. S. 190.

GRANTHAM & DYE for Appellees.

Percolating waters belong to the soil, form a part of the realty and may be used and controlled by the owner of the realty without regard to the effect of such use upon his neighbor's land or supply of water. Hanson v. McCue, 42 Cal. 308; Mosier v. Caldwell, 7 Nevada 363; Emporia v. Soden, 25 Kan. 410; Sullivan v. Northern Spy M. Co., 40 Pac. 709; Crescent Mining Co. v. Silver King M. Co., 54 Pac. 244; Willow Cr. Irr. Co. v. Michaelson, 60 Pac. 943; Harriman Irr. Co. v. Keel, 69 Pac. 710; Bruennig v. Dorr, 47 Pac. 290; Wolson v. Ward, 56 Pac. 573; Deadwood Cent. R. Co. v. Barker, 86 N. W. 619; Tyler v. Welch, 6 Ore. 198; Platt Valley Irr. Co. v. Buckers I. & M. Co., 25 Colo. 77, 53 Pac. 334; Boyce v. Cupper, 61 Pac. 642; Ogilvy Irr. and L. Co. 75 Pac. 598; Metcalf v. Nelson, 65 N. W. 911, 23 Pa. Rep. 528; Southern Pacific Railroad Co. v. Dufour, 19 L. R. A. 92; 108 N. Y. 400; 106 Penn. State 626; 51 Am. Rep. 542, and notes; 31 Am. State Rep. 438; 17 Am. State Rep. 796; 64 Am. Decisions 727, extended notes.

Besides the intent, which naturally precedes any definite action, appropriation consists of two things, diversion and application to beneficial use, and in case of irrigation the water must be applied to the land to make the appropriation complete. Mills Irrigation Manual, sec. 39, page 57; 45 Pac. 444; 34 Pac. 268.

Where seepage water is not from constructed works, it is not subject to appropriation. Mills Irrigation Manual, sec. 42, page 59; Slosser v. Salt River Val. Canal Co., 65 Pac. 332; Gould v. Canal Co., 76 Pac. 598; Reaffirmed 85 Pac. 117.

STATEMENT OF THE CASE.

From the opinion of Hon. William H. Pope, the presiding Judge who tried the case in the court below, we adopt the following statement of the facts, disclosed by the record, and upon which a reversal is sought in this court.

"That some time in the latter part of the year 1906, there appeared upon the surface of the land of J. M. Hewes, one of the contestants, seepage water or spring water, from some unknown source, at a place where there had been no seepage or spring water for at least five years previous.

"That the flow increased during the winter of 1906-07, diminished during the summer of 1907, and again increased during the fall of 1907, to such an extent that it spread over the public road and onto adjoining land of E. O. Dean, contestant herein, and that by reason of an embankment constructed on the land of said E. O. Dean, across a draw or swale, the water backed over the public road.

"The road overseer of that district requested permission of Dean to cut the embankment and allow the water to flow down upon the land of Dean and relieve the public road. To this Dean consented, provided that he be allowed to make use of the water for irrigating his lands and to construct a ditch to convey the water to his farm lands for that purpose. About the same time or subsequently thereto, Dean secured permission from said Hewes to so use the water and did construct a ditch for that purpose. The court further finds that on February 6, 1908, Fred Vanderwork, applicant named above, filed an application in the office of the Territorial Engineer for a permit to appropriate the water, claiming it to be subject to appropriation under Chapter 49, Laws of 1907. The plan of Vanderwork, as shown by his plats and field notes,

being to construct a deep ditch through the land of Hewes so as to carry off the water and convey it by ditch a distance of about one mile, in order to use the same for irrigating lands belonging to Vanderwork.

"After publication of notice, protest was filed by said Hewes and Dean. Upon a hearing on the protest, by the Territorial Engineer, he dismissed the protest and approved the application of Vanderwork. From this decision Hewes and Dean appealed.

"By agreement of counsel the appeal was submitted to the Board of Water Commissioners upon briefs and the affidavits and records in the office of the Territorial Engineer, and the Board of Water Commissioners, after hearing and considering same, reversed the findings and holdings of the Territorial Engineer, and found that the water in controversy was not subject to appropriation by Vanderwork, whereupon Vanderwork has appealed said controversy to this court."

OPINION OF THE COURT.

McFIE, J.—The main question for our consideration, is, whether or not the water involved in this controversy is public water subject to distribution by the Territorial Engineer under Chapter 49, Laws of 1907. It is clear that the application of Vanderwork for the appropriation of the water was made under that law and the permission granted by the engineer for the use of the water upon the lands of Vanderwork, necessarily assumes that the water which rises upon Hewes' land is subject to distribution under the provisions of the Act of 1907.

Section 12, Chapter 49, Laws of 1907, provides as follows:

"The Territorial Engineer shall have the supervision of the apportionment of the water in this Territory, according to the licenses issued by him and his predecessors and the adjudications of the courts."

This section, however, cannot be held to relate to
1 waters held in private ownership or by prior appro-
priation, but must be held to relate to public and unappropriated waters within the Territory.

Section 1 of the Act of 1907, makes this clear, as it provides, that:

"All natural waters flowing in streams and water courses, whether such be perennial or torrential, within the limits of the Territory of New Mexico, belong to the public and are subject to appropriation for beneficial use."

This section expressly limits the operation of the Act of 1907 to natural public waters within the Territory of New Mexico, with the further limitation, that it is water flowing in streams and water courses. This section, necessarily, indicates the character of the waters to which the engineer's jurisdiction attaches for purposes of distribution as provided for in the act, with the single exception of the seepage water referred to in section 53, of that act.

The legislature, therefore, did not confer upon the Territorial Engineer jurisdiction for the distribution of all the waters within the Territory, but only over such public waters as are embraced in section 1, and the seepage waters referred to in section 53, subject to the conditions therein expressed.

The case at bar seems to furnish an excellent illustration of the correctness of the above construction.

In the first place it is admitted that the water involved in this case does not come from a stream or water course as defined in section 1, of the Act of 1907, but, on the contrary, its source is unknown. Such being the case, it is not contended by appellant that this water comes from either a stream or water course.

That it is seepage or percolating water, seems to be accepted by all parties. In fact, appellant's application for permit, states that it is seepage water and not tributary to any stream. Clearly, then, the Territorial Engineer had no authority to grant Vanderwork a per-
2 mit to take this water under section 1, of the Act of 1907, but his authority to act must be found in section 53, if such authority existed.

Section 53 is as follows:

"In the case of the seepage water from any constructed works the owner of such works shall have had the first right to the use thereof upon filing and application

with the Territorial Engineer, as in the case of an original appropriation, but if such owner shall not file said application within one year after the completion of such works, or the appearance upon the surface of such seepage water, any party desiring to use the same shall make an application to the Territorial Engineer, as in the case of unappropriated water, and such party shall pay to the owner of such works reasonable charge for the storage or carriage of such water in such works; *Provided,* That the appearance of such seepage water can be traced beyond a reasonable doubt to the storage or carriage of water in such works."

Under the above section the only seepage water over
3 which the engineer has power to grant permits for appropriation by applicants is seepage water from "constructed works."

The term "constructed works" is used in many of the sections of the Act of 1907, and, as was held by the Board of Water Commissioners, in its opinion overruling the Territorial Engineer, refers to constructed reser-
4 voirs and ditches. There being no proof of any such constructed works, or proof that the seepage water came from such works, the engineer was without authority under that section to grant permits for its appropriation by the appellant; and this is true regardless of whether the owner of the land upon which the water appeared, applied for its appropriation or not.

It is true, that one witness was of the opinion that the water came from a dynamited artesian well, three-fourths of a mile away. This, of course, was only a speculative opinion of the witness. Even if true, it
5 would be immaterial, as this well would not be constructed works, within the act.

These sections are the only sections in the Act of 1907 conferring authority upon the Territorial Engineer to grant permits or licenses for the appropriation of water, and as the waters, for the use of which the engineer granted the appellant a permit, were not of the character embraced in either section 1 or 53, but were seepage or percolating waters from an unknown source, the lower

6 court, correctly held, that the Territorial Engineer had no jurisdiction over such waters and no power to grant appellant a permit to appropriate them.

Counsel for appellant further contend, that although appellant's permit for the appropriation of the water on Hewes' land may not be upheld, he has a superior right, by virtue of his attempted appropriation as against Dean, and even Hewes, the owner of the land upon which the water appears upon the surface, except as to so much as may be applied to a beneficial use by Hewes, upon his own land. Counsel, in his able brief, presents a line of authorities supporting the doctrine of *"a reasonable use"* rather than ownership of seepage or percolating waters upon lands in private ownership, and in a proper case, these cases would have great force, but in our opinion, the present case does not come within the doctrine laid down in Katz v. Walkinshaw, 141 Cal. 116, a leading case upon this subject.

This case, and many others, involve the disposition of percolating water from large areas of land saturated with artesian water, and the same rules of law pertaining to surface and subterranean streams is held to be applicable to such water, notwithstanding such water is not in a channel with well defined bed and banks, the accepted definition of streams and water courses.

The case, at bar, is entirely different, in this, that a small quantity of water percolates to the surface and forms a small basin, wholly upon the lands of Hewes, and coming from a source unknown, so far as the record discloses.

While this water sometimes recedes to the point of disappearance and returns again to the surface, it spreads over a part of Hewes' land at times and upon a portion of the lands of Dean, an adjoining owner.

It must be conceded, that for many years, the law as to such waters has been that the water was a part of the land and that each land owner could do with it as he
7 chose. Southern Pacific R. R. Co. v. Dufour, 19 L. R. A. 92.

The case of Metcalfe v. Nelson, 65 N. W. 911, we re-

gard as directly in point under the facts in this case. The court in that case says:

"As the hidden water in the plaintiff's soil belonged to him as a part of it, he might, by artificial means, separate it from the soil, and it would still belong to him. He might sink a well, into which such water would work its way, and the accumulation in the well would still be his, and subject to his proprietary control. Davis v. Spaulding, (Mass.) 32 N. E. 650.

"If the water which fills this spring is not subject to the law of running streams, but to that of percolating water, did the plaintiff lose his ownership of it when it appeared upon the surface?

"If a cloud had burst on plaintiff's land, and filled a cavity thereon with rain, it would, while so confined, belong to plaintiff, and we are unable to see why or how the question of ownership can be made to depend upon which way the water comes from. Suppose this percolating water appeared at the surface only at the point of the spring, and at once sunk away again into the surrounding soil, resuming its character of wandering, seeping water, would the plaintiff's proprietary rights come and go with the appearance and disappearance of the water? It must be remembered that we are not dealing with a running stream, or with riparian rights, but simply with percolating waters which have combined and struggled to the surface on plaintiff's land. We think the plaintiff had more than the ordinary usufruct in the water of this spring, so long, at least, as it was held in the spring. He might consume or dispose of it all if he chose. He might convey it away in pipes, or carry it off in tanks. If medicinal, he might bottle it, and sell it for the healing of the nations. It would be inconsistent with the maintenance of such right, in plaintiff to allow that the defendant or, any other stranger had also the right, in hostility to the plaintiff, to take and carry away water from the same spring.

"While it may not be technically correct to say that the land owner is the absolute owner of percolating waters gathered into a spring or well, such is often the expression of the courts and text writers, and probably means

what, in respect to water, is practically equivalent to ownership, * * * the exclusive right to use and dispose of it. While the precise question presented by this case appears to be novel, there are many cases which recognize the right of the owner of land upon which a spring so appears to sell and dispose of the right to all or a portion of the water it supplies."

The court below affirmed the decision of the Board of Water Commissioners, overruling the Territorial Engineer in granting Vanderwork a permit to appropriate this water, and in doing so the court said:

"In the opinion of the court, this water on the land of Hewes and Dean is not subject to appropriation by any one without their consent, so as to deprive them of the use thereof on their land. The court is further of the
8 opinion, that Hewes and Dean did not have to apply to the Territorial Engineer for a permit to appropriate this water, and that the applying of this water to their lands was an appropriation thereof."

This, we believe, to be a correct statement of the right of the parties under the law, as it is immaterial whether Hewes was the absolute owner of the water on his land or had the exclusive right to appropriate it and apply it to a beneficial use upon his lands. Hewes' testimony is to the effect that he was applying the water to a part of his lands and was preparing to use it upon one hundred acres of his land. He certainly has the right to do this if he can.

The court below found, that the water percolating to the surface on Hewes' land "does not flow in a defined channel, or stream, but spreads over the sod, following the swales on the surface of the land of Hewes and Dean."

The appellant, under his permit from the Territorial Engineer claims all of the water which reaches the lands of Dean in this way, notwithstanding, Dean, with the consent of Hewes, has constructed a ditch or ditches to receive and conduct any surplus water which may reach his land, and claims the right to its use upon fifty acres of his land, and he has, undoubtedly, the better right to it as a prior appropriator, as between himself and Vanderwork.

It would be doing violence to the Act of 1907, to hold, that the Territorial Engineer was empowered by it, to authorize another applicant to go upon lands held in private ownership, construct ditches and appropriate seepage water or waters from snows, rain or springs, not trace-
9 able to or forming a stream or water course, or from constructed works, as the limitations contained in sections 1 and 53, defining the waters over which the engineer has been given jurisdiction, plainly indicates.

In our opinion, therefore, if any surplus water exists, after Hewes has appropriated to a beneficial use, all he desires, and is permitted to enter the lands of Dean, he has a perfect right to appropriate it also to a beneficial use; but the rights of Dean are subject to the prior
10 right of Hewes to apply all of the water to a beneficial use on his lands.

As to the water in controversy in this case, any surplus which may in future exist beyond the necessities of Hewes and Dean, would not be subject to appropriation and distribution under Chapter 49, Laws of 1907, but, if subject to appropriation at all without the consent of
11 Hewes and Dean, it would be governed by the general law of prior appropriation which is applicable to the arid lands of the West.

This water, not being seepage water from constructed
12 works, and therefore, not subject to distribution under the Act of 1907, it was not necessary for Hewes to make application within a year to the Territorial Engineer for the appropriation of it, and his failure to make application, as provided in section 53, did not warrant an application for the appropriation of it by the appellant.

The decision of the lower court is affirmed with costs, and it is so ordered.

Associate Justice Wright, who did not hear the argument of this case, did not participate.

[No. 1331, August 9, 1910.]

CARRIE M. CHILDERS, Executrix, Appellant, v. FRANK A. HUBBELL, Appellee.

SYLLABUS (BY THE COURT.)

1. It is the duty of the court to direct a verdict where in the exercise of a sound judicial discretion it would be called upon to set aside a contrary verdict. Gildersleeve v. Atkinson, 6 N. M. 250, followed.

2. Under Comp. Laws, Sec. 3021, requiring corroboration of the claimant's testimony in a suit against the executor of a deceased person, there was error in allowing the item of $500 in defendant's counter claim.

Appeal from the District Court for Bernalillo County before IRA A. ABBOTT, Associate Justice. Affirmed upon remittitur.

SUMMERS BURKHART for Appellant.

There was no evidence to support defendant's counter claim for money paid to the Bank of Commerce, and if it be held that there was such evidence, there was no corroboration of it as required by section 3021, C. L. 1897. Gildersleeve v. Atkinson, 6 N. M. 260; Byert v. Robinson, 9 N. M. 432.

The court erred in instructing for appellee. U. S. v. Gumm, 9 N. M. 617.

MARRON & WOOD for Appellee.

There was ample corroboration of the defendant's evidence. Gildersleeve v. Atkinson, 6 N. M. 250, 260.

The possession of these checks by the defendant, endorsed by him as chairman, proved *prima facie* his ownership of the checks, and that he had paid full value for them. Leitensdorfer v. Webb, 1 N. M. 34 at 51; Negotiable Inst. Law, secs. 52-59.

Where there is no evidence for the jury to pass upon,

or where the evidence is of such a character that the court, in the exercise of its sound judicial discretion, would be called upon to set aside the verdict and grant a new trial, if found in favor of one party rather than the other, 'it is the right and duty of the judge to direct the jury to find according to the views of the court. Gildersleeve v. Atkinson, 6 N. M. 250-265; 6 Enc. Pl. & Pr. 679, and cases cited.

The errors complained of by the appellant, if any, have been waived and are not before the court for review. Laws 1907, ch. 57, sec. 37; Anderson v. Territory, 4 N. Mex. 108; Territory v. Christman, 9 N. Mex. 582; Raper v. Amer. Tin Plate Co., 156 Ind. 323; Klots v. Penton, 101 Mo. 213; Norres v. Evans, Kas., 18 Pac. 818; Chavez v. Meyer, 85 Pac. 233; Nashville, etc., Co. v. Moore, Ala. 41 So. 984; Whitaker v. Nichols, 87 Pac. 865; Ottawa Ry. Co. v. McMath, 91 Ill. 104; Ft. Scott Ry. Co. v. Jones, 48 Kas. 51; Wolcott v. Backman, 3 Wyo. 335; Braman v. Record, 42 Ind. 181.

The facts are stated in the opinion.

POPE, C. J.—The appellant as executrix of the last will of William B. Childers brought suit against Hubbell, for $6,000 for professional services alleged to have been rendered by Childers to Hubbell. The latter filed a counter claim praying judgment for $710. On the trial appellant entered a dismissal and the cause proceeded upon the counter claim with the result that the court instructed the jury to find for defendant in the full amount sued for. The correctness of this ruling is the question controlling this appeal.

The counter claim proceeded upon two items: One for $500 being an amount which defendant alleges that he "at the request and by the direction of the said William B. Childers paid, laid out and expended for and on behalf of said Wm. B. Childers to the Bank of Commerce of the City of Albuquerque, the sum of $500 being the amount of two checks given by the said William B. Childers to this defendant as chairman of the republican committee of Ber-

nalillo County which said sum the said William B. Childers promised and agreed to repay to this defendant," and the other being for fifteen tons of hay and alfalfa alleged to have been sold and delivered to said Childers during the year 1908. It is claimed by appellant that as to the first of these items the peremptory instruction was wrong because there was no corroboration of the testimony of the cross plaintiff as required, in cases of claims against deceased persons, by C. L. Sec. 3021, and that as to the second such instruction was wrong because there was a conflict of evidence which should have gone to the jury. Dealing with the assignments in inverse order we hold the latter not well taken. The testimony for Hubbell is positive to the effect that the hay was delivered. The opposing evidence is negative in character and is so vague and uncertain as in our judgment not to raise any substantial issue. The case was thus within the rule announced by this court in Gildersleeve v. Atkinson, 6 N. M. 250, to the effect that it is the duty of the court to direct a ver-
1 dict where in the exercise of a sound judicial discretion it would be called upon to set aside a contrary verdict. We hold therefore that the trial judge did not err in directing a verdict on this branch of the case.

The remaining assignment is a more serious one. Our statute on the subject (C. L. Sec. 3021) proceeds: "In a suit by or against the heirs, executors, administrators, or assigns of a deceased person, an opposite or interested party to the suit shall not obtain a verdict, judgment or decision therein, on his own evidence, in respect of any matter occurring before the death of the deceased person, unless such evidence is corroborated by some other material evidence."

The corroboration thus required has been defined by this court as follows: "Corroborating evidence is such evidence as tends, in some degree, of its own strength and independently, to support some essential allegation or issue raised by the pleadings testified to by the witness whose evidence is sought to be corroborated, which allegation or issue, if unsupported, would be fatal to the case; and such corroborating evidence must of itself, without the aid of any other

evidence, exhibit its corroborative character by pointing with reasonable certainty to the allegation or issue which it supports. And such evidence will not be material unless the evidence sought to be corroborated itself supports the allegation or point in issue." Gildersleeve v. Atkinson, 6 N. M. 250, 260.

This statute has been further considered and construed in Radcliffe v. Chaves, decided at the present term. Bearing in mind that this is a suit not upon the checks mentioned above, but upon the contract to repay implied from the payment of money for Childers at his request, is there any evidence aside from Hubbell's tending to support "some essential allegation" raised by the pleadings? These latter essentials are that Hubbell (a) at the request and by the direction of Childers (b) paid on the latter's behalf to the Bank of Commerce (c) the sum of five hundred dollars.

The testimony of Hubbell so far as corroborated shows that Childers gave Hubbell two checks of $250 each. These were left by Hubbell in the Bank of Commerce for collection, but were never carried into Hubbell's account and later on were returned unpaid to Hubbell in whose possession they have remained. Beyond this the uncorroborated testimony of Hubbell is that the checks were contributions to the then current political campaign; that at the end of the campaign there was an overdraft of some $5,000 at said bank on his account as chairman of the campaign committee; that he asked Childers to pay the checks, presumably in order that by application of the proceeds to the overdraft it might be decreased; that Childers requested him to pay the overdraft and take up the checks, holding the checks until he (Childers) could pay them off. Hubbell paid the overdrafts, still leaving the checks for collection. Some time later they were returned to him by the bank.

We find in the foregoing none of the element of corroboration necessary under the statute. Recurring to the material allegations above outlined, there is no corroboration of these in any material respect. There is no corroboration of the claim that he paid any money to the

bank at Childers' request. Indeed Hubbell's own statement is that the amount paid was not on behalf of Childers, since the Childers checks had never been carried into Hubbell's account as chairman, but such payment was of an overdraft on his (Hubbell's) account as chairman and therefore on behalf of the committee rather than of Childers. Counsel for appellee contends that the possession of the checks by Hubbell affords the necessary corroboration. But we find no such significance in the fact. Under Hubbell's statement of his arrangement with Childers he was, it is true, to hold the checks if he paid the overdraft. But equally was he entitled to the possession of the checks had he not paid the overdraft. The checks being payable to his order and having been left for collection the regular course of business required their return to him if unpaid. Since necessarily they came back to him whether he paid the committee's overdraft or not, their possession by him affords no proof of such payment nor of any payment on behalf of Childers. Failing therefore to find in the only circumstance relied upon by appellee's counsel or in any other testimony appearing

2 in the record any corroboration of appellee's claim the cause must, as to this item, be reversed.

Counsel for appellee having upon the argument asked that in the event of an adverse ruling upon either of these items he be given the privilege of a remittitur, it is the decision of the court that if the appellee shall within twenty days from this date file a remittitur of $500 on the judgment awarded, then the latter shall stand modified so as to run for $210 and as so modified shall stand affirmed with costs; otherwise the cause to stand reversed and remanded with direction for a new trial.

(The above judgment as to costs is modified by the opinion in case No. 1263, King v. Tabor.)

[No. 1334, August 9, 1910.]

CHARLES MELINI and J. D. EAKIN, Co-Partners Under the Firm Name of Melini & Eakin, Appellants, v. FREIGE and NICHOLAS FREIGE, Co-Partners Under the Firm Name of Alex Freige & Brother, Appellees.

SYLLABUS (BY THE COURT.)

1. Assignments of error which fail to point out the specific error complained of, will not be considered on appeal. Cevada v. Miera, 10 N. M. 62.

2. An assignment of error that a verdict is against the weight of the evidence will not be considered on appeal. Cunningham v. Springer, 13 N. M. 259.

3. Error on the improper dissolution of an attachment is harmless where finding in the main case was that defendant owed plaintiff nothing.

4. Where the matter at issue was whether or not a valuable consideration was paid for the abrogation of a lease and evidence was introduced that certain articles of personal property were given in consideration of such abrogation, it is not error to allow the owner of such property to testify as to their cost as tending to show that they had some value.

Appeal from the District Court for Bernalillo County before IRA A. ABBOTT, Associate Justice. Affirmed.

ISAAC BARTH for Appellants.

The purpose of an attachment is to secure to the plaintiff the benefit of such judgment as he might recover. 4 Cyc. page 403, and cases cited; Laws 1907, ch. 107; Smith Drug Co. v. Casper Drug Co., 40 Pac. 979; 4 Cyc. 812; Adams v. Evant, Miss. 1896, 19 So. 834; Hockspringer v. Ballenburg, 16 Ohio 304; Emmett v. Yeigh, 12 Ohio St. 335; Carton v. Paige, 9 Ohio St. 397; Harrison v. King, 9 Ohio St. 388; Tallon v. Elison, 3 Neb. 63.

The only ground for the dissolution of an attachment is that it was improperly or irregularly issued. Century Digest 943; Mason v. Lieuallen, 1895, Idaho; Cooper v. Reeves, 13 Ind. 53; Searcy v. Platte County, 10 Mo. 269; Waldert v. Nedderhut Packing Co., 18 Tex. Civ. App. 602; Ward v. Ward, 43 W. Va. 1.

Parole is inadmissable to prove the cancelling of a written contract. It is the strongest evidence that can be given against it. Century Digest, vol. 20, column 3095; Sharkey v. Wood, 5 Rob. 326; William Deering & Co. v. Russell, 5 N. D. 319; Stewart v. Kindell, 15 Colo. 539; Kern v. Calvit, 1 Miss., Walk. 115, 12 Am. Dec. 537; U. S. v. Hughes, 34 Fed. 732; State v. Miller, 49 Mo. 505.

NEILL B. FIELD for Appellee.

If the cause of action fails the attachment must fall with it. C. L. 1897, sub-secs. 43, 46.

When a party to an action applies for an order which is granted to him upon the condition of paying costs or doing any other thing, and the party accepts the benefit of the order, and performs the condition, he waives his right to appeal from that part of the order imposing the condition. Cogswell v. Colley, 22 Wisc. 399; Radway v. Graham, 4 Abb. 468; Vail v. Remsen, 7 Paige 206; Bennett v. Van Syckel, 18 N. Y. 481; Buckman v. Alwood, 44 Ill. 183; Holt v. Rees, 46 Ill. 181; Glackin v. Zeller, 52 Barb. 152; Burton v. Brown's Executors, 22 Gratt., Va. 1; Alabama & V. Ry. Co. v. Davis, 69 Miss. 444, 13 South. 693; Tuller v. Howard, 40 N. Y. 739, 17 Mics. 105; Flanders v. Town of Merrimac, 44 Wis. 621, 623; Smith v. Morgan, 56 S. W. Tex. 950, 951; U. S. v. Griego, 11 N. M. 392, 411.

A general assignment of errors or an assignment of error that the verdict is contrary to the weight of the evidence or against the law and the evidence, will not be considered on appeal. Cunningham v. Springer, 13 N. M. 259, 273; Chaves v. Lucero, 13 N. M. 368, 380; Maxwell v. Tufts, 8 N. M. 401; Lamy v. Lamy, 4 N. M. 29; Mogollon v. Stout, 14 N. M. 245; Cevada v. Miera, 10 N. M.

62, 66; Pearce v. Strickler, 9 N. M. 467; Badeau v. Baca, 2 N. M. 194; Territory v. Webb. 2 N. M. 147; Waldo v. Beckwith, 1 N. M. 97; Territory v. Maxwell, 2 N. M. 250; Torlina v. Trorlich, 5 N. M. 148; Armijo v. Abeytia, 5 N. M. 533; U. S. v. De Amador, 6 N. M. 173; Territory v. Hicks, 6 N. M. 596; Trujillo v. Territory, 7 N. M. 43; A. T. & S. F. Ry. Co. v Martin, 7 N. M. 158; Green v. Browne & Manzanares, 11 N. M. 658; Robinson v. Palatine Insurance Co., 11 N. M. 162; Schofield v. Territory, 9 N. M. 526.

The only absolute test we can have of the value of a merchantable article is what it has been sold for at a fair sale. Budd v. Van Orden, 33 N. J. Eq. 143, 146; Burke v. Pierce, 83 Fed. 95; Swanson v. Keokuk & W. R. Co., 116 Iowa 304, 89 N. W. 1088; Atwood v. Berss, 45 Mich. 469; 8 N. W. 55; Humphreys v. Minn. Clay Co., 94 Minn. 469, 103 N. W. 338; Southern Ry. Co. v. Williams, 113 Ga. 335, 38 S. E. 744; Terre Haute & I. R. Co. v. Smith, 65 Ill. App. 101; Bringham v. Knox 127 Cal. 40, 59 Pac. 198; Matthews v. Mo. Pac. Ry. Co., 142 Mo. 645, 44 S. W. 802.

STATEMENT OF FACTS.

This was an action brought by the appellants, hereinafter called plaintiffs, against appellees, hereinafter called defendants, in the district court of Bernalillo County for the recovery of rent. A lease had been made February 10, 1908, between these parties for the rental of a building in Albuquerque at $80 per month for a period of two years. The complaint alleges that the defendants quit the premises and were at the time indebted to the plaintiffs in the sum of $440, for rent due, and they brought suit for this amount and for the further sum of $100 for attorney's fees expended in enforcing covenants of the lease. The defendants answered that they had rented the building for the rental specified in the complaint and that they quit the premises on or about the first day of May, 1908; that it was agreed between them and plaintiffs; "that the said plaintiffs would accept and receive from the said defendants, and that the said defendants would deliver and surrender to said plaintiffs, certain shelving and fixtures, and electric

light wiring, and the rights of these defendants to certain moneys theretofore paid by these defendants to the Albuquerque Water Supply Company and the Albuquerque Gas, Electric Light and Power Company by way of advance payment for services of said companies, and that the said plaintiffs in consideration thereof, would and did consent to the abrogation of the said lease and to the release of these defendants from all further liability on account thereof;" and that in consideration of said agreement the appellees did surrender and deliver to appellants and appellants did receive from appellees, "certain shelving and fixtures, and electric light wiring, and the rights of these defendants to certain moneys theretofore paid by these defendants to the Albuquerque Water Supply Company and the Albuquerque Gas, Electric Light and Power Company and did then and there accept from these defendants possession of said leased premises, and did agree to release these defendants from all liability on account of the covenants contained in the said lease and from all liability for rent thereafter to accrue under the terms thereof, which said release and surrender was by the said defendants accepted and acted upon."

The plaintiffs sued out a writ of attachment against the defendants and garnisheed two banks in which the defendants had money on deposit. After the answer of the defendants was filed, and they also filed a traverse of affidavit in attachment, they moved for judgment on the pleadings for want of a reply to the new matter set forth in the answer. Thereafter the plaintiffs moved for leave to file reply, which motion was by the court granted upon conditions, the condition being that the plaintiffs should forthwith file a written dismissal of the attachment and discharge the garnishees. Thereafter the plaintiffs filed a written dismissal of their attachment and a reply denying the new matter set up in the answer. The case was tried to a jury and a verdict returned finding issues for the defendants.

OPINION OF THE COURT.

MECHEM, J.—There are six assignments of error made in the brief. Of these, the 2nd, 3rd, and 6th assignments read as follows:

"That the said verdict is contrary to the law and the evidence."

"That said verdict was rendered against the weight of evidence," and "for many other manifest errors in the trial of this cause, which appear in the record and were prejudicial to the plaintiff."

It has been repeatedly held by this court that an assignment of error must point out the specific error complained of. Schofield v. Territory, 9 N. M. 526;
1 Cevada v. Miera, 10 N. M. 62; Pearce v. Strickler, 9 N. M. 467.

In the case of Cunningham v. Springer, 13 N. M. 259, it was said: "This court has repeatedly held, that where there is a conflict of evidence, it being the exclusive province of the jury to determine the weight and
2 credibility of the testimony, the verdict will not be disturbed in the appellate court"; citing numerous cases heretofore decided on this point by the court.

For these reasons we will not consider the 2nd, 3rd and 6th assignments of error.

2. The plaintiffs assign error to the action of the court in requiring them, before leave to file a reply, to dismiss their attachment. In view of the fact that
3 the jury found that there was no debt owing from defendants to the plaintiffs, we deem it unnecessary to pass upon this assignment, because if the debt upon which the attachment was set out did not exist, it did not matter whether or not there was error in the court's requiring the appellants to dismiss their attachment for had the attachment remained in force there could have been no lien. Smith v. Morgan, 56 S. W. 950.

3. By their fourth and fifth assignments of error, the plaintiffs claim that the court erred in permitting the witness Alex Fregie, one of the defendants, to testify as to the value of the electric light fixtures, and shelving alleged to have been left in the building because said evi-

dence is irrelevant and immaterial, and because no proper foundation for such evidence is laid.

We have examined the record of this witness' testimony and find that he did not testify as to the value of the shelving and fixtures, but only as to what they cost, but we believe that this evidence was admissible as it went to show that the shelving and fixtures constituted a valuable consideration, for it was alleged in the answer that "the said lease was for a valuable consideration by the defendants to the plaintiffs then and there paid, then and there surrendered and abrogated;" and the reply denies this in these words: "The plaintiffs deny that for a valuable consideration or at all they did abrogate the lease mentioned in the pleadings herein." The consideration alleged by the defendants to be a valuable consideration was the shelving and fixtures, so that necessarily the question was raised as to whether or not they were a valuable consideration. Therefore, any evidence tending to show that they were of some value was competent and material, and
4 certainly, testimony as to what they cost the person parting with them was competent to show, not their value, but that they were of some value.

For the foregoing reasons the judgment of the lower court is affirmed; and it is so ordered.

[No. 1227, August 10, 1910.]

GEORGE K. NEHER, Appellant, v. ANGELO VIVIANI et al, Appellees.

SYLLABUS.

1. Upon evidence of extrinsic facts showing uncertainty as to time of completion, it was a question of fact for the jury whether or not the building was completed within a reasonable time.

2. Use of the words "extravagant and unnecessary," in an instruction, as to the cost of a building, is supported by evidence disclosing that in the accounts submitted to show that the value of the building was $30,000, as required

by the contract, numerous charges were included which had no relation to the construction of the building, such, for instance, as printing tickets, court costs, hack fare.

3. The "piano, furniture, carpets and similar articles, movable and practically as well adapted to use elsewhere," cannot be said to be a necessary part of a theater building.

4. A written agreement is for the court to construe and not for the jury.

5. Requested instructions referring to furniture and appointments, which ignore the distinction drawn as to whether or not they were of a fixed and permanent nature or movable, declared incorrect upon the question of the value of the building.

6. Receipts are not the best evidence that the articles for which they were supposed to represent payment, were used in the construction of a building and formed a legitimate part of its alleged cost.

7. Assignments of error must be specific.

Appeal from the District Court for Bernalillo County before IRA A. ABBOTT, Associate Justice. Affirmed.

E. W. DOBSON for Appellant.

Where contract is silent as to time in which building should be completed and the evidence with reference to the completion and date thereof is undisputed, it is error for the court to submit the question to the jury whether or not it was completed in reasonable time. Fleischner, Mayer & Co. v. Kubli, 20 Or. 339, 25 Pac. 1086; Howell v. Johnson, 38 Ore. 571, 64 Pac. 659; Goltra v. Penland, 77 Pac. 131, Ore.; Gilmore v. Wilbur, 22 Am. Dec. 413, 12 Pick. 120; Morse v. Bellows, 28 Am. Dec. 377, 7 N. H. 549; Bowen v. Detroit City St. Ry. Co., 20 N. W. 562, 54 Mich. 496; McFadden v. Henderson, 29 Southern 642, Ala.; 2 Parsons on Contracts, 9th ed., 687, 688, bottom paging, sec. 535; id. bottom paging 813, sec. 661.

No instruction should be given which assumes as a

matter of fact that which is not conceded or established by uncontradicted evidence. United States v. Breitling, 20 How. 254, 15 Co-op. ed. 900; Bank v. Elred, 9 Wall. 544; Bank v. Hunt, 11 Wall. 391; Tracy v. Swartout, 10 Peters 97; Railroad Co. v. Gladmon, 15 Wall. 409; 1 Blashfield Inst. to Juries, sec. 33 and cases cited in the notes.

Where the terms of a promise admit of more senses than one, it is to be interpreted in the sense in which the promisor had reason to suppose it was understood by the promisee. Potter v. Berthelet, 20 Fed. Rep. 243; White v. Hoyt, 73 N. Y. 506; 1 Thompson on Trials, sec. 1081, p. 838, and cases cited in note 3 to the text; Canal Co. v. Hill, 15 Wall. 94; Etting v. Bank, 11 Wheat. 59; Barreda v. Silsbee, 21 How. 146, especially 170; 1 Blashfield Inst. to Juries, sec. 33 and cases cited.

THOMAS N. WILKERSON for Appellee.

Whether building was completed in reasonable time, in the absence of definite testimony as to date of its completion, is a question for the jury. A. & E. Enc. Law, vol. 23, pp. 565, 566, 585, and authorities cited.

STATEMENT OF THE CASE.

Appellant, plaintiff below, filed his complaint against Angelo Viviani and Lorenzo Gradi, and the Bank of Commerce, alleging that on February 4, 1899, said Viviani and Gradi, with one Lombardo, entered into an agreement with one, Frank P. McClure, a copy of the agreement being as follows:

"We, the undersigned, agree to guarantee to Frank P. McClure ($3,000.00) three thousand dollars, to be paid to the said Frank P. McClure when he has foundation completed for the new proposed opera house to be located on Third street, between Copper avenue and Tijeras road.

"We further agree to guarantee the said Frank P. McClure a clear title to the property as set forth in the warranty deeds made for the same, one from A. Viviani and one from Peter Badaracco to the said Frank P. McClure,

also to pay the said Frank P. McClure any amount of money that he may lose by Joe Badarraco or Peter Badaracco interfering, in any way, with the title to the above mentioned property."

The complaint further alleges that the consideration for the agreement was that McClure should erect an opera house on a certain tract of land in Albuquerque, described in paragraph 1, page 4 of the record. That in pursuance of said agreement deeds to said land were deposited in escrow with the Bank of Commerce, under an escrow agreement containing the following clauses:

"These warranty deeds are placed in escrow with your bank with the following instructions, to-wit: In case of the said Frank P. McClure erecting, building and completing a modern $30,000 theater building upon the premises described in the warranty deeds made to him as grantee, then you shall deliver to the respective grantees the respective deeds; *Provided, however,* That the amounts specified to be paid in the respective deeds to the respective grantors has been paid as set forth in said deeds. Further, the said grantors shall have the right to use such portion of the theater building wall, or party walls that may come upon the dividing line between the respective owners.

"In event of the said Frank P. McClure not erecting, building and completing or causing to be erected, built and completed upon the said premises said theater building, and provided further, that if the erection thereof is not started within thirty days after the date of this escrow, then in that event, you are to deliver the respective deeds to the respective grantors."

The bank was to deliver the deeds to said McClure, and a deed for an alley sixteen feet to the city of Albuquerque, provided said McClure, or his heirs or representatives, should construct a theater building on said premises, work to be commenced within ninety days from the date of a notice provided for.

The complaint further alleges, that work was commenced within said time and that said agreement was fully complied with; and further alleges that McClure assigned and conveyed to plaintiff, for a valuable consideration, all

his right, title and interest in said agreement and guaranty, and also conveyed to him his interest in said land. It then alleges that defendants notified said bank not to deliver the deeds to plaintiff, and that the bank refused to do so; and prayed that the bank be compelled to deliver the deeds to plaintiff and that his title to said premises be quieted.

There is a second count in the complaint, which repeats the allegations of the first count to the prayer for relief, and further alleges, that after the making of said guarantee, the title to a portion of said premises, which defendants had guaranteed, failed and was, in a separate proceeding, decreed to be in one Joseph Badaracco; that thereby said land was lost to plaintiff and he sustained a loss and prayed judgment for $3,000.00 damages.

The amount prayed for was originally $1,000 but on a former trial of the case, the same was amended, increasing the claim for damages to $3,000.

After a demurrer to the complaint and a motion for a bill of particulars had been overruled, defendants filed an answer admitting the execution of the agreement alleged, and that work was commenced within ninety days, but denying that the work was prosecuted to completion, and denying that a modern theater building was erected of the value of thirty thousand dollars, as contemplated by the contract; denying that the plaintiff became the successor to the rights of said McClure by virtue of the deeds given by McClure; and denying that plaintiff is entitled to receive said deeds from said bank.

The answer further admits the failure of the title, as alleged, but denies that McClure or plaintiff ever complied with the contract, by the erection and completion of the theater building; denies that the plaintiff ever became entitled to said deed or the property, and denies injury to the plaintiff or that he is entitled to any relief whatever.

Paragraph 9 of the answer, which attacked the assignment by McClure to the plaintiff, was demurred to, and the demurrer being sustained, the paragraph was eliminated.

On the 1st day of October, 1906, the cause was tried before a jury and a verdict for the defendants was rendered.

A motion for a new trial was filed and denied, and judgment upon the verdict was rendered by the court.

From this judgment the plaintiff, in the court below, appealed to this court.

OPINION OF THE COURT.

McFIE, J.—Numerous errors have been assigned in this case, but only a few of them seem to be relied upon by the appellant, and those relied upon are discussed in appellant's brief.

The first point contended for by the appellant involves the sixth and twelfth paragraphs of the court's instructions to the jury. The sixth instruction was as follows:

"6. The agreement does not specify any time within which the building provided for should be completed, and you are instructed that its requirements were complied with in that particular if it was completed within a reasonable time and before this suit was brought."

It is urged that this instruction was erroneous, in that it was left to the jury to determine, as a question of fact, whether or not the theater building was completed within a reasonable time.

As will be observed, the agreement is silent as to the time within which the theater building was to be completed. Counsel contend that there was no dispute as to the time of the completion, and, therefore, it was a question of law for the court and not of fact for the jury.

If there had been no dispute as to the time when this agreement was fully performed, counsel's position would be well sustained by the authorities referred to in his brief; but the evidence discloses a conflict as to the time of completion of the building. McClure fixes the date June 10, 1899, Neher, at first, thought this was the time, but on resuming the stand he was asked the question: "Was it, (the building), completed before 1900?" Answer. "I do not think it was." Neher further testified that he purchased the property from McClure, December 28, 1899, and the accounts produced in evidence show that a large amount of work was done during the year 1900, some

of the accounts and receipts bearing date of October and December, 1900.

This evidence corroborates the testimony of Mr. Neher and shows the testimony of Mr. McClure to be incorrect as to the completion of the building June 10, 1899.

Mr. Neher's testimony is wholly uncertain as to the time of completion, as he only says, he does not think it was finished before 1900. Upon the evidence of these extrinsic facts showing uncertainty as to time of completion, it was a question of fact for the jury as to whether
1 or not the building was completed within a reasonable time. The court in these instructions submitted this question to the jury, and we think properly. Cyc., Vol. 9, page 614; Hagerman v. Cowles, 94 Pac. 946.

The next point insisted upon as error is the court's instruction No. 13, which is as follows:

"By the cost of the building, with the portion of the equipment already defined, is meant its reasonable cost, its proper cost, and not what the cost might become through improvement, extravagant or unnecessary expenditures. Stated concisely, your duty is to find, upon the evidence and the instructions given you, whether the plaintiff and his assignor, McClure, erected a "modern thirty thousand dollar theater building" under said agreement or did not. If you find in the affirmative, of that issue, you should determine, from the evidence, the damage which the plaintiff suffered from the failure of title described in the evidence."

The only criticism of this instruction, is, that there was no evidence to support the use of the words "extravagant and unnecessary." The evidence discloses that in the accounts submitted, tending to show that the value of the theater building was thirty thousand dollars, as required by the contract, numerous charges were inclined which have no relation to the construction of the building; such, for instance, as printing tickets, court costs, hack fare, etc. Such expenditures were clearly unnecessary
2 and, while they may not be extravagant in a technical sense, we cannot see how this instruction would be prejudicial to the appellant, as the court was simply

directing the jury that in ascertaining the value of the constructed building, they should not include unnecessary and extravagant expenditures, having in mind, doubtless, just such items as those above referred to, as well as others.

Suppose the effect were to cause the jury to exclude such expenditures from consideration as proper items of expenditure under the contract, this would not be prejudicial to the appellant who could not be entitled to the benefit of them.

The third ground of error urged involves the construction, by the court, in its instructions Nos. 7 and 8, as to the meaning of the terms "erecting, building and completing a modern $30,000 theater building."

The instructions were as follows:

"7. You are further instructed that the agreement in question did not require the erection of a building which should cost not less than thirty thousand dollars, but would be satisfied by the erection of one which fairly cost substantially that amount, or so near it that it would be classified as a thirty thousand dollar building."

"8. You are further instructed that the phrase "a modern thirty thousand dollar theater building" includes in addition to the bare building, the usual, necessary, permanent equipment, such as plumbing, heating and lighting apparatus, seats, curtains and scenery adapted to and intended for use in that particular building, but not the piano, furniture, carpets and similar articles, movable and practically as well adapted to use elsewhere."

Instruction No. 2, requested by the appellant and refused, fairly represents the contention of the appellant as to the construction of those terms, and is as follows:

"The court further instructs the jury, that if they believe from the preponderance of the evidence, that the said Frank P. McClure, or his assigns, the plaintiff, George K. Neher, erected an opera house upon the land referred to in the pleadings and furnished the same with chairs, scenery and other articles of furniture and property necessary or proper for the conducting of a theater, and that the same was reasonably of the value of thirty thousand dollars, then they should find a verdict in favor of

the plaintiff, and assess his damages at such amount as they believe, from the preponderance of the evidence, the plaintiff sustained by the failure of the defendants to make good the title and deliver the deeds to the said lot, title to which so failed, as aforesaid."

The use of the word "building" in connection with the word "theater" is quite significant.

The word "opera" is very different in meaning from the words "opera house," in that the former may have no relation to the building in which it may be rendered. The word theater and theater building may have different meanings also, as a theater may mean a place where plays are being produced, whereas a theater building may be such whether plays are produced therein or not.

In the case of Bell v. Mahan, 121 Pac. Stat. 225, the court said:

"The opera house and theater alike comprehend the stage, proscenium, boxes, orchestra pit or parquet, and the galleries; the scenic representations are of the same general character, and the stage machinery and decorations of the same order."

From this language, it would appear that, the court intended to draw a line between the building and its necessary fixtures, and the movable articles, similar to that drawn by the court below in the 8th instruction. The use of the word building in the agreement seems to necessitate this construction and not that which is presented in appellant's refused instruction. The "piano, furni-
3 ture, carpets and similar articles, movable and practically as well adapted to use elsewhere" cannot be said to be a necessary part of a *theater building*.

Therefore, the court's instructions were correct, and there was no error committed by the refusal to give appellant's 2nd instruction.

The remaining instructions requested by the appellant, in the court below, and refused, substantially, directed the jury to construe the contract according to the intention of the parties and the circumstances surrounding its execution, and further, to determine whether the theater

building with its *furniture and appointments* were reasonably worth $30,000 when completed in 1899 and 1900.

This being a written agreement, it was for the court
4 to construe, and not for the jury. The court did construe it in paragraphs Nos. 7 and 8, quoted above, and we think correctly.

The requested instructions, in referring to *furniture* and *appointments* ignore the distinction drawn in the court's instructions as to whether or not the furnish-
5 ings were of a fixed and permanent nature or movable, and in this respect they were incorrect, upon the question of value.

The fourth point urged in the brief of counsel is based upon the giving of the 10th paragraph of its instructions.

10. "Certain receipts have been introduced in evidence and testimony given in relation to them and to the payments it is claimed they represent. You are instructed that the receipts in question are to be considered by you only as memoranda and exhibits in connection with the testimony relating to them and not as the evidence of the parties who it is claimed gave them, to anything contained in them."

Upon the trial, in the court below, a large number of receipts were offered in evidence, to which objections were made. There was considerable testimony offered as to the contents of many of these receipts. Those receipts were evidently offered to prove expenditures upon the theater building. It is insisted that this instruction practically directed the jury not to consider these receipts.

These receipts were, certainly, not the best evidence,
6 that the articles for which they were supposed to represent payment, were used in the construction of that building and formed a legitimate part of the $30,000.

The instruction of the court informed the jury that these receipts were competent in connection with the testimony as to their contents, and not as a substitute for the testimony of the witness. In this particular case, even if the money was paid as the receipts indicate, in the absence of some proof connecting them with this building, it

would have been improper for the jury to consider them as part of the claim of thirty thousand dollars.

The jury was instructed to consider those supported by such testimony, which was a proper direction, upon the issues in this case.

Numerous other assignments of error are found in the record, but as they have neither been considered in the briefs of counsel nor made to specifically indicate the ground of error relied upon, they will not be further considered, as it has been repeatedly held, by this court, 7 that assignments of error must be specific. Schofield v. Territory, 9 N. M. 526; Cevada v. Miera, 10 N. M. 62; Pearce v. Strickler, 9 N. M. 467.

The cause was submitted to the jury under instructions fairly covering the issues in the case, and while the title to the lot sued for had failed, the jury returned a verdict for the defendants, appellees in this court, which necessarily was a finding that the appellant had failed to construct within a reasonable time, a modern $30,000 theater building, the consideration for the agreement, by virtue of which, he was to obtain title to the lots.

Under this verdict, the appellant never became entitled to the ownership of the property conveyed by the deeds in escrow, and it was immaterial to him whether the title failed or not. No right of action for damages for failure of title existed in him, for which a judgment could properly be rendered.

The judgment of the court below is affirmed with costs. It is so ordered.

[No. 1338, August 10, 1910.]

FRANZ SCHMIDT, as Trustee in Bankruptcy of Jaspar N. Broyles, a Bankrupt, Appellee, v. THE BANK OF COMMERCE, Appellant.

SYLLABUS.

1. In an action brought by a trustee in bankruptcy to recover a voidable preference, the intent of the bankrupt in making the preference is immaterial.

2. Where creditor bank persuaded and induced a bankrupt to pay it money for the express purpose and with the intent to apply the same upon the indebtedness then owing by the bankrupt to the creditor bank, no question of the right of set-off for money deposited in the ordinary course of business arises.

Appeal from the District Court for Bernalillo County before IRA A. ABBOTT, Associate Justice. Affirmed.

E. W. DOBSON for Appellant.

Where an insolvent person has money on deposit in a bank subject to check, and also owes the bank upon a promissory note, upon such insolvent person being adjudged a bankrupt, the bank is entitled to have the amount of the bankrupt's deposit set off against the sum due on the promissory note, and to prove its claim against the bankrupt for the balance. West v. Bank of Lahoma, 85 Pac. 469; Clark v. Northampton National Bank, 35 N. E. 108; Hooks v. Gila Valley Bank & Trust Co., 100 Pac. 806; New York County National Bank v. Massey, 192 U. S. 138, 48 L. ed. 380; 30 Stat. at L. 562; U. S. C. St. 1901, p. 3445, sec. 60 a, 68 a; 14 Stat. 517; Hough v. First National Bank, 4 Bis. 349, 12 Fed. Cases 564, No. 6721; re Petries, 5 Ben. 110, 19 Fed. Cases, No. 11,040; Blair v. Allen, 3 Dill. 101, 3 Fed. Cases, No. 1483; in re Myers et al, 99 Federal Rep. 691; in re Myers et al, 107 Fed. Rep. 86; in re Philip Semmer Glass Co., 135 Fed. Rep. 77; Tomlinson v. Bank of Lexington, 145 Fed. 824.

In order that a conveyance by a bankrupt shall be fraudulent within Bankrupt Act, July 1, 1898, c. 541, sec. 67 e, 30 Stat. 564, U. S. Comp. St. 1901, p. 3449, providing that all conveyances made by the bankrupt within four months prior to the filing of the petition with intent to hinder, delay, or defraud his creditors, or any of them, shall be void except as to purchasers in good faith and for a fair consideration, the bankrupt must have an intent to hinder, delay and defraud creditors, and there must have been a want of good faith on the part of

the transferee. Barbour v. Priest, 103 U. S. 296, 26 L. ed. 478; Hardy v. Gray et al, 144 Fed. 922; Pirie v. Chicago Title & Trust Co., 182 U. S. 438, 21 Sup. Ct. 906, 45 L. ed. 1171; Wilson v. City Bank, 17 Wall. 486; Grant v. National Bank, 97 U. S. 81, 24 L. ed. 971; Van Iderstine v. National Discount Co., 174 Fed. 518; J. W. Butler Paper Co. v. Goembel, 143 Fed. 295; Western Tie & Lumber Co. v. Brown, 129 Fed. 728; Libby v. Hopkins, 104 U. S. 303; Wetstein v. Franciscus, 133 Fed. 900, 67 C. C. A. 62; in re Eggert, 102 Fed. 735, 43 C. C. A. 1.

Without regard to the question of preference, it has been held that under the provision of the National Bankruptcy Act (section 68 a, of the bankruptcy act of 1898, 1 Fed. St. Ann. 696, which is almost a literal reproduction of section 20 of the act of 1867) authorizing the setting off against each other of mutual debts, a bank deposit may be set off against a debt due to the bank from the depositor who becomes bankrupt. In re Petrie, 5 Ben. 110, 19 Fed. Cas. No. 11,040; in re Farnsworth, 5 Biss. 223, 8 Fed. Cas. No. 4, 673; Blair v. Allen, 3 Dill. 101, 3 Fed. Cas. No. 1, 483; ex p. Howard, 2 Lowell 487, 12 Fed. Cas. No. 6764; Scammon v. Kimball, 92 U. S. 362, 23 U. S., L. ed. 483; New York County Bank v. Massey, 192 U. S. 138, 24 S. Ct. 199, 48 U. S., L. ed. 380; in re Little, 110 Fed. 621; in re Myers, 99 Fed. 691; in re George M. Hill Co., 130 Fed. 315, 64 C. C. A. 561; 66 L. R. A. 68; in re Scherzer, 130 Fed. 631; in re Schults, 132 Fed. 573; in re Phillip Semmer Glass Co., 135 Fed. 77, 67 C. C. A. 551, appeal dismissed 203 U. S. 141, 27 S. Ct. 50, 51 U. S., L. ed. 128; Ridge Ave. Bank v. Studheim, 145 Fed. 798, 76 C. C. A. 362; Irish v. Citizens' Trust Co., 163 Fed. 880; Tomlinson v. Lexington Bank, 145 Fed. 824, 76 C. C. A. 400, 16 Am. Bankr. Rep. 632; Robinson v. Wisconsin, etc., Ins. Co. Bank, 9 Biss. 117, 20 Fed. Cas. No. 11,969; Hough v. Ft. Wayne First Nat. Bank, 4 Biss. 349, 12 Fed. Cas. No. 6,721; Union Nat. Bank v. McKay, 102 Fed. 662, 42 C. C. A. 583; in re Meyer, 107 Fed. 86; Dressel v. North State Lumber Co., 119 Fed. 531; in re Koenig, 127 Fed. 892, affirmed 133 Fed. 1019; in re Elsasser, 7 Am. Bankr. Rep. 215; in re

Medaise-Vine Carriage Co., 17 Am. Bankr. Reg. 897; McDonald v. Clearwater Shortline R. Co., 164 Fed. 1007; Bank v. Sundheim, 16 Am. Bankr. Rep. 866; Pirie v. Chicago Title & Trust Co., 182 U. S. 438, 48 L. ed. 1171.

MARRON & WOOD for Appellee.

If the bank accepted a check from the bankrupt, that is not applying one debt against another, but is accepting payment of a debt by check. This would amount to a preference. Traders Bank v. Campbell, 81 U. S. 87.

It is not necessary that the bankrupt should have purposed and wished to benefit the defendant over his other creditors in order to constitute a voidable preference under the bankruptcy act. Western Tie & Timber Co. v. Brown, 129 Fed. 728; in re Andrews, 135 Fed. 599; Brewster v. Goff Lumber Co., 164 Fed. 124; Western Tie & Timber Co. v. Brown, 196 U. S. 502; Benedict v. Deshel, 177 N. Y. 1.

STATEMENT OF FACTS.

This was an action brought by appellee against appellant, under sub-division "b" of section 60 of the Bankruptcy Act, (30 Stat. 562), as follows:

"If a bankrupt shall have given a preference within four months before the filing of a petition, or after the filing of the petition and before the adjudication, and the person receiving it, or to be benefited thereby, or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee, and he may recover the property or its value from such person."

The case was tried by the court without a jury and resulted in a judgment in favor of appellee. The court made, among others, the following findings of fact:

"4. That the said Jaspar N. Broyles on the said sixteenth day of April, 1908, was insolvent and as a reasonable man should have known from the circumstances that he was so insolvent.

"5. That the said defendant on the said sixteenth

and seventeenth days of April, 1908, in the person and through the medium of its cashier and attorney, persuaded and induced the said Jaspar N. Broyles to pay and to remit to the said defendant the sum of two thousand two hundred and eight-three dollars and forty-five cents ($2,283.45) for the express purpose and with the intent to apply the same upon the indebtedness then owing by the said Broyles to the defendant."

"6. That the effect of said payment was to enable the said defendant to secure and obtain a greater percentage of its debt than would be secured by any other of the creditors of the said Broyles of the same class.

"7. That the said Jaspar N. Broyles intended to do, and did that which constituted giving a preference within the meaning of the Bankruptcy Law, namely made a transfer to the defendant of some of his property with the effect of enabling the defendant to obtain a greater percentage of its debt than any other creditor of the same class, but he did not intend that result in the sense that he wished or proposed to have the defendant obtain a greater percentage of its claim than any other creditor of its class.

"8. That the defendant and its cashier, being the same officer who secured the payment on the said sixteenth day of April, 1908, had reasonable ground to believe that the said Jaspar N. Broyles was insolvent, and that it was the purpose of the defendant and was intended by the transaction to grant and secure to the said defendant a preference.

"9. That the said Jaspar N. Broyles, thereafter, and within four months of the said sixteenth day of April, 1908, was duly adjudicated a bankrupt, and the plaintiff duly appointed his trustee in bankruptcy."

OPINION OF THE COURT.

PARKER, J.—The appellant contends for a construction of sub-division "b" of the Bankruptcy Act to which we cannot give our consent. It contends that an actual intent on the part of the bankrupt to create a preference, as well as the fact that the creditor preferred shall have reasonable cause to believe that the transaction was intend-

ed thereby to give preference, is necessary in order to authorize the recovery of the subject matter of the preference by the trustee in bankruptcy. It cites Hardy v. Gray, et al., 144 Fed. 922, in support of the contention, which case seems to support the same. That was a case arising under sub-division "g" of section 57 of the Bankruptcy Act, as amended by section 12 of the act of February 5, 1903, (32 Stat. 799). The amendment of 1903 brought into the section the same terms as those employed in sub-division "b" of section 60, and therefore the case is in point upon the question in this case. We refuse, however, to follow this case for the reason that we regard the same as unsound and as being in conflict with the controlling and much greater weight of authority.

Appellee contends that under the statute the intent of the bankrupt in making a preference is wholly immaterial if the preferred creditor had reason to believe that the preference was intended, and cites Western Tie and Lumber Company v. Brown, 129 Fed. 728, in re Andrews, 135 Fed. 599; Brewster v. Goff Lumber Company, 164 Fed. 124; Western Tie & Lumber Co. v. Brown, 196 U. S. 502; and Benedict v. Deschel, 177 N. Y. 1, in support of his contention.

In the case in 129 Fed. 728, in the Circuit Court of Appeals of the Eighth Circuit, it is said:

"The preferences denounced by the statute are often secured by creditors without any desire or intention on the part of the debtors to give them, as in cases in which the creditors obtain judgments against their debtors over defenses made to the actions in good faith, and in cases, like that a bar, where, without the consent of their debtors, creditors appropriate to the payment of their claims the property of their debtors which happens to be under their control. Such transactions are none the less voidable preferences, that the debtors do not intend them to have that effect. If they are conducted within the four months and if they have the effect to give to the creditors who conceive and execute them larger percentages of their claims than other creditors of the same class receive, they fall, as clearly under the ban of the law as transfers made

by debtors with the intent on their part to give the preferences. Such a transaction is voidable by the trustee not only when the party receiving it has a reasonable cause to believe that it was intended by the debtor, but also when it was intended by the creditor, or by the actor who accomplished the result, to work a preference by means of the transactions."

The Supreme Court of the United States, in 196 U. S. 502, reversed this case, but upon another point, and upon the point in question said:

"This conclusion, moreover, is the result of the finding that Harrison had no intention to give the tie company a preference, for if Harrison, being insolvent, to the knowledge of the company, within the prohibited period, gave to the tie company authority to collect the sums due to him by the laborers for goods sold them, with the right, or even the option to apply the money to a prior debt due by Harrison to the company, the necessary result of the transaction would have been to create a voidable preference. And if the inevitable result of the transaction would have been to create such a preference, then the law would conclusively impute to Harrison the intention to bring about the result necessarily arising from the nature of the act which he did."

In the case in 153 Fed. it is said:

"It follows that a preference was given which must be surrendered before proof, if the creditor then 'had reasonable cause to believe that it was intended thereby to give a preference.' If the debtor is insolvent, he intends preference by any payment of a pre-existing debt. If the creditor has reasonable cause to believe that the debtor is insolvent, then the creditor has reasonable cause to believe that a preference is intended."

In the case of 164 Fed., it is said:

"That there was a preference in fact, cannot, of course, be gainsaid; the firm, as well as the individual members of it, being insolvent, and the Goff Lumber Company securing by the transaction over one-third of their bill, where other creditors will get practically nothing. This being the inevitable effect, it will be conclusively pre-

sumed that it was so intended, even though it may be that Moore had no idea in reality of treating the Goff Lumber Company any differently from or of giving them any advantage over other creditors."

In the case of 177 N. Y. 1, it is said:

"As to the debtor the statute declares that a judgment under certain conditions shall be held to be preferential. He is not to be heard upon the question of his intent. The effect of his act is fixed by law."

See also Van Idersteine v. National Discount Co., 174 Fed. 518; Coder v. Arts, 213 U. S. 223.

We therefore hold that in an action brought by a
1 trustee in bankruptcy to recover a voidable preference, the intent of the bankrupt in making the preference is immaterial.

2. Appellant contends that as to all of the payments secured it should have the right of set-off against the claim of appellee by reason of the fact that the same were received in due course of business as a deposit in a bank, and as payments on notes and interest. The fifth finding of the court below, which seems to be supported at least by sufficient evidence, effectually cuts out this question from the case. The court finds that the appellant persuaded and induced the bankrupt to pay to them the amount
2 of money involved in this action for the express purpose and with the intent to apply the same upon the indebtedness then owing by the bankrupt to appellant. This being so, no question of the right of set-off for money deposited in the ordinary course of business, arises.

There being no error in the record the judgment of the lower court will be affirmed; and it is so ordered.

[No. 1246, August 16, 1910.]

AARON GRAY, Appellee, v. NEW MEXICO PUMICE STONE CO., et al., Appellants.

SYLLABUS.

1. Claim of lien held sufficient on its face as to its terms where record shows that there were no other terms or conditions than: "Claimant agreed to and with the New Mexico Pumice Stone and Lithograph Company, to work for said company for the sum of $3 per day and board."

2. In the case under consideration, the specific character of the labor performed by the lien claimant is not stated further than to say that it was labor performed in the construction of the mining claim on the land. This seems to be sufficiently definite and may include many different kinds of labor, for all of which, a claimant would be entitled to a lien.

3. Every person who deals directly with the owner of the property and who, in pursuance of a contract with him performs labor or furnishes material, is an original contractor within the meaning of the mechanics' lien statute.

4. Separate demurrer directly raises question whether the complaint and claim of lien stated facts sufficient to constitute a cause of action against the defendant demurring.

5. Attorney's fees properly allowed by trial court.

6. Under New Mexico mechanics' lien law, labor of any class bearing a direct relation to the mining operations held sufficient to form a basis for a claim of lien, and labor expended by a lien claimant in care of the team of horses upon a mining claim, and which are used in the mining operations thereon, as well as labor performed in a lime kiln, closing lime bins and gathering up tools at the lime quarry and lime kiln, all on the mining claim, furnish a basis for a claim of lien upon the mining claim.

7. The words "mining claim" mean a portion of the public mineral lands of the United States, to which qualified persons may first obtain the right of occupancy and posses-

sion by means of location, and secondly, title by pursuing certain prescribed methods therefore.

8. Where title to limestone mine was originally obtained from government by means of an agricultural patent, has New Mexico mechanics' lien statute any application to labor performed upon any such lands? Quaere.

Appeal from the District Court for Bernalillo County, before IRA A. ABBOTT, Associate Justice. Affirmed.

HERBERT F. RAYNOLDS for Appellant.

A compliance with the statutory requirements is necessary in order to acquire a valid and enforceable lien. C. L. 1897, sec. 2221; 27 Cyc. pp. 42, 152, 154, 171, 110, 175 and cases cited; Phillips' Mechanics Liens, secs. 342, 359, 367, 366; 2 Jones on Liens, secs. 1390, 1391, 1389; 20 Am. & Eng. Encyclopedia of Law, Mechanics' Liens, pp. 380, 407 and cases cited; Pearce v. Albright, 12 N. M 202, 76 Pac. 286; Ford v. Springer Land Association, 8 N. M. 37, 41 Pacific 541; Fairhaven Land Co. v. Jordon, 32 Pac., Wash. 729; U. S. Savings Loan & Bldg. Ass'n. v. Jones, 37 Pac., Wash. 666; Warren v. Quade, 29 Pac. 829; White v. Mullins, 31 Pac. 801, 3 Idaho 434; Hooper v. Flood, 54 Cal. 218; Bradbury v. Improvement Co., 10 Pac. 620; Canal Co. v. Gordon, 6 Wall. 561; Minor v. Marshall, 6 N. M. 195; 13 Pa. 167; Finane v. Hotel Co., 3 N. M. 256; Baldwin v. Merrick, 1 Mo. App. 281; Tuttle v. Moutford, 7 Cal. 358; Barnes v. Thompson, 2 Swan, Tenn. 313; Barnard v. McKenzie, 4 Colo. 251; 15 A. & E. Enc. Law 179; Baisot on Mechanics' Liens 401; Gates v. Brown, 1 Wash. 470; Wagner v. Hansen, 103 Cal. 104; Morrison v. Willard, 70 A. S. R. 786, 17 Utah 306; 53 Pacific 833; Bertheolet v. Parker, 43 Wis. 551; Malter v. Falcon Min. Co., 18 Nev. 209; Wagner v. Hansen, 103 Cal. 104; Fernandez v. Burlson, 110 Cal. 164, 52 A. S. R. 75, 42 Pac. 566; Madera Flume Co. v. Kendall, 120 Cal. 182, 52 Pac. 304, 65 A. S. R. 177; Cal. Code of Civil Procedure, sec. 1187; Wood v. Wrede, 47 Cal. 637; Phil-

lips v. Maxwell Mining Co., 49 Cal. 336; Ehdin v. Murphy, 170 Ill. 339, 48 N. E. 956, M.; MacDonald v. Rosengarten, 134 Ill. 126, 25 N. E. 429; Pitschke v. Pope, 20 Colo. Appeals, 328, 78 Pac. 1077; Boyle v. Mining Co., 9 N. M. 237, 50 Pac. 347.

When lienable and non-lienable items are joined and cannot be separated, and one lumping charge is made, as here, the whole claim of lien is invalid. Boyle v. Mining Co., 9 N. M. 237, 50 Pac. 347; Wharton v. Real Estate Investment Co., 180 Pa. State 168, 36 Atlantic 7; 27 Cyc. Mechanics' Liens, 172, note 77 and cases cited; Williams v. Toledo Coal Co., 42 A. S. R. 799, 36 Pac. 159; Hughes v. Lansing, 75 A. S. R. 574, 55 Pac. 95; Evans Marble Co. v. International Trust Co., 109 A. S. R. 568; 101 Md. 216, 60 Atlantic 667.

C. L. 1897, sec. 2229, allowing attorney's fees to the successful plaintiff and not to the defendant if he is successful, is unconstitutional. Gulf etc., Ry. Co. v. Ellis, 165 U. S. 150, 17 S. C. 255, 41 L. ed. 666; Builders' Supply Depot v. O'Connor, 88 Pac., Cal. 983; Union Lumber Co. v. Simons, 89 Pac. 1080; Farnham v. California Safe Deposit & Trust Co., 96 Pac. 788; Davidson v. Jennings, 83 A. S. R. 49; Wilder v. Chicago, etc., Ry. Co. 70 Mich. 382, 38 N. W. 289; Davidson v. Jennings, 83 A. S. R. 50, 54, 56, 60 Pac. 354, 27 Colo. 187, 48 L. R. A. 340; Atkinson v. Woodmansee, 74 Pac. 640, 68 Kas. 71, 64 L. R. A. 325; Hocking Valley Coal Co. v. Rosser, 41 N. E. 263, 53 Ohio State 12, 29 L. R. A. 386; Grand Rapids Chair Co. v. Runnels, 43 N. W. 1006, 77 Michigan 104; Perkins v. Boyd, 65 Pac. 360, 16 Colo. App. 266; Joliffe v. Brown, 44 Pac. 149, 14 Wash. 155, 53 A. S. R. 868.

FELIX H. LESTER for Appellee.

Under our code there is but one form of action in the territory and if the complaint states facts which entitle the plaintiff to relief either legal or equitable it is not demurrable on the ground that it does not state facts sufficient to constitute a cause of action. Dodge v. Trust Co., 106 U. S. 445; White v. Lyons, 42 Cal. 282; Poett v. Stearns,

28 Cal. 228; Bender-Moss on Law of Mech. Liens and B. C., sec. 729; Fleming v. Albeck, 67 Cal. 227, 7 Pac. 659; Knowles v. Baldwin, 125 Cal. 224, 57 Pac. 988; White v. Lyon, 42 Cal. 282; Poett v. Stearns, 28 Cal. 228.

Any insufficiency or uncertainty in the complaint was cured by the judgment. Lund v. Ozanne, 84 Pac., N. M. 710; Territory v. Watson, 78 Pac., N. M. 504; Territory v. Eaton, 79 Pac., N. M. 713; Howell v. The City of Philadelphia, 38 Penna. St. 471; School v. Gerhab, 93 Penna. St. 346; Perez v. Barber, 7 N. M. 223; Coler v. Board of County Commissioners, 6 N. M. 88; Phillips on Mech. Liens, sec. 35; Tel. Co. v. Longwell, 5 N. M. 316; Barruel v. Irwin, 2 N. M. 224; Bullard v. Lopez, 7 N. M. 561; Herlow v. Arman, 3 N. M. 471; Curran v. Kendall Shoe Co., 8 N. M. 417.

The Mechanics' Lien Law being remedial in its nature and equitable in its enforcement, should be liberally construed. Ford v. Springer Land Association, 8 N. M. 37; Post v. Miles, 7 N. M. 323.

The New Mexico Lien Law was adopted from California and the decisions of the Supreme Court of that state should be followed here. Perea v. Colo. National Bank, 6 N. M. 1; Lutz v. A. & P. R. R. Co., 6 N. M. 497.

A substantial compliance with the statute as to the claim of the lien is all that is required. Post v. Miles, 7 N. M. 323; Hobbs v. Spiegelberg, et al., 3 N. M. 357; Benders-Moss Law of Mech. Liens and B. C., secs. 370, 371, 394; Ascha v. Fitch, Cal., 46 Pac. 298; Hagman v. Williams, 88 Cal. 151, 25 Pac. 1111; Russ Lumber Co. v. Garrettson, 87 Cal. 595, 25 Pac. 747; McGinty v. Morgan, 122 Cal. 105, 54 Pac. 392; Macomber v. Bigelow, 126 Cal. 16, 58 Pac. 312; Castagnetto v. Coppertown Mining & Smelting Co., 146 Cal. 329, 80 Pac. 74; Durling v. Gould, 83 Me. 134; Wood v. Crede, 46 Cal. 637; Malone v. Big Flat Gravel Co., 76 Cal. 578; Newell v. Brill, 83 Pac. 76; Bryan v. Abbott, 131 Cal. 222, 63 Pac. 363; Cal. Code Civil Proc. sec. 1187; Hill v. Ohlig, et al, 63 Cal. 104; Jewell v. McKay, 82 Cal. 144, 152, 23 Pac. Rep. 139; Lonkey v. Wells, 16 Nev. 74, 271; Phillips on Mechanics' Liens, secs. 342, 350, 353; Cohn v. Wright, 89

Cal. 86; Tredinnick v. Mining Co., 72 Cal. 78, 80, 13 Pac. 152; Kelly v. Plover, 103 Cal. 35, 36 Pac. 1020; Reed v. Norton, 90 Cal. 596, 597, 26 Pac. 767, 27 Pac. 426; Blackman v. Marsicano, 61 Cal. 639; Germania B. & L. Association v. Wagner, 61 Cal. 349; Selden v. Meeks, 17 Cal. 128.

Where the claim avers that the work was done within the period allowed for filing the lien, the claim is valid, though the bill of particulars does not show this fact affirmatively. It may be made to appear by evidence that the work was done within a specified time, which is a question of fact for the jury. Phillips on Mech. Liens, secs. 362, 357, 359; McKay's Appeal, 37 Pa. 125; Bender-Moss on Mech. Liens & B. C., sec. 397 and cases cited, 695; Bryan v. Abbott, 63 Pac. 363; Hill v. Ohlig, et al, 63 Cal. 104; Sullivan v. Grassvalley Q. M. & M. Co., 77 Cal. 418, 19 Pac. 757; Board of Education v. Greenbaum, 39 Ill. 610; Malone v. Big Flat Gravel Co., 76 Cal. 578.

Attorney's fees were properly allowed. Genest v. Las Vegas Masonic Building Association, 11 N. M. 251.

STATEMENT OF THE CASE.

This is an action to foreclose a mechanic's lien upon Section 10, Township 11 N., Range 11 West, in Valencia County. The decree of foreclosure was awarded and declared the lien of appellee prior to the mortgage of defendants, of whom, M. W. Flournoy, the only appellant, was one. Appellant, with some of his co-defendants, interposed a demurrer to the complaint on the ground that it did not state facts sufficient to constitute a cause of action, which demurrer was overruled. Thereupon, appellant, with some of his co-defendants, put in a general denial. The owner of the property, the New Mexico Pumice Stone Company, did not appear. Upon the trial, the court found, among other things, that the labor performed by appellee consisted:

(1). In actual manual labor in a limestone quarry on the premises.

(2) In overseeing the work of laborers with whom he worked.

(3) Labor at a lime kiln located on the premises.

(4) In taking care of the horses and teams after said kiln had ceased to be operated and most of the laborers working at said kiln had departed; in closing up the lime bins, collecting tools about the kiln and quarry and in putting the property in shape so that it could be left without a caretaker. There were no items in either the claim of lien or complaint showing separately what was the value of the work done in the quarry, and what was the value of the work done at the kiln. We assume that there was no evidence making clear the amount of work done in either of the several capacities mentioned.

OPINION OF THE COURT.

PARKER, J.—1. Objection is made to the claim of lien on the ground that it fails to state the terms, time given and condition of the contract under which the labor was performed, as is required by Section 2221 of the Compiled Laws of 1897, which is as follows:

"Every original contractor, within ninety days after the completion of his contract, and every person, save the original contractor, claiming the benefit of the act, must within sixty days after the completion of any building, improvement, or structure, or after the completion of the alteration or repair thereof, or the performance of any labor in a mining claim, file for record with the county recorder of the county in which such property or some part thereof is situated, a claim containing a statement of his demands, after deducting all just credit and offset, with the name of the owner or reputed owner, if known, and also the name of the person by whom he was employed, or to whom he furnished the materials, with a statement of the terms, time given and conditions of his contract, and also a description of the property to be charged with the lien, sufficient for identification, which claim must be verified by the oath of himself or of some other person."

The terms of the claim of lien are as follows:

"Claimant agreed to and with the New Mexico Pumice Stone and Lithograph Company, to work for said company for the sum of $3 per day and board."

This is certainly a very meagre statement. But, can it be said, that it is so insufficient as to invalidate the lien? If the terms and conditions of the contract, as stated, were the only terms and conditions agreed upon, none others could be stated. If no time was given, then no statement could be made on the subject. There is nothing in this record to show that there were, in fact, any other terms or conditions in the contract of employment than those expressed. Under such circumstances, the claim of lien is clearly not open to attack by demurrer. We therefore hold that the claim of lien is sufficient on its face in this particular.

1

2. The lien claim is challenged on the ground that it fails to show the character of labor for which it is asserted. This requirement, in so far as it exists, arises out of the provision of the statute heretofore quoted, to the effect that the claim of lien shall contain "a statement of his demands." In some jurisdictions, as for instance in Washington, this provision has been quite strictly construed, and it is there held that it must appear what the labor or materials were for which the claim is asserted. See Warren v. Quade, 3 Wash. 750.

In other jurisdictions, it is held, more properly as we believe, that a statement of the general nature of the materials furnished, or labor performed, together with the amount claimed to be due therefor, after deducting all just credits and offsets, is all that is required. Jewell v. McKay, 82 Cal. 150; McClain v. Hutton, 131 Cal. 133; Maynard v. Ivey, 29 Pac. 1090.

In the case under consideration, the specific character of the labor performed by the lien claimant is not stated, further than to say that it was labor performed in the construction of the mining claim on the land. This seems to be sufficiently definite and may include many different kinds of labor, for all of which, a claimant would be entitled to a lien.

2

3. Objection is made to the claim of lien, upon the ground that it was not filed for record in time. The objection is based upon the proposition that the lien claimant is not an original contractor within the meaning of the

section above quoted. There has been much diversity of opinion and confusion as to the meaning of these words in a statute like ours, but we think that the Idaho court, under a statute identical in terms with ours, has announced the true rule, namely,—that every person who deals
3 directly with the owner of the property and who, in pursuance of a contract with him performs labor or furnishes material, is an original contractor within the meaning of the statute. Colorado Iron Works v. Riekenberg, 38 Pac. 651.

The same holding prevails in Texas, Missouri, Virginia and Wisconsin, and the cases from those states are cited in the Idaho opinion.

We therefore hold that the claim of lien in this case was filed in time.

4. It is urged by appellee that the objections to the claim of lien heretofore discussed are not available to the appellant for the reason that his demurrer, being general, and the complaint stating a cause of action against the owner of the property for money due, the demurrer was, at any event, properly overruled, and consequently, these objections to the claim of lien were never properly presented to the court below. In this he is in error. This was a separate demurrer by a subsequent incumbrancer. Had the demurrer been joint with the owner, perhaps his proposition would be sound, but being a separate demurrer, it directly raises the question whether the complaint
4 and claim of lien stated facts sufficient to constitute a cause of action against the defendant demurring. Mark Paine Lumber Co. v. Douglass Imp. Co., 94 Wis. 322.

5. Appellant, in his 6th assignment, complains of the allowance by the court below of an attorney's fee to the appellee and urges upon the court a reconsideration of the constitutionality of the lien statute under which the same was allowed. We do not, however, deem it necessary to re-examine the question, this court having set-
5 tled it in favor of the constitutionality of the statute in the cases of Genest v. Las Vegas Masonic Building Association, 11 N. M. 251, 67 Pac. 743, and Baldridge v.

Morgan, 106 Pac. 342. See Cascaden v. Wimbish, 161 Fed. 241.

6. The appellant contends that the claim of lien was for work performed by appellee of a character, in part, which furnished no basis for a claim of lien, and this raises the only question in the case requiring much consideration. As already appears, the labor performed by appellee was in working in a lime quarry as a laborer, working as a sort of foreman with other laborers and directing them in their work, working at the lime kiln, gathering up tools, closing lime bins and caring for teams of horses, and nowhere does it appear how much labor was expended by him in these several capacities. The question, under the circumstances in this case, might well raise two points for consideration, namely,—Is the work shown to have been performed by appellee within the terms of the claim of lien? and second,—Is such work within the terms of the statute?

The first point might be a very serious one under the terms of the claim of lien, which declares "said lien being claimed for labor and services in the construction of the mining claim on the said land," but the point does not seem to be raised in the brief. It may well be doubted whether labor in a lime kiln, in gathering up tools, caring for teams of horses, or closing lime bins, is work in the construction of a mining claim, if, indeed, the word construction can be properly used in connection with work upon a mine. However, the draftsman of the claim of lien evidently intended by the use of the word to confine the scope of the lien to such labor as was actually performed in the mining of lime rock, and there is a variance between the proof and the allegation in this regard. At any rate, as above stated, this point does not seem to be raised.

The second point, however, is raised and it becomes necessary to determine whether the work shown to have been performed is within the terms of the statute. As to all of the classes of labor, save that of caring for the teams of horses, there would seem to be no difficulty whatever in concluding that the same furnishes a basis for a claim of lien under the statute. They were all work upon or in a

mining claim within the terms of our statute. They all bear direct relations to the mining operations being carried on by the owner of the premises, and consequently in most, if not all of the states, would be held to furnish the basis for a claim of lien. But the labor expended in caring for the horses of the mine owner, the extent and value of which is unknown, is more remote and under some of the mechanc's lien statutes would be held not to furnish a foundation for a claim of lien. Of course, the original idea underlying the mechanic's lien statutes was that where the person contributed his labor or materials to the construction of a building or other improvement, the owner ought in equity and good conscience be made to pay for the increased value of the property by reason of the labor or materials of the lien claimant. But, in mining, it cannot be said that the labor of a man adds to the value of the mine. On the other hand, it necessarily, except in strictly prospecting and development work, detracts from the value of the mine by removing therefrom its ores, which, when exhausted, leave the mine valueless. It may well be argued, therefore, that the statutes extending liens to laborers upon mining claims were intended to include all laborers of every class and kind who may be employed in and about the mining operation thereon. Where the specific relation which the labor of a lien claimant must bear to the property is pointed out in the statute, of course, no other labor furnishes the basis for a claim of lien, but where the statute is general in terms, as ours is, and provides for a lien of any person who performs labor upon or in a mining claim, we see no reason why labor of any class bearing a direct relation to the mining operations should not be
6 sufficient to form a basis for a claim of lien. It has been so held under a statute identical in terms with ours. Thompson v. Wise Boy Co., 9 Ida. 363, 74 Pac. 958; Idaho Co. v. Davis, 123 Fed. 396; See 27 Cyc. 770; Cascaden v. Wimbish, 161 Fed. 241.

We therefore hold that the labor expended by a lien claimant in care of the teams of horses upon a mining claim, and which are used in the mining operations thereon, as well as labor performed in a lime kiln, closing lime

bins and gathering up tools at the lime quarry and lime kiln, all on the mining claim, furnish a basis for a claim of lien upon the mining claim. It follows, therefore, that the contention that the claim of lien is for classes of labor for which no lien can be allowed, is not well founded.

7. A point not mentioned in the briefs seems to deserve at least passing notice. Our statute provides for liens upon mining claims. The word "mining claim" in the mining country has a certain well understood mean-
7 ing, namely,—a portion of the public mineral lands of the United States, to which qualified persons may first obtain the right of occupancy and possession by means of location, and secondly,—title by pursuing certain prescribed methods therefor. It appears in this case that this mine is a limestone mine consisting of a section of land. How the title of the defendant owner was acquired does not appear, but it is quite within the possibilities that the same may have been acquired from the
8 government by the predecessor in title of the present owner by means of an agricultural patent of some kind. The question, if such were the case, would then arise whether the lien statute has any application to labor performed upon any such lands. It is entirely unnecessary for us to decide the question in this case as the same is not raised, and there is nothing before us to show the origin of the title. See 27 Cyc. 534; Marsch et al., v. De Ardo, et al., 107 Cal. 622, 40 Pac. 1018.

There being no error in the record, the judgment of the lower court will be affirmed; and it is so ordered.

[No. 1263, August 16, 1910.]

JOHN KING, Appellant, v. LEVI TABOR, Appellee.

SYLLABUS (BY THE COURT.)

1. The court is under no obligation in a civil case to instruct the jury unless requested so to do; and hence the fact that an instruction is insufficient is not available error unless a sufficient instruction was requested.

2. In the absence of any specific agreement for the measurement of hay in stacks, the rule of measurement laid down in Chapter 34 of the Session Laws of 1901, entitled "An Act to establish a legal method of measuring hay," will control.

3. Under the general assignment of error that the verdict of the jury and the judgment thereon are contrary to the evidence in the case, the only question that can be considered by the court is whether there is any substantial evidence to support the verdict. Candelaria v. Miera, 13 N. M. 360.

Appeal from the District Court for Union County before WILLIAM J. MILLS. Affirmed upon Remittitur.

CATRON & CATRON for Appellant.

Where, no provision is made in the contract for the measurement of hay, if there is a statute in force prescribing the method of measuring hay, such statute must be applied. Laws 1901, ch. 34.

The court will not disturb a verdict where it is merely against the preponderance of the evidence, but where there is no evidence on a point essential to support the verdict it is otherwise. Waldo v. Beckwith, 1 N. M. 97; Badeau v. Baca, 2 N. M. 194; Rody v. Trav. Ins. Co., 3 N. M. 543; Crolot v. Maloy, 2 N. M. 198; Vasquez v. Spiegelberg, 1 N. M. 464; Archibeque v. Miera, 1 N. M. 160; Perea v. Barela, 6 N. M. 239; Ruhe v. Abreu, 1 N. M. 247; Frick v. Joseph, 2 N. M. 138; Hammond v. Jewett, 22 Neb. 359; Helfrich v. Ogden City R. Co., 71 Utah 186; Pratt v. Clawson, 7 Utah 254; Caldwell v. Craig, 71 Gratt, Va. 132; Grayson v. Buchanan, 88 Va. 251; Keggy v. Height, 12 Ill. 100; Ham v. State, Texas, 15 S. W. Rep. 405; Vogle v. Wadforth, 48 Iowa 28; Knox v. Hanlon, 48 Iowa 252; Smith v. Walker, 49 Iowa 289.

Where the facts upon which a decision is based are uncontroverted their legal effect is a question of law and the appellate court may inquire whether they warrant the

decision. Knapp v. Standley, 45 Mo. App. 264; Bruen v. Kansas City, A. etc., 40 Mo. App. 425; Waddel v. Williams, 50 Me. 216; Henry v. Bell, 75 Mo. 194; Douglas v. Arr, 58 Mo. 573; Moore v. Hutchinson, 69 Mo. 429.

A refusal to find a fact which is supported by undisputed evidence is reversible as a question of law. Bedlow v. N. Y. Floating Dry Dock Co., 112 N. Y. 263; The City of N. Y., 147 U. S. 77; The Francis Wright, 105 U. S. 381; The E. A. Packer, 140 U. S. 360.

If one contracts with a skilled mechanic or laborer to do certain work such work and contract cannot be assigned and the failure personally to perform such work is a breach of contract and is a foundation for a suit for damages or a suit in equity to compel the specific performance of the contract. 3 Page on Cont., sec. 1262; Burck v. Taylor, 152 U. S. 634; Colton v. Raymond, 114 Fed. 863; Edison v. Babka, 111 Mich. 235.

Failure to instruct the jury in the law of the case shall be sufficient grounds for the reversal of the judgment by the supreme court upon appeal. C. L. 1897, secs. 2992, 2685, sub-sec. 119.

C. E. FARRINGTON for Appellee. No brief filed.

OPINION OF THE COURT.

WRIGHT, J.—The appellant assigns five grounds of error. The first assignment assigns error in that the court failed to instruct the jury as to the application of the territorial law relative to the rule prescribed for measuring hay in stacks. This assignment cannot be considered by the court for the reason that the appellant wholly
1 failed to call such failure to instruct to the court's attention and thereby give him an opportunity to correctly state the law to the jury. This rule has been generally adhered to by this court. In the case of Palatine Insurance Company v. Santa Fe Mercantile Company, 13 N. M. 241, the court said:

"The court is under no obligation in a civil case to instruct the jury unless requested so to do; and hence the

fact that an instruction is insufficient is not available error unless a sufficient instruction was requested."

The second assignment of error is the only one in this case that can be considered by the court. This assignment of error is the general assignment that the verdict of the jury and the judgment thereon are contrary to the
3 evidence in the case. Under this assignment the only question which can be considered is whether there is any substantial evidence to support the verdict.

Appellee, the plaintiff below, sued to recover balance due on a contract to cut and stack hay, claiming to have cut and stacked 372 tons at an agreed price of $2.00 per ton. He admitted payments, as appears from the evidence, to the amount of $397.95. Defendant admitted that the contract was entered into at $2.00 per ton, but denied that more than 282.69 tons were cut and stacked. He further answered, claiming a payment of $71.30 upon an order which he claimed to have paid, which order he claimed had been previously accepted by plaintiff below. By way of counter-claim he set up certain claims for damages arising from the negligence and carelessness of the plaintiff in the manner in which the work of cutting and stacking had been done by the plaintiff, and further claimed two items of $7.55 and $5.72, moneys paid out to repair machinery used by the plaintiff, and other incidental matters. The evidence discloses the fact that the $71.30 item is disputed by the plaintiff, as well as the items of damage. Plaintiff did not, however, dispute the two items of $7.55 and $5.72. From this it appears that there were undisputed credits to the total amount of $411.22. Plaintiff and defendant both stated that when the contract was made it was understood that the hay was to be measured in stacks after settling for at least thirty days, but that no rule of measurement had been incorporated in their contract. Chapter 34 of the Session Laws of 1901, provides a rule for the measurement of hay in stack. The act follows:

"An Act to establish a legal method of measuring hay."

"Section 1. The following rule and method of meas-

uring loose hay in the stack and specifying the cubical contents of a ton of loose hay, is hereby established.

"Sec. 2. Measure the stack for length, width and the 'over,' to get the 'over' throw a tape line over the stack at an average place, from ground to ground, drawing it tightly. Multiply the width by the over and divide the result by four. Multiply result of division by the length, for approximate cubical contents of stack. To reduce to tons for hay that has stood in stack less than twenty days, divide cubical contents by 512, for more than twenty days and less than sixty days, divide cubical contents by 422, for more than sixty days divide cubical contents by 380."

In the absence of any agreement as to the method of
2 measurement between the parties, the rule laid down and the method of measurement laid down in the statute would undoubtedly apply.

An examination of the evidence shows that the plaintiff adopted a different rule from the one prescribed by the territorial statute in his computations, and that the defendant claimed that the territorial rule should apply. Both parties used the same stack measurements but an examination of the record fails to disclose what these stack measurements were. The jury returned a verdict in favor of the plaintiff in the sum of $228.20. The determination of the question as to whether there is substantial evidence to support the verdict now becomes merely a matter of computation. In making this computation every doubtful item by way of credit claimed by the defendant must be resolved in favor of the plaintiff. Keeping this in mind, and considering only the admitted items of credit which are to be deducted from plaintiff's claim, we find that the plaintiff claimed damages for 372 tons of hay at $2.00 per ton, giving a total of $744; that in making this computation he did not use the territorial rule of measurement. In as much as the record, does not show the actual measurements of the stack it now becomes a question of how we can determine the exact number of tons of hay in the stacks, using the territorial rule of measurement. It becomes merely a simple problem in proportion based upon

random figures worked out under both rules. Taking for example the following random figures:

"Length of stack, 30 feet, breadth, 20 feet, overcast, 30 feet."

The plaintiff in making his figures used one-third of the overcast as the correct height of the stacks; stating this as a formula, we have:

Overcast $\frac{30}{3}$ (Breadth 20 x length 30) Equals 15.8 tons.

380

Applying the territorial rule and stating it as a formula we have:

Overcast $\frac{30}{4}$ (Breadth 20 x length 30) Equals 11.8 tons.

380

Now, by proportion, we have the following problem: 15.8, the result of our random calculation under the formula used by the plaintiff, is to 372 tons, being the amount of hay claimed by the plaintiff, as 11.8, the result of our random calculations under the territorial rule, is to the amount in the stacks under the territorial rule of measurement. To recapitulate, it then becomes 15.8 : 372 : : 11.8 : X. This being solved gives us 277.78 tons. The question then becomes one of arithmetic. The total hay in the stack, 277.78 tons, at $2.00 a ton, gives us the total contract price for cutting and stacking hay, $555.56. The undisputed credits to be deducted therefrom are $411.22. Substract this amount from the total contract price and we have the maximum verdict that could have been found in favor of the plaintiff, $144.24.

It therefore appears that there is no evidence to support a verdict for more than $144.26, and to the extent that the verdict found by the jury exceeds that amount, it is contrary to the evidence.

The remaining assignments of error are subject to the same objection as the first assignment of error discussed herein and will not be considered by this court.

It is therefore ordered that if the appellee within twenty (20) days shall here remit the amount of damages

found by the jury in excess of the sum of $144.26, the judgment of the lower court will thereupon be affirmed, otherwise it will be reversed and the cause remanded. It further appearing to the court that the failure of the court below to instruct the jury upon the proper rule of measurement to be adopted herein is due to the failure of the attorney for appellant to call such rule of measurement to the court's attention by a proper requested instruction, it is therefore ordered that the costs of this appeal be equally divided between the appellant and appellee.

ON MOTION TO RETAX COSTS OF APPEAL.

SYLLABUS.

1. C. L. 1897, sec. 3148, regarding costs, applies to the Supreme Court as well as to the District Court in-so-far as actions at law are concerned.

2. Where on appeal or error appellee or defendant in error remits a portion of the amount recovered, he will be required to pay the costs of appeal or writ of error.

OPINION OF THE COURT.

WRIGHT, J.—In the opinion in this case, heretofore handed down at this term, the judgment of the lower court was affirmed upon the appellee filing a remittitur of a portion of the judgment obtained in the lower court. The costs of appeal were equally divided between the appellant and the appellee. Upon the motion to re-tax the costs of such appeal counsel for the appellant calls our attention to section 3148 of the Compiled Laws of the Territory of New Mexico, which provides as follows:

"For all civil actions or proceedings of any kind, the party prevailing shall recover his costs against the other party except in those cases in which a different provision is made by law."

This section of the statute was part of the old Kearney Code adopted September 22, 1846, and undoubtedly applied to all of the courts created by such act.

The question now before us for consideration is wheth-

er or not the statute above cited applies to all of the courts as they now exist in New Mexico, or whether it is limited to the district courts. The statute is broad and general in its terms and under the decision of this court in the case of Baca v. Anaya, 14 N. M. 20, this statute un-
1 doubtedly applies to the Supreme Court as well as the District Court, at least in-so-far as actions at law are concerned. It then remains to be considered as to whether or not the appellant in this case was the prevailing party within the meaning of such statute.

In passing upon the question of who shall be deemed the prevailing party Cyc. uses the following language:

"In the absence of some special statutory provisions of the apportionment of the costs, where each party succeeds on one or more of the causes of action, claims or issues, it would seem that the plaintiff having obtained a judgment for a part of the relief prayed would, as the prevailing party, be entitled to such costs. It has been so held in a number of decisions." 11 Cyc. 28 and cases cited.

"According to the weight of authority, where on appeal or error appellee or defendant in error remits a portion of the amount recovered, he will be required to pay the costs of the appeal or writ of error." 11 Cyc. 215.

In the case of Sullivan v. Latterman, 43 S. Car. 262, the court held as follows:

"The prevailing party shall have his costs, it makes no difference how many questions he has raised; if he succeeds in any one of them he shall have his costs and the same shall be taxed against the appellee."

We do not think it necessary to cite further authorities upon this question in view of the terms of our statute quoted *supra*.

The motion to retax costs of appeal will therefore be
2 granted and the costs will be taxed against the appellee.

[No. 1289, August 16, 1910.]

L. E. McRAE and T. G. GREGORY, Appellants, v. DOMINICK CASSAN, Appellee.

SYLLABUS (BY THE COURT.)

1. Assignments of error upon which no argument, either orally or upon the brief, is made, will be considered as waived.

2. The trial court sustained an objection to the following question: "Was it common knowledge that this house was being erected for sporting purposes before it was completed?" Held that that ruling was correct.

3. Assignments of error which do not point out the specific error of fact or law complained of, will not be considered on appeal. Cevada v. Miera, 10 N. M. 62.

4. The present record falls within that rule stated in Candelaria v. Miera, 13 N. M. 360, as to the finality of finding in the trial court when sustained by substantive evidence.

Appeal from the District Court for Colfax County before WILLIAM J. MILLS, Chief Justice. Affirmed.

MORROW & LEIB for Appellant.

A lease made with the knowledge and intention of the leaser that the demised premises are to be used for immoral or illegal purposes is unenforceable and invalid. Laws 1901, chap. 84, secs. 2, 4; A. & E. Enc. Law, 2 ed., vol. 18, pp. 316, 317 and cases cited; Cyclopedia of Law and Procedure, vol. 24, p. 909 and cases cited; Chateau v. Singla, Cal., 45 Pac. Rep. 1015; Demartini v. Anderson, 59 Pac. Rep. pp. 207, 208; Caldwell v. State, 17 Conn. 467; Graeter v. State, 105 Ind. 271; Daugherty v. Seymour, Colo., 26 Pac. 823.

A house of ill fame may be proved to be such by direct evidence, or by reputation, or by circumstances. Demartini v. Anderson, 59 Pac. Rep. 207, 208; Sylvester v. State,

42 Tex. 496; Morris v. State, 38 Tex. 603; Allen v. State, 15 Tex. App. 321; State v. McDowell, Dud. 346; King v. State, 17 Fla. 183; O'Brien v. People, 28 Mich. 213; Betts v. State, 93 Ind. 375; Graeter v. State, 105 Ind. 271, 4 N. E. 461; State v. Brinnell, 29 Wis. 435; State v. Smith, 29 Minn. 193, 12 N. W. 524; Territory v. Bowen, 2 Idaho, 607, 23 Pac. 82; Drake v. State, 14 Neb. 535, 17 N. W. 117; Cadwell v. State, 17 Conn. 467; Com. v. Kimball, 7 Gray, 328; Moore, Cr. Law, par. 1072 and cases cited.

C. J. ROBERTS for Appellee.

Except in cases where the question involved goes to the jurisdiction, rulings to which assignments of error have been taken will not be considered on appeal, where such assignments are not discussed by counsel in brief or in argument, as it will be presumed that they are waived. 3 Cyc. page 388 and authorities cited; Illinois Central R. Co. v. Cheek, 152 Ind. 663; Patrick v. Graham, 132 U. S. 627.

Where the lessor leases his premises without any knowledge that they are to be used for unlawful or immoral purposes, the fact that they are subsequently so used, without collusion or assent on his part, will not vitiate the lease, or impair his rights to enforce any of the covenants therein contained. 24 Cyc. 909; Haas v. Cones Mfg. Co., 25 Ind. App. 469.

Assignments of error too general to present any question to the court for review. 2 Cyc. 992 and authorities cited; Cevada v. Miera, 10 N. M. 62; Schofield v. Territory, 9 N. M. 526 and authorities cited.

Where there is a conflict of evidence, it being the exclusive province of the jury to determine the weight and credibility of the testimony, the verdict will not be disturbed in the appellate court. Cunningham v. Springer, 13 N. M. 259; Badeau v. Baca, 2 N. M. 194; Territory v. Webb, 2 N. M. 147; Waldo v. Beckwith, 1 N. M. 97; Territory v. Hicks, 6 N. M. 596; Territory v. Barrett, 8 N. M. 70; Lynch v. Grayson, 7 N. M. 26; De Baca v.

Pueblo of Santo Domingo, 10 N. M. 38; Badaracco v. Badaracco, 10 N. M. 761; 3 Cyc. 348, 360 and authorities cited, 372.

OPINION OF THE COURT.

MECHEM, J.—This was an action for rent brought by appellee against the appellant as surety for one McRae.

The only question here arises on the affirmative defense of appellant by which he tried to establish that the lease was illegal, alleging that Cassan had knowingly leased the premises for illegal and immoral purposes, and that the said premises were located within seven hundred feet of a church.

There is no doubt but that it is the law that where a building is leased with the intent that it is to be used as a house of prostitution, and the house is so used, the lessor cannot recover rent, especially where there is a statute that makes it a misdemeanor to lease to another a house to be used for the purpose of prostitution. 18 Am. & Eng. (2nd ed.) 317.

Section 2, Chapter 84, Laws of 1901, is as follows:

"Sec. 2. Every person who shall knowingly lease or let to another any house or other building, for the purpose of setting up or keeping therein any such brothel, bawdy house, house of assignation or prostitution, as mentioned in the foregoing section, within seven hundred feet of any school house, college, seminary, or other institution of learning, or any church, opera house, theater, hall of any benevolent or fraternal society, or other place of public assemblage, or for the purpose of being kept or used as such brothel, bawdy house, house of assignation or prostitution, shall on conviction thereof be adjudged guilty of a misdemeanor, and punished as provided in section one of this act."

In order, therefore, to bring the lease in question within the terms of the statute, or the general rule of law applicable, it was incumbent on the appellant to prove that the appellee did "knowingly lease the building for

the purpose of setting up or keeping therein a house of prostitution."

The case was tried before the court without a jury and judgment given for the appellee.

1. Eight assignments of error are made by appellant. Of these the first three were abandoned by counsel as no mention is made of them in the argument con-
1 tained in their brief, at least they will be considered as waived. 3 Cyc. 388.

2. It is assigned as error in the fourth assignment that the court below erred in sustaining an objection of appellee's attorney to the following question: "What was the Red Light District first known as, over there—what was the purpose of it?"

Whether or not the court erred in sustaining this particular objection is not necessary to decide, for an examination of the testimony in the case shows that the character and constituency of the "Red Light District" were very minutely described and the trial court fully advised on that subject.

Objection by appellee's counsel to the following question was sustained by the court: "Was it common knowledge that this house was being erected for sporting
2 purposes, before it was completed?" and this is assigned as error in the fifth assignment. It was shown that the lease was entered into before the house was built.

As claimed by counsel for appellant, there is authority to the effect that a house of ill fame may be proved to be such by reputation, but here the question was, did the appellee knowingly rent the house with the intent that it should be used as a house of ill fame. It would be going a long way, indeed, to admit hearsay evidence to prove intent.

3. Assignments Nos. 6, 7 and 8 may be considered together. They are: No. 6. "That the trial court erred in finding from the evidence, in favor of the plaintiff or the appellee and against the defendant or appellant." No. 7. "That the decision rendered in said cause, by the trial court, in favor of the appellee and against the appellant, is against the weight of the evidence produced in the trial

of said cause," and No. 8. "That the decision of said cause, by the trial court, in favor of the appellee and against the appellant, is contrary to the laws of this Territory."

These assignments are too general. They do not point out any specific error complained of and this court has held in numerous cases that such general assign-
3 ments of error will not be considered on appeal. Cevada v. Miera, 10 N. M. 62; Schofield v. Territory, 9 N. M. 526; Melini & Eakin v. Freige Bros., (decided at this term).

We have, however, examined the record carefully and
4 find that there was substantial evidence to sustain the judgment of the trial court. Candelaria v. Miera, 13 N. M. 360.

Finding no error in the record, the judgment of the lower court is affirmed.

[No. 1301, August 16, 1910.]

EMMET WIRT, EUGENIO GOMEZ and FELIX GARCIA, a Copartnership Doing Business Under the Firm Name and Style of Wirt, Gomez & Company, Appellants, v. GEORGE W. KUTZ & COMPANY, Appellees.

SYLLABUS (BY THE COURT.)

1. This court will not on appeal disturb the verdict of a jury when supported by any substantial evidence. Candelaria v. Miera, 13 N. M. 361.

2. In this case the jury gave as incident to the recovery by defendant of certain sheep "damages in double the amount of the value of the wool taken from the sheep replevined during their detention, Wool 520 pounds, 10 cents per pound," held that such damages are not recoverable under sub-section 239, chapter 107, Laws of 1907, which allows double damages for the use of the property from the time of delivery.

3. Error alleged in variance between verdict and judgment; the record in this case examined and held that the judgment was correct.

4. Where an action is brought by certain persons described as a "copartnership doing business under the firm name and style of, etc.," and judgment is rendered against the copartnership and not against the individuals composing it; held that this court will supply the omission of the individual names by ordering them inserted in the judgment. Sub-sec. 94, sec. 2685, C. L. 1897.

Appeal from the District Court for Rio Arriba County before JOHN R. MCFIE, Associate Justice. Affirmed upon Remittitur.

A. B. RENEHAN for Appellants.

The value of the sheep and wool must be at a time proper to the issue. 13 Enc. Ev. 557, 565, 566, 567 n. 7, 8; Mining Syndicate Co. v. Fraser, 130 U. S. 611; Chapman v. Kerr, 80 Mo. 158 and cases cited; Mix v. Kepner, 81 Mo. 93; White v. Storms, 21 Mo. App. 288; Cattle Co. v. Mann, 130 U. S. 78; Dewey v. Highland, 69 Iowa 504; Tiedeman on Sales, sec. 231; Winter v. Landphere, 42 Iowa 471; Thorpe v. Cowles, 55 Iowa 408; Kellogg v. Lovely, 46 Mich. 131; 34 Cyc. 1534 n. 94, 1560(2), 1562(3).

The judgment must conform to the verdict, findings and pleadings. Smith v. Dinneen, 70 N. Y. S. 477; 34 Cyc. 1531 n. 68, 1540 n. 53; 23 Cyc. 821; 11 E. P. & P. 903, 906, 910, 911; Kennon v. Gilmer, 131 U. S. 29; Colonization Society v. Reed, 25 Texas Sup. 353; Horse Importing Co. v. Novak, 95 Iowa 602; McCartney v. Hubbell, 52 Wis. 360; Dorsett v. Crew, 1 Colo. 20; 6 E. P. & P. 905, n. 172.

When in an action at law a joint liability is charged, judgment cannot be entered separately against one of the parties. Ruppe v. Lumber Association, 3 N. M. 397; 11 Enc. P. & P. 848 n. 1, 850 n. 1; 11 Ired. 321; Bank v. Allen, 68 Mo. 474; 23 Cyc. 862 n. 96.

HANNA & WILSON for Appellee.

As a general principle the return of an officer is conclusive upon the parties of the facts which are set forth therein, but it has been authoritatively decided that a sheriff's return is only *prima facie* evidence of the facts therein stated and may be shown in law as in equity to be untrue. Stevens v. Williams, 46 Iowa 540; Miller v. Marks, 20 Mo. App. 369; Kockman v. O'Neil, 102 Ill. App. 475; 66 N. E. 1047, 202 Ill. 110; Newman v. Greeley State Bank, 92 Ill. 638; Bick v. Hawley & Hoops, 105 N. W. 688, 129 Iowa 406.

The rule as to the assessment of values seems to be, when plaintiff recovers, that the values must be of the date of the trial, but it is otherwise where values are assessed upon a verdict for defendant. In the latter case the assessment of values must be as of the date when the property was taken. Sherman v. Clark, 24 Minn. 37; Willison v. Smith, 1 Mo. App. 174, 60 Mo. App. 469; Werner v. Graley, 54 Kan. 383, 38 Pac. 482; Pratt v. Welcome, 92 P. 500, 6 Cal. App. 475; Black v. Black, 74 Cal. 520, 16 Pac. 311; Drake v. Auerbach, 37 Minn. 505, 35 N. W. 367.

The evidence was sufficient to sustain the verdict which will not be disturbed by the appellate court, unless it clearly appears that there was no evidence to sustain the verdict, and a legitimate inference such as the jury evidently drew from the evidence will not be disturbed by the appellate court. Corcoran v. Albuquerque Traction Co., 103 Pac. 645, N. Mex.; Zanz v. Stover, 11 N. Mex. 29; Badeau v. Baca, 11 N. Mex. 194; Candelario v. Miera, 13 N. Mex. 360, 362.

A verdict for damages will not be disturbed as excessive if there is any evidence to support the verdict. North & Douglas v. Woodland, 85 Pac. 215, 12 Idaho 50; Braegger v. Railroad Co., 68 Pac. 140, Utah; sub-sec. 239, Code Civil Procedure 1907; Doherty v. Enterprise Mining Co., 50 Cal. 187; Holdredge v. McCombs, 66 P. 1048, 63 Kans. 889; City of Stillwater v. Swisher, 85 P. 1110, 16 Okl. 585; Alabama M. Ry. Co. v. Brown, 29 So. 548, 129 Ala. 282; Harding v. Harding, 85 P. 423, 36 Colo. 106; Burr v. Harty, 52 A. 724, 75 Conn. 127; City of Anderson v.

O'Conner, 98 Ind. 168; 34 Cyc. 1562, sec. 3; Barness v. Bartlett, 15 Pick., Mass. 71; Dodge v. Runels, 20 Nebr. 33, 28 N. W. 489.

A judgment against the firm in the firm name is irregular, but not void. Meyer v. Wilson, 76 N. E. 748, 166 Ind. 651; Justice v. Meeker, 30 Pac. 207; Mueller v. Kinkead, 113 Ill. App. 132; Compiled Laws of 1897, sec. 2943; Lewinson v. First Nat. Bank of Albuquerque, 70 Pac. Rep. 567, N. Mex.

OPINION OF THE COURT.

MECHEM, J.—This was an action of replevin, tried before a jury and resulted in a verdict and judgment thereon against the appellants.

1. Appellants assign error in that the verdict is contrary to the evidence and not sustained by it.

This court, in the case of Candelaria v. Miera, 13 N.
1 M. 361, laid down the rule, that a verdict of a jury will not be disturbed in this court when supported by any substantial evidence.

We have examined the record as to the matters pointed out by counsel for appellants in this connection and find ample evidence to sustain the verdict, except that part of it, that gives the defendants damages as follows: "And damages in double the amount of the value of wool
2 taken by the plaintiffs from the sheep replevined during their detention. Wool 520 lbs. 10 cts a pound." The wool was recoverable in this action under the pleadings and the evidence or its value in the alternative, but not as damages. Our statute allows as part of the recovery in replevin "double damages for the use" of the property from the time of delivery, chap. 107, sec. 239, Laws 1907, but the property recovered by defendants was the sheep and wool. The statute also gave them as incident to the recovery of the specific property double damages for its use, and the value of such use could only be estimated on its ordinary market price. 34 Cyc. 1563.

No evidence of that market price was introduced and it would be rather difficult to show that the property in-

volved in the action had any use as that term is generally understood. Cobbey on Replevin, sec. 888.

2. Counsel for appellants seriously urges for our consideration a variance which he says exists between the verdict and the judgment.

Our attention is called to the record, where it appears by the verdict that 5.20 pounds of wool were found to have been taken by plaintiffs from the sheep during the time they were replevined.

The judgment is rendered on the basis of five hundred and twenty pounds.

The clerk's minutes, in which the verdict is placed of permanent record, contains the words: "Wool five hundred and twenty pounds." The evidence was sufficient to sustain a finding that plaintiffs did shear five hundred and twenty pounds of wool from the sheep.

The original of the verdict is not before us. In view of this fact, and further that from the judgment, the record of the court made by the clerk and the evidence at the trial, it is possible to draw no other conclusion
3 but that there is a mistake in the transcript and that the verdict was for five hundred and twenty pounds of wool. This contention in our opinion attaches too much importance to a matter of punctuation. Ewing v. Barnett, 11 Pet. (U. S.) 41; 32 Cyc. 1262.

3. This action was brought by "Emmett Wirt, Eugenio Gomez and Felix Garcia, a copartnership doing business under the firm name and style of Wirt, Gomez and Company."

The appellants allege error because a judgment was rendered against them as a copartnership instead of against them individually.

The omission of the names of the individual plain-
4 tiffs will be inserted here and the judgment corrected to correspond with the complaint. Sub-Sec. 94, Sec. 2685, C. L. 1897.

For the reason that it appears that the appellee in his answer alleged the wrongful taking by the appellants of wool, and the evidence being sufficient to sustain the finding by the jury that appellants had taken five hun-

dred and twenty pounds of wool of the value of ten cents per pound, from the sheep during the time they were replevined, the judgment of the lower court will be affirmed upon the appellee filing a remittitur of $52.00, within 15 days from this date. Otherwise the judgment will be reversed.

[No. 1308, August 16, 1910.]

CHICAGO, ROCK ISLAND AND EL PASO RAILWAY COMPANY, Appellant, v. JACOB WERTHEIM, Appellee.

SYLLABUS (BY THE COURT.)

1. Denial upon information and belief of matters necessarily within the knowledge of the pleader is not permissible.

2. In a suit against a railroad company a denial by such company upon information and belief that it was operating a railroad at the time and place alleged being a matter necessarily within defendant's knowledge, raises no such issue upon the pleadings as will admit testimony that it was not operating such railroad over an objection that such testimony was not admissible under the pleadings.

Appeal from the District Court for Quay County before EDWARD A. MANN, Associate Justice. Affirmed.

HAWKINS & FRANKLIN for Appellants.

Parole proof was admissible to show that defendant was not operating the line of railroad which passed through or near to the lands of the plaintiff.

HARRY H. MCELROY for Appellee.

A railroad company by the acceptance of its charter and franchises from the state assumes a responsibility toward the public for the proper exercise thereof, and if it

permits others to use its road the latter must be deemed to do so as its agents.

STATEMENT OF THE CASE.

The appellee Wertheim sued the appellant railway company for damages. The complaint alleges plaintiff's ownership in the North-half of the North-east quarter of Section 22, Township 11, North Range 30 East, New Mexico Principal Meridian. The following allegation then appeared:

"That the defendant now is and was at the time hereinafter mentioned, a corporation organized and existing under and by virtue of the laws of the Territory of New Mexico, owning, controlling and operating a line of railway and a right of way, extending across said Territory near to said land."

It is further alleged that the company negligently and carelessly allowed dried grass and other combustible material to accumulate along the said right of way over which it was then operating trains, and that it carelessly and negligently allowed sparks to escape from engines operated over its railroad track, located on said right of way, and as a result said dried grass and combustible materials were set on fire and same was communicated to the lands of the appellee, with the result that the grass and hay thereon situated were burned and the real estate injured, and plaintiff asked for damages in the sum of four hundred dollars.

The company filed the following answer:

"Comes now the defendant in the above styled and numbered cause and answering the complaint of the plaintiff last filed herein, says:

"Defendant on information and belief denies each and every allegation contained in the complaint of the plaintiff filed herein except only the allegations therein contained to the effect that the defendant is a corporation organized as stated in the said complaint.

'And defendant further denies that the plaintiff is

entitled to the relief, or any part thereof, by him claimed. or to any relief whatsoever."

Jury was waived. From a judgment for one hundred dollars the company prosecutes this appeal.

OPINION OF THE COURT.

POPE, C. J.—(After making the foregoing statement of the facts.)—The only assignment of error relates to the rejection of the testimony to be now mentioned. Upon the trial the witness Franklin was introduced, who testified that by reason of being the New Mexico attorney for the defendant he passed on the lease between that company and the El Paso and Southwestern system of which he was assistant general attorney and that he also had charge of the settlement of claims over the portion of the railroad (from Tucumcari to Santa Rosa) here involved and had frequent occasion to advise with reference to the operation of that section of the railroad; and that being thus in daily touch with these matters he knew who was operating the road between the points above named. With this preliminary proof it was sought to be shown by the witness that the defendant was not operating or in charge of the track and equipment between Tucumcari and Santa Rosa at the date of the alleged injury. This was objected to on the grounds that the witness had not shown the proper qualification to testify, that the answer involved the contents of a written lease and that the evidence was not admissible under defendant's answer. The objection was sustained and we are asked to review the action of the court in declaring this testimony inadmissible. We find it unnecessary to determine the correctness of this ruling upon the first two objections urged, for we deem the third—that the testimony was not admissible under the pleadings—well taken. The answer, as we have seen, was a denial on information and belief. While this tendered an issue upon some of the matters set up in the complaint it did not have this effect as to the allegation that the defendant was operating the line of road at the place and time in question.

This was a matter necessarily within the knowledge
1 of the defendant and as to such the law does not permit a denial upon information and belief. 31 Cyc. 201; Weil v. Crittenden, 139 Cal. 488, 73 Pac. 238; Smith v. Stubbs, 16 Colo. App. 130, 63 Pac. 955.

Such a pleading raises no issue of fact. Humphreys v. McCall, 9 Cal. 59; Ord v. Steamer Uncle Sam, 13 Cal. 370; Loveland v. Garner, 74 Cal. 298; Crane Bros. Co. v. Morse, 49 Wis. 368; Carpenter v. Momsen, 92 Wis. 449; Carpenter v. Rolling, 107 Wis. 559; Nashville Co. v. Carrico, 95 Ky. 489, 26 S. W. 177; Avery v. Stewart, 136 N. C. 426, 68 L. R. A. 776; Raymond v. Johnson, 17 Wash. 232, 61 A. S. R. 908; Ensley v. Page, 13 Col. App. 452; Howard v. Maysville Co., 24 Ky. Law Rep. 1051, 70 S. W. 631; Gribble v. Columbus Co., 100 Cal. 67, 34 Pac. 527.

Nor do we consider that the plaintiff waived the question by going to trial without attacking the form of the answer. While the general rule is that an objection to a pleading may be waived by failure to urge the objection at the proper time or by any act which in legal contemplation implies an intention to overlook the defect (31 Cyc. 717; Keator Lumber Co. v. Thompson, 144 U. S. 434; Pring v. Goldenburg, [N. M.] 107 Pac. 529), we find no such failure and no such act here. Neither a motion for judgment on the pleadings nor a demurrer was available as against the answer for it contained denials which, although upon information and belief, were good, as for instance the denials as to the ownership of the premises and the suffering of damage. These preliminary methods of attack were therefore not open to plaintiff. Upon the trial plaintiff did not by his proofs go into the question of who was operating that part of the line nor recognize that as an issue, and when the defendant, by this line of proof,
sought to make it an issue the objection now con-
2 sidered, based upon the pleadings, was promptly made,
thus giving defendant notice of the question raised and of the desirability of an amendment. There is nothing in this to indicate a waiver of the objection or an acquiescence in the defective pleading as sufficient. 31 Cyc. 723; Rogers v. St. Paul, 86 Minn. 98.

On the other hand the form of the answer lacks much of giving the plaintiff that notice which our code system guarantees to parties as to the issues to be insisted upon. An insistence upon this by the courts aids to economy in the preparation of cases and to certainty and dispatch in the administration of justice.

We are aware that there are one or two Minnesota cases holding, contrary to the views here expressed, that advantage of a defect in pleading such as this must be made in advance of trial and not by an objection to evidence. Smalley v. Isaacson, 40 Minn. 450; Schroeder v. Capehart, 49 Minn. 525.

The latter case seems the more nearly in point. In that case, however, it will be noted that the court's decision proceeds at least in part upon the ground that the matter denied upon information was not necessarily within the knowledge of the defendant. But whatever be the basis of these contrary decisions we deem them not in accord with the modern ideas of pleading. The face to face contest and not the masked battery typifies the latter.

The judgment is affirmed.

[No. 1292, August 22, 1910.]

JOHN H. RAPP, Appellant, v. E. B. VENABLE, Probate Clerk, etc., Appellee.

SYLLABUS.

1. State legislatures have power to regulate or prohibit absolutely the sale of intoxicating liquors and may prohibit the manufacture of them.

2. That construction of a statute which declares the legislative intent, is the proper one.

3. Laws of 1905, Chapter 115, Section 2, providing that "no license shall be issued for such purpose (to establish or conduct a saloon for the vending or sale of spirituous, vinous. or malt liquors within a distance of five miles of any United

States government sanatorium) but this section shall not apply to any saloon previously established," does not create a monopoly and is not contrary to the 14th amendment of the Constitution of the United States.

4. Laws of 1905, Chapter 115, Section 2, operates to discontinue, upon their expiration, licenses within the prohibited limit in existence at the time of the passage of the act.

5. Laws of 1905, Chapter 115, Section 2, is not a local and not a special act and not void under the Springer Act.

Appeal from the District Court for Grant County before FRANK W. PARKER, Associate Justice. Affirmed.

FRED C. KNOLLENBURG for Appellant.

Laws of 1905, chapter 115, section 2, is unconstitutional. Organic Act, secs. 7 and 17; R. S. of U. S., sec. 1851; 10 Current Law 418; Zanone v. Mound City, 103 Ill. 552; State ex rel. Galle v. N. O., 113 La. 371, 36 So. 999; Allgeyer v. State of La., 165 U. S. 579; in re Jacobs, 98 N. Y. Supp. 98.

Laws of 1905, chapter 115, section 2, creates a monopoly. Tugman v. City of Chicago, 78 Ill. 405; Moore v. City of Danville, 1908, 232 Ill. 307, 83 N. E. 845; State ex rel. Galle v. N. O., 1904, 113 La. 371, 36 So. 999; Beebe v. State, 6 Ind. 501, 63 Am. Dec. 391; Town of Elba v. Rhodes 1905, 142 Ala. 689, 38 So. 807; Town of Manderville v. Band. 1904, 111 La. 806, 35 So. 915; C. L. 1897, sec. 3774; Duncan v. Mo., 152 U. S. 377, 382; Philbrook v. Newman, 85 Federal 139, 143; State v. Catigan, 50 Atl. 1079, 1081, 73 Vt. 245; Sunderland's notes on U. S. Const. 728, 733; Cooley's Const. Law (Student's Series) 248; Connolly v. Union Sewer Pipe Co., 184 U. S. 540; ex-parte Deeds, 87 S. W. 1030; Sam's v. St. L. & M. R. R. Co., 73 S. W. 686; State v. Redmon, 114 N. W. 137; N. Y. Sanitary, etc., Co. v. Dept. Pub. Health, 70 N Y. Sup. 510; Union Saw Mill Co. v. Felsenthal, 85

Ark. 346, 108, S. W. 217; ex parte Woods, 108 S. W. 1171; Cooley's Const. Lim., 6 ed., 481, 483.

The police power of the state must be exercised in subordination to the Federal Constitution. Sunderland's notes on the U. S. Constitution 611, 716, 717; Cooley's Constitutional Law (Student's Series) 251; People v. Warden of Prison, 39 N. E. 689, 144 N. Y. 529; Mugler v. Kansas, 123 U. S. 661; in re Wilshire 103 Federal 620; Logan & Bryan v. Postal Tel. & Cable Co., 157 Federal 570; State v. Redmon, 114 N. W. 137; Iler v. Ross, 90 N. W. 869, 57 L. R. A. 895; Priewe v. Wis. Land & Imp. Co., 79 N. W. 780, 103 Wis. 537; Tiedeman State & Federal Control, sec. 3; L. S. & M. S. Ry. Co. v. Smith, 173 U. S. 684; State v. Chittenden, 107 N. W. 500-517, 127 Wis. 468; State v. Walker, 92 Pac. 775; State v. First Nat. Bank, 51 N. W. 587; 2 S. D. 568.

Laws of 1905, chapter 115, section 2, is local and special legislation and contrary to the Springer Act. Black's Law Dictionary; Codlin v. Kohlhousen, 9 N. M. 565-575, 58 Pac. 499-502; Kehr v. Turner, 1908, 107 S. W. 1064; Clark v. Finley, 54 S. W. 343, 345, 93 Tex. 171; 5 Words and Phrases 4208; Title, etc., Co. v. Kerrigan, 88 Pac. 356-365, 150 Cal. 289; State v. Walsh, 37 S. W. 1112, 1113, 136 Mo. 412.; Kerrigan v. Force, 68 N. Y. 381; Dundee Mortgage, etc., Co. v. School District No. 1, C. C. 21 Fed. 151; Rambo v. Larrabee, 73 Pac. 915, 67 Kan. 634; Kansas v. City of Lawrence, 100 Pac. 485, 494; Topeka v. Gillett, 4 Pac. 800, 803, 32 Kan. 431; People v. R. R. Co., 23 Pac. 303, 83 Cal. 393; People v. Election Commissioners of Chicago, 77 N. E. 321, 325, 221 Ill. 9; Van Geisen v. Bloomfield, 47 N. J. Law 442; Park Commissioners v. Chicago, 74 N. E. 771, 216 Ill. 54; Marsh v. Hanley, 43 Pac. 975, 111 Cal. 368; Sutherland St. Const., sec. 129; Thomas v. Wabash, etc., Co., C. C., 40 Fed. 126; State v. Thomas, 39 S. W. 481, 138 Mo. 95; State v. Bliler, 39 S. W. 1117, 138 Mo. 139; in re Branch, 57 A. 431, 70 N. J. L. 537-576; Noel v. People, 58 N. E. 616, 187 Ill. 587; De Hart v. Atlantic City, 43 Atl. 742, 63 N. J. L. 223; in re Fagan, 57 Atl. 469, 70 N. J. L.

341; State v. Jackson, 89 Mo. 237, 1 S. W. 307; Thomas v. Wabash, etc., Co., 40 Fed. 126.

COLIN NEBLETT and WILSON & WALTON for Appellee.

The legislature may regulate or may absolutely prohibit the sale of intoxicating liquors without violating the fourteenth amendment to the Constitution of the United States. Crowley v. Christensen, 137 U. S. 86; Gray v. Conn., 159 U. S. 74; Beer Company v. Mass., 97 U. S. 25; Bartemeyer v. Iowa, 18 Wall. 129; Mugler v. Kansas, 123 U. S. 623; Kidd v. Pearson, 128 U. S. 1; Organic Act; State of Oregon v. Richardson, 85 Pac. 225, 8 L. R. A., n. s. 362, 48 Or. 309; U. S. v. Ronan, 33 Fed. 117; Decie v. Brown, 167 Mass. 290, 45 N. E. 765; State v. Stovall, 103 N. C. 416, 8 S. E. 900; Meyer v. Baker, 120 Ill. 567, 12 N. E. 79; Commonwealth v. Petri, 28 Ky. Law 940, 90 S. W. 987; in re Kessler, 163 N. Y. 205, 57 N. E. 402.

Laws of 1905, chapter 115, section 2, is not special or local legislation such as is prohibited by the Springer Act. Codlin v. Kohlhousen, 9 N. M. 565; Decie v. Brown, 167 Mass. 290, 45 N. E. 765; Iler v. Ross, 64 Neb. 710, 57 L. R. A. 895, 90 N. W. 869; River Rendering Co. v. Behr, 7 Mo. App. 345; Smiley v. MacDonald, 42 Neb. 5, 27 L. R. A. 540, 60 N. W. 355; State v. Currans, 111 Wis. 431, 56 L. R. A. 252; Grumbach v. LeLande, 98 Pac. 1059.

A police regulation discriminating in favor of saloons already established, is not unconstitutional. City of New Orleans v. Charles Smythe, 116 La. 685, 41 So. 33, 6 L. R. S., n. s. 722.

STATEMENT OF THE CASE.

The appellant applied for a license to vend liquors at retail in the town of Central, Grant County, New Mexico, but was refused the license by the appellee, who based his refusal on the ground that the saloon was "within five miles of a United States Government Sanatorium" and was not "one previously established," and was, therefore, within section 2, chapter 115, Laws of 1905, which provides:

"It shall be unlawful for any person, company or corporation to establish or conduct a saloon for the vending or sale of spirituous, vinous, or malt liquors within a distance of five miles of any United States Government Sanatorium, or within a distance of two miles of any military reservation in New Mexico, or within one mile of the established boundaries of the New Mexico College of Agriculture and Mechanic Arts, or within one-half mile of the University of New Mexico or the School of Mines, and no license shall be issued for such purpose, but this section shall not apply to any saloon previously established."

The appellant brought suit in mandamus, by which he sought to compel the appellee, in his official capacity, to issue a license to him upon his application. In the return of the appellee to the alternative writ and petition filed in this cause, to the effect that the place and building, in and for which appellant requested the issuance to him of a license for the vending of liquor, was within a distance of five miles of a United States Government Sanatorium, was not denied by plaintiff below, no reply whatever having been filed by plaintiff to defendant's return. The existence of the facts thus alleged is also assumed in appellant's assignment of errors and brief herein, and the attack upon the rulings of the lower court is made solely upon the ground of the unconstitutionality of the act upon which appellee based his refusal to issue the license.

Upon the trial in the court below a peremptory writ of mandamus was denied and the cause was dismissed. From this judgment the plaintiff below appealed to this court.

OPINION OF THE COURT.

McFIE, J.—The assignments of error, though several in number, raise but one question for the consideration of this court, and that is the unconstitutionality of the act of the Territorial Legislature above referred to.

The court below having upheld the act of the Legislature, its decision is attacked as erroneous for two reasons. First, the act creates a monopoly and is therefore void under section 1 of the 14th amendment to the Constitu-

tion of the United States; and second, because it is in violation of chapter 818 of the Acts of Congress of 1886, 24 U. S. Statutes at Large 170, commonly known as the "Springer Act," prohibiting the enactment of special or local laws in certain cases.

The provision of the 14th amendment to which reference is made is as follows:

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

That the Constitution of the United States applies to the territories, as asserted by counsel for appellant, is true; and if the act of the legislature above referred to is in violation of the terms of the 14th amendment thereto, it must give way as a void enactment.

The vice alleged to exist in the Territorial act is found in the closing sentence of section 2, "but this section shall not apply to any saloons previously established." It is urged that the use of the words *"previously established"* creates a monopoly and therefore deprives appellant of the equal protection of the laws. Unless this provision of the act, when properly construed, necessarily accomplishes this result it is not perceived in what manner this act could be obnoxious to the 14th amendment, as the evident purpose of the act is to prohibit the establishment and licensing of saloons within five miles of *any* United States Sanatorium and within certain distances of military reservations and the territorial educational institutions. The exercise of the police power under the enactment of similar laws for the benefit and protection of educational institutions has been sustained by the courts in a large majority of the states and we see no valid or constitutional objection to the application of such laws for the benefit and protection of a Sanatorium of the United States.

Under the Organic Act, which stands as a constitution for this Territory, the power of the legislature extends to all rightful subjects of legislation, not inconsistent with

the Constitution and laws of the United States. Organic Act, Sec. 7.

In many respects the legislature of New Mexico has more power than those of the states as those of the states are subject to many limitations placed upon them by state consitutions that do not exist in the territories.

It has been repeatedly held that state legislatures have power to regulate or prohibit absolutely the sale of intoxicating liquors and may prohibit the manufacture of
1 them, without violating the 14th amendment to the Constitution of the United States, and it has been furher held that such statutes do not deny the equal protection of the laws or abridge the privileges or immunities of the citizen, nor do they deprive any person of life, liberty or property, without due process of law. Bartemeyer v. Iowa, 18 Wall. 129; Beer Co. v. Mass., 97 U. S. 25; Mugler v. Kansas, 123 U. S. 623; Foster v. Kansas, 112 U. S. 205; Kidd v. Pearson, 128 U. S. 1; Crowley v. Christensen, 127 U. S. 86; Gray v. Comm., 159 U. S. 74; Cronin v. Adams, 192 U. S. 114; Lawton v. Steele, 152 U. S. 133.

It was held in United States v. Ronan, 33 Fed. 117, that statutes restricting or prohibiting the sale of intoxicating liquors within certain localities are constitutional.

In Jordan v. Evansville, 163 Ind. 516, an ordinance establishing a four mile limit was declared constitutional. In Webster v. State, 110 Tenn. 505, the court upheld a law forbidding sales of liquor within four miles of institutions of learning.

In Whitney v. Township Board, 71 Mich. 244, the court upheld a law forbidding the sale of intoxicants within one mile of a Soldiers Home.

In State v. Banninger, 110 N. C. 527, the court sustained an act of the legislature of that state prohibiting the sale of liquors within three miles of an Orphans Home.

In Crawley v. Christensen, *supra,* the Supreme Court of the United States, says: "But the possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, good order and morals of the community. Even liberty, itself, the great-

est of all rights, is not unrestricted license to act according to one's own will. This case states in concise form the basis of the police power and the reasons for the wide range of its application. Regulations such as are above indicated have been most frequently upheld notwithstanding they excepted certain specific persons and business within certain localities from the operation thereof. Decie v. Brown, 167 Mass. 290; State v. Stoval, 103 N. C. 416; Meyer v. Baker, 120 Ills. 567; Comm. v. Petri, 28 Ky. Law 940.

The last case above referred to suggests the proper construction to be placed upon our statute and was based, in part at least, upon facts quite similar to the facts in the case now under consideration.

In the Kentucky case Dan Petri applied to the county court for a license to sell liquors at retail within the district of the Highlands. The license was refused and Petri appealed to the Campbell County Circuit Court in which court his counsel attacked the validity of Sec. 11 of the Statute of Kentucky relating to liquor licenses wherein it provided: "In said district no person without a license from said board (of trustees), except the taverns now existing on the Campbell turnpike road, may set up or engage in the business of retailing or making intoxicating liquors," etc.

It was contended that this law was void because it discriminated in favor of and conferred special rights or privileges upon the owners of taverns situated on the Campbell turnpike road. The Supreme Court of Kentucky in disposing of this contention said:

"The position of appellant, that section 11 is void because it seems to discriminate in favor of and confer special rights upon the owners of the taverns on the Campbell turnpike road, is untenable. This exception was placed in the act merely to protect the rights of the owners of those taverns which were being operated under license at the time the act was passed. The object was to prevent a forfeiture of the licenses then in existence. The exception could only operate until the annual license expired, and it has had no force or effect, since the expiration of one year from the date of the approval of the act of 1872."

The taverns referred to in the Kentucky case were saloons conducted under that name and therefore the attack upon that law was identical with that now being made in the present case. The theory of the appellants in both cases is that the saloons in existence at the time the laws were enacted and which were excepted from the operation created a monopoly and conferred special privileges in that the excepted saloons were authorized to continue in business indefinitely, while other saloons were prohibited. The Kentucky court in its decision exposes the fallacy of that position and at the same time states the solid foundation for the exceptions found in these statutes.

The record in this case does not show that there were any saloons at the town of Central and within five miles of the United States Sanatorium, at Fort Bayard, at the time the law of 1905 was enacted, but it was admitted on the trial in the lower court, that there were two such saloons in the town of Central and within the five mile limit at the time that act was approved, and for the purposes of this hearing, the same admission is made in this court. But admitting that there were two saloons established there at the time and that the act was not to apply to them it does not follow that a monopoly was thereby created. Saloons are licensed in this Territory of which fact the legislature was aware. If two saloons were being conducted in Central we must presume that they were licensed, as none other could lawfully exist there.

It is the duty of this court to sustain the act if by a reasonable and proper construction it can be done. That construction which declares the legislative intent is, **2** of course, the proper one. That the legislature intended to create a monopoly by perpetuating the *previously established* saloons indefinitely, is not fair to the legislature to conclude. It is much more reasonable to conclude that the legislative intent was to recognize the validity of the legally issued licenses, under which such saloons were being conducted during the term of their existence, without any intention whatever to grant a perpetual right of renewal, or of being continued without license. It was

clearly within the legislative power to so provide and the recognition of the validity of existing licenses furnishes a reasonable and just basis for the proviso in the act,
3 and renders untenable the contention of appellant that the act is void in that it creates a monopoly.

It cannot be fairly understood that the reference to saloons in this act is to the building and paraphernalia without regard to the license which is indispensible to its legal existence in this Territory. It is true that in the first part of the section the establishment and conducting of a saloon is forbidden, but toward the close of the same section it is said *"and no license shall issue for such purpose."* Thus making the saloon and its license inseparable. The scope of the act is that no saloons shall be conducted after the passage of the act, nor shall any license be issued for such purpose.

The main purpose of this section of the Act of 1905, was to prohibit the licensing or conducting of saloons within five miles of any Government Sanatorium after the passage of the act, but to avoid the forfeiture of licenses then in existence for which payment has been made, the taking effect of the act was in legal effect postponed as to such licenses; but upon their expiration, under the terms of the act, the clause *"and no license shall be issued for*
4 *such purpose"* would operate to discontinue them. We cannot assent to the correctness of appellant's contention that the legislature intended to perpetuate the two *previously established* saloons so close to the Sanatorium in an act intended to prohibit saloons within five miles of the institution thus creating a monopoly and discrimination which would render the act not only reprehensible but, doubtless, absolutely void.

We are aware that certain legislative acts regulating the number of saloons which might be established within a given territory have been upheld by the courts as within the legislative power, but we do not believe that the legislature had any such purpose by the insertion of the proviso in the Act of 1905, but, rather, the purpose was to abolish saloons within the five mile limit. The legislature has

this power and the exercise of it is not subject to the objection made.

The second contention of appellant's counsel, as disclosed by both his oral argument and his brief, is that the Act of 1905 is void under the "Springer Act" in that it is a local and special act.

That the act, upon its face, is general we think must be conceded. The fact that there may have been but one United States Sanatorium in the Territory at the
5 time the act was passed would not make the act local or special, unless, by the terms of the act, its provisions could have no application to Sanatoriums thereafter established. The act now under consideration is made specifically applicable to "any United States Government Sanatorium" and therefore is not subject to the objection that it is local or special.

Upon this subject the case of Codlin v. County Commissioners, 9 N. M. 565, is quite instructive. Numerous cases are therein referred to in which the distinction between a general and a local or special act is pointed out.

As illustrating the point above stated, as to there being but one Sanatorium in New Mexico, take the case of State ex rel. Columbus v. Mitchell, 31 Ohio St. 592.

The act in question in that case provided that it should be applicable to "cities of the second class having a population of over 31,000 at the last federal census." In holding this to be a special act the court said, in part:

"Columbus is the only city in the state having the population named, at the last federal census, and the act therefore applies alone to that city, and never can apply to any other."

In State v. Herman, 75 Mo. 340, the court says:

"* * * the act under consideration applied only to cities having a population of one hundred thousand or more. The court expressly referred to the fact that the act was limited to then existing conditions and held the act to be special legislation because it did not permit other cities which might thereafter have a population of one hundred thousand to have the benefit of its provisions."

Cases might be multiplied almost indefinitely making

this distinction the turning point as to whether legislation is general or special, but we will not pursue it further.

It is within the legislative power to classify counties, cities, business and occupations, and where such classification acts are founded upon good and sufficient reasons, are reasonable and of general application within such classification they have been so generally upheld by the courts that it is useless to refer to the authorities.

The act now before the court is undoubtedly founded upon good and sufficient reason, as the purpose of the act in defining limits surrounding Sanatoriums, Military Reservations and educational institutions within which saloons may not exist, is in line with similar legislation in many, if not all of the states.

Nor can this act be declared a local law, in that it operates to perpetuate local saloons previously established, for as we have said, the act does not do this nor is there anything in the act disclosing an intent to accomplish any such result on the part of the legislature.

In our opinion the judgment of the court below sustaining the validity of Sec. 2, Chap. 115, Laws of 1905, was correct and it is therefore affirmed.

[No. 1295, August 22, 1910.]

TERRITORY OF NEW MEXICO, Appellee, v. JUAN BARELA, Appellant.

SYLLABUS (BY THE COURT.)

A term of a District Court in this Territory, 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 sooner adjourned without day, although another term of the same court for another county has been held, as required by law, in the meantime, by the same or another judge.

Appeal from the District Court for Dona Ana County before FRANK W. PARKER, Associate Justice. Affirmed.

LLEWELLYN & LLEWELLYN for Appellant.

The court was without jurisdiction. C. L. 1884, sec. 543; Laws 1891, ch. 19; Laws 1893, ch. 34; Laws 1895, ch. 17; C. L. 1897, secs. 908, 909, 910, 911; Laws 1905, ch. 89; C. L. 1897, sec. 905; Borrego v. Territory, 8 N. M. 446; Freeman on Judgments, 4 ed., secs. 90, 121; Territory v. Armijo, N. M., 89 Pac. 67; Cooper v. Am. Central Ins. Co., 3 Colo. 318; State v. Williams, 48 Ark. 227; ex parte Jones, 49 Ark. 110; ex parte Williams, 60 Ark. 457, 65 S. W. 711; Parker v. Sanders, 46 Ark. 229; Batten v. State, 80 Ind. 394; in re Millington, 24 Kan. 214; Grable v. State, 2 G. Greene 559; Bates v. Gage, 40 Cal. 183; Smith v. Chester, 1 Cal. 409; Domingues v. Domingues, 4 Cal. 186; Norwood v. Kenfield, 35 Cal. 329; Blake v. Harlan, 75 Ala. 205; State v. McBain, 102 Wis. 431, 78 N. W. 602; Cooper v. Granger, 108 N. W. 193; Roberts Schafer Co. v. Jones, Ark., 101 S. W. 165.

Press of business does not incapacitate a judge so as to authorize the calling in of another judge. C. L. 1897, sec. 882; in re Bignolds Settlement Trusts, 26 L. T. Rep. N. S. 176; in re Munger, 41 Sup. N. Y. 882; State v. Williams, 48 Ark. 227, 2 S. W. 843; People v. O'Neil, 47 Cal. 109; Caldwell v. Barrett, 71 Ark. 310, 74 S. W. 748; C. L. 1897, sec. 905; Rev. St. 1887, sec. 1865; in re Millington, 24 Kan. 214.

A judgment rendered or proceedings had at a time not appointed by any law for the holding of the court is void for the want of jurisdiction. Kidd v. Burke, 142 Ala. 625, 38 Southern 241; McMillan v. City of Galsden, 39 Southern 569; Ins. Co. v. Pappe, 4 Okl. 110, 43 Pac. 105; Cooper v. Am. Cen. Ins. Co., 3 Colo. 318; Bates v. Gage, 40 Cal. 183; Meyers v. East Bench Ins. Co., Utah, 89 Pac. 1005; Davidsburg v. Knickerbocker Ins. Co., 90 N. Y. 526; Olds Wagon Works v. Benedict, C. L. A., 67 Fed. 1; Cyc. Page 673; Note 44 and cases cited.

FRANK W. CLANCY, Attorney General, for Appellee.

Each county in New Mexico has a separate, independent District Court. Organic Act, sec. 10.

The statutes disclose a legislative intent not to limit the duration of the terms of court. Laws of 1855, pp. 19, 21; Laws of 1859, p. 62; Laws 1860, p. 86; Laws of 1861, p. 96; Laws of 1863, p. 92; Compiled Laws of 1865, p. 112; Laws of 1866, p. 154; Laws of 1868, p. 88; Laws of 1869, chapter 8, sec. 6, chapter 24, sec. 13; Laws of 1874, p. 48; Laws of 1876, p. 37; Laws of 1878, p. 59; Laws of 1880, p. 63; Prince's Laws, p. 71; Laws of 1895, p. 51; Laws of 1897, pp. 15, 88; Laws of 1899, p. 26; Laws of 1901, pp. 30, 134; Laws of 1903, pp. 16, 131, 135; Laws of 1905, pp. 11, 44, 65, 204, 355, 367; Laws of 1907, pp. 67, 104; Laws of 1909, pp. 1, 245, 327.

The beginning of a term of court in one county of a district, does not necessarily end the term immediately preceding, in another county of the same district. White v. Brown, 38 S. W. 335, Ind. Terr.; King v. Sears, 91 Ga. 577; Stirling v. Wagner, 4 Wyo. 5; in re MacDonald, 4 Wyo. 150; State v. Leahy, 1 Wis. 259; Florida v. Phosphate Co., 70 Fed. 885; Gonzales v. Cunningham, 164 U. S. 626; Borrego v. Territory, 8 N. M. 446; Gonzales v. Cunningham, 164 U. S. 612; Territory v. Netherlin, 85 Pac. Rep. 1044; Territory v. Armijo, 14 N. M. 210.

STATEMENT OF THE CASE.

The appellant was convicted of murder in Dona Ana County, in the Third Judicial District, May 15, 1909.

After verdict and before sentence a motion in arrest of judgment was made on the ground that the term of court begun for said county as provided by law, April 5, 1909, expired by limitation of law, May 3, 1909, on which date, according to the provisions of Chapter 95, Session Laws of 1905, a term of court was to begin in Sierra County in said district. A term did in fact begin there, with another Associate Justice presiding by request of the District Judge. The appellant claims that thereby the term of court in Dona Ana County ended and his trial was a nullity. The motion in arrest of judgment was overruled and the

defendant was sentenced. From that action of the District Court he appealed to this court.

OPINION OF THE COURT.

ABBOTT, J.—In his exhaustive brief for the Territory, the Attorney General maintains that there are two kinds of District Courts in this Territory: one, the District Courts established directly by Congress, whose districts embrace several counties each; and the other kind, created by Territorial Statutes, each of which is a court for a specific county and not for any other county and that there is a District Court of Dona Ana County wholly distinct from the District Court of Sierra County.

If this contention is correct and the reasoning in support of it is strong, the appellant is left wholly without standing ground. But even if it be granted that the court which assumed to try the appellant was the court of the Third District, sitting for the trial of causes in Dona Ana County, there remains to bar the appellant's way to a new trial, the recent decision of this court in Territory v. Armijo, 14 N. M. 210, in which practically the same question now raised was decided adversely to the appellant's position and in which the court said: "The beginning of the term is fixed by law for each county. Its end comes only by the adjournment, or by the arrival of the date designated by law for the beginning of another term of the same court, *for the same county.*"

That decision was based largely on Territory v. Borrego, 8 N. M. 446, in which it was held in effect, that merely constructive interference of one term with another does not terminate the existence of either, or render anything invalid done by the court at the term in progress, after the time for a term in another county of the district arrives.

That decision was upheld in Gonzales v. Cunningham, 164 U. S. 626, in which the court said: "There was nothing in any of these provisions which controlled the discretion of the trial judge, in continuing any special term he may have been holding until a pending case was concluded, and nothing which operated to invalidate the proceedings of such special term because prolonged beyond the day fixed

for a regular term. Jurisdiction did not depend on the stroke of the clock."

While these decisions are practically controlling on this court, we do not wish to ignore the decisions of other courts on the same or similar questions which have been brought to our attention. The case of Cooper v. Ins. Co., 3 Colo. 318, cited by the appellant, while it arose in a court similar to the District Courts of this Territory, was apparently decided by the State Court after the Territorial Courts had gone out of existence and their powers had mainly ceased to be matters of present interest there.

An examination of the opinion in the case shows that the ground of the decision was not that on which the appellant here stands, and, indeed, the court did little more than declare that the fixing of a date by law, for the beginning of a term in one county of a district, by implication, fixed the end of any term in progress in another county of the same district.

That view is very conclusively disposed of in Gonzales v. Cunningham, *supra.*

The question has been ably and exhaustively treated in Sterling v. Wagner, 4 Wyo. 5, followed by in re MacDonald, 4 Wyo. 150, where the court reached the same conclusion which this court arrived at in Territory v. Armijo, *supra,* the distinction being that, in the cases relied on for the opposite view, the time for the end of the term of court, as well as for the beginning, was fixed by law, which was not the case in Wyoming, and is not so here in New Mexico.

In Montana, when it was a territory and had a system of courts like ours, a case undistinguishable from that at bar arose, Carland v. Commissioners of Custer County, 5 Montana 579-599. In that territory the time for the beginning of a term was fixed under the law by order of the judges, but no time was set for the end of a term. As in the case at bar, a term of court was in progress in each of two counties in a district at the same time, the judge of the district holding the one in which the case cited was tried.

The court, speaking by Galbraith, J., said he "knew

of no law, and there is no order of the Supreme Court of this Territory, fixing the time when a term court shall terminate. But, however this may be, if the proceedings of either court were invalid, it would be those of Choteau County and not those of Curtis County where the judge of the third district presided.

"By holding the court in Curtis County, the judge of the Third Judicial District will be presumed to have elected to hold that court," referring to Wells on Juris. of Courts, Section 134.

We see no reason to depart from the decision in Territory v. Armijo, *supra*, and the judgment of the trial court is affirmed.

[No. 1314, August 22, 1910.]

CITY OF ROSWELL, Appellee, v. BERT INGERSOLL, Appellant.

SYLLABUS.

1. Chapter 54, Laws 1899, contains a specific delegation of power to the city councils and boards of trustees of cities or incorporated towns.

2. Chapter 31, Laws of 1909, contains no grant of power to the city council, nor does it take away any power theretofore granted. It permits a majority in value of the owners of real estate in a city or in a portion of a city, to make public improvements independently of the city government.

3. Chapter 31 of the Laws of 1909 does not repeal Chapter 54 of the Laws of 1899.

Appeal from the District Court for Chaves County before WILLIAM H. POPE, Chief Justice. Affirmed.

U. S. BATEMAN for Appellant.

Chapter 31, Laws of 1909, repealed Chapter 54 of the Laws of 1899. Acts 1891, ch. 43, p. 93; C. L. 1897, sub-

secs. 80 and 81 of sec. 2402; Acts 1899, ch. 54, p. 107; Acts 1903, ch. 42, p. 65; Acts 1909, ch. 31, p. 55; Norwood v. Baker, 172 U. S. 269, 43 L. ed. 443; Cleveland C. C. St. L. R. Co. v. Porter, 210 U. S. 52, Law ed 1015; Voight v. Detroit, 184 U. S. 115, 46 Law ed. 459; Goodrich v. Detroit, 184 U. S. 432, 46 L. ed. 627; Londoner v. Denver, 210 U. S. L. ed. 1113; Elliott on Roads and Streets, sec. 20; United States v. Tynen, 11 Wal. 88, 20 L. ed. 153; Pana v. Bowler, 107 U. S. 529, 27 L. ed. 424; 5 Dig. U. S. Supreme Court, Lawyers' Co-operative Edition 1908, p. 5421, sec. 603

H. M. Dow for Appellee.

Chapter 54 of the Session Acts of 1899 has not been repealed by Chapter 31 of the Session Acts of 1909 or by Chapter 42 of the Session Acts of 1903. 2 Cooley on Taxation, 1128, 1152; Palmer v. Way, 6 Colo. 106; Suth. St. Const., secs. 138, 160, 267; U. S. v. Clafin, 97 U. S. 546; Hudson Furniture Co. v. Freed Furniture & Carpet Co., Utah, 36 Pac. 132; People v. McAllister, Utah, 37 Pac. 578; Frost v. Wenie, 157 U. S. 46; U. S. v. Healy, 160 U. S. 147.

OPINION OF THE COURT.

MECHEM, J.—The City of Roswell, appellee, passed an ordinance requiring the appellant to build a sidewalk in front of his lot.

The appellant brought suit to enjoin the appellee from enforcing said ordinance, upon the ground that it did not conform to Chapter 31 of the Laws of 1909, but that it had been drawn pursuant to Chapter 54 of the Laws of 1899. The sole question here is, as stated in brief of appellant, whether Chapter 54 of the Laws of 1899 is repealed by Chapter 31 of the Laws of 1909. The court below held the negative of this proposition. It is not claimed by the appellant that the act of 1909 expressly repeals the act of 1899, but he says that the later act covers the whole subject of the former, and was, in fact, a substitute for the old law, and therefore the statute of 1899 was repealed

by implication. We believe a very short review of these statutes will demonstrate the fact that the act of 1899 was not repealed by implication.

The Act of 1899, entitled "An Act to authorize the building and repair of sidewalks in cities, towns and villages," conferred upon city councils and boards of trustees the power by ordinance, to require the owners of property to build, rebuild or repair sidewalks in front of their lots, and if such owner upon being required so to do failed or refused, the city or town might build, rebuild or repair the same, and the act further provided that the cost of such building, rebuilding or repairing should be a lien against the property. Such an ordinance might affect one owner or a dozen owners, might affect one block or a dozen blocks, or one lot in a block, or, perhaps, a sub-division of a lot, might require the building of a number of sidewalks or might only require one owner to build a sidewalk so as to connect with sidewalks already built, or might require but one owner to repair, even in a slight degree, a walk already in place.

Chapter 31, Laws 1909, is entitled "An Act relating to improvement districts in cities and incorporated towns." By it the city council of any city or incorporated town, is empowered, upon petition by a majority in value of the owners of real property in the improvement district proposed to be created, to create such improvement district, and appoint three resident taxpayers in such district as a board, with full power and authority to make the specific improvements set forth in the petition; the board then takes charge of the improvements to be made, fixes the cost of the improvements, lets contracts for the work to be done, and issues bonds to raise the money to pay for the work.

With the character, scope and cost of the improvement, the city council has nothing more to do after the appointment of the board.

The Act of 1899, contains a specific delegation of
1 power to the city councils and boards of trustees of cities or incorporated towns.

The Act of 1909 contains no grant of power to the

city councils, nor does it take away any power theretofore granted, it permits a majority in value of the owners
2 of real estate in a city or in a portion of a city, to make public improvements independently of the city government.

While a majority in value of the owners of real estate might take into their hands the building, rebuilding or repair of sidewalks, until said property owners did so, there could be nothing to hinder the city council from acting under the law of 1899.

Until action is taken under the Act of 1909, a city council may proceed under the Act of 1899, for it is not reasonable to suppose that the legislature intended that before a property owner could be compelled to put a sidewalk in front of his lot, or repair one already there, that an improvement district must be created. Such would be the necessary result of appellant's contention.

For these reasons, and because the Act of 1909 does not contain any clearly expressed or indicated purpose of an intention to repeal the Act of 1899, and because
3 the said acts are not absolutely irreconcilable, it is held that the latter act is not repealed by the former. Territory v. Digneo, 103 Pac. 975.

The judgment of the lower court is therefore affirmed; and it is so ordered.

[No. 1329, August 22, 1910.]

THE COSTILLA LAND AND INVESTMENT COMPANY, Appellee, v. ROBERT ALLEN, et al., Appellants.

SYLLABUS (BY THE COURT.)

1. Proceedings to punish for contempt are deemed criminal in their nature when the purpose is primarily punishment.

2. Where the purpose of such proceeding is primarily compensatory or by way of reimbursement to the opposite

party for expenses growing out of the alleged contempt the proceeding is deemed civil.

3. While the border line between the two classes of proceedings is often indistinct, the question of whether the offender is a party to the suit, whether the proceedings are before final decree and whether the fine goes to the public or a party to the litigation are often determinative considerations.

4. No appeal lies in this Territory from a judgment for what is classed as a criminal contempt. Marinan v. Baker, 12 N. M. 451, followed.

5. An order imposing a fine, payable by way of reimbursement to the opposite party, for violation of a preliminary injunction is an interlocutory order in a civil proceeding and review of such an order can be entertained only after final decree and in connection with an appeal therefrom.

Appeal from the District Court of Taos County before JOHN R. MCFIE, Associate Justice. Appeal Dismissed.

A. C. VOORHEES for Appellant.

ABBOTT & ABBOTT, BROOKS & SMITH, and CHARLES J. HUGHES for Appellee.

No briefs filed.

STATEMENT OF THE CASE.

The Costilla Land and Investment Company, a corporation, filed their complaint against Allen and others alleging ownership in the south half of what is known as the Sangre de Cristo Grant and further alleging that the defendants "have wrongfully and unlawfully slandered the title of your plaintiff and have by false rumors alleged that said plaintiff has no title to said land and is without title to said portions thereof and has wrongfully and unlawfully claimed that the boundaries thereof are not where they properly belong by the grants and patent of same; and

wrongfully and unlawfully contend that each part and portion of the land of plaintiff is the land of the United States and the said defendants; and the defendants threaten to take possession of certain portions of the land, water, pasture, woods and right of plaintiff situate within the boundary and description of said grant, * * * and are trying to induce others to take possession of said lands and are threatening to pasture large herds of sheep and other stock upon said tract and are threatening to hold and retain other large tracts of land belonging to this plaintiff and to induce others to do the same and are threatening to fence large tracts of said land owned by said plaintiff and are now threatening to exclude this plaintiff, its agents, servants and tenants, and are threatening to prevent its agents and tenants from entering said land and from pasturing their sheep on plaintiffs' said land to the great and irreparable damage to this plaintiff in the sum of $10,000."

The complaint prays damages, a decree quieting title and an injunction against the acts and pretensions of the defendants as above outlined.

The court ordered a preliminary injunction as prayed, upon the giving of bond. This latter was done and the defendants answered to the merits of the action, which, however, as yet remains untried. Subsequent to the filing of the answer the plaintiffs filed a motion supported by affidavits alleging that the defendants had violated the terms of the injunction and praying that they be ordered to show cause why they should not be punished for contempt. The rule issued and upon hearing and after the taking of much testimony eight of the defendants were adjudged in contempt "in having wilfully disobeyed the injunction which issued out of this court in the above entitled action on to-wit, the 26th day of July, A. D., 1906, in that they, and each of them, have continued to trespass upon the lands in controversy in the above entitled cause by enlarging their possessions thereon, constructing additional fences and buildings upon said lands, and have committed waste on said lands by cutting hay therefrom and selling the same for profit, and have slandered the title of the above named plaintiff to said lands."

The court fined each of said defendants twenty-five dollars together with costs "to be paid to the clerk of this court for the use of the above named plaintiff" and ordered that each of said defendants "be committed by the sheriff of the County of Taos, Territory of New Mexico, to the county jail of said county, to be there detained in close custody until he pays said sum or be discharged according to law." The defendants prayed and were allowed an appeal from this decision. The case is now before us on a motion to dismiss the appeal.

OPINION OF THE COURT.

POPE, C. J.—(After making the foregoing statement of the facts). The motion to dismiss the appeal proceeds upon the ground that the action of the court in fining the defendants for contempt is not appealable. It is argued that if the contempt proceedings be deemed criminal and punitive in their nature no appeal lies, since it was held by this court in Marinan v. Baker, 12 N. M. 451, that under C. L. Sec. 3406 there is no right of appeal in a criminal case except "from a final judgment rendered *upon an indictment;*" and on the other hand, if a civil and remedial proceeding that the decision rendered was interlocutory and not final and thus not appealable under Jung v. Myer, 11 N. M. 379, which declares that under the Organic Act appeals are permitted only from final decisions. These contentions involve a determination by us of whether the proceeding is criminal or civil, for if the former the appeal is clearly not maintainable under Marinan v. Baker, *supra.* Before proceeding to the consideration of the main question there is to be dealt with the contention of appellant that Marinan v. Baker is not in point because our statutes regulating appeals have been changed since that decision. We find no basis for this claim, however. Chapter 57 of the Laws of 1907, entitled "An Act providing appellate procedure in civil and criminal cases," by its section 47, simply re-enacts, but does not in the slightest change C. L. 3406, *supra,* which was the controlling statute in Marinan v.

Baker, and which, as we have seen, limits appeals in
4 criminal cases to final judgments rendered upon indictments. Neither does section 1 of the Act of 1907, upon which appellant specially relies as changing the status, have that effect, since it is an exact copy of Sec. 161 of the Civil Code, in force when the Marinan case was decided, and for the further reason that it applies only to civil cases as witness the following language: "Any person aggrieved by any final judgment or decision of any district court in any civil case may, at his election take an appeal or sue out a writ of error," etc.

Deeming Marinan v. Baker controlling authority, if the decision complained of be for a criminal contempt, we proceed to determine whether such was criminal or civil and if the latter whether the action of the trial court was interlocutory or final.

The border line between what may be termed civil and what criminal contempt is, as has been pointed out by many authorities, exceedingly indistinct and narrow, leaving it often a question of extreme refinement as to whether the act was one or the other. Of course all judgments for contempt are in a sense punitive since the sentence imposed, even if simply to preserve private rights and even if the so-called fine go to the litigant purely by way of reimbursement, has the effect to punish the recalcitrant and to declare the purpose of the court that its orders shall not be trifled with. The authorities, however, draw a distinction between those contempts where the protection of the court and a vindication of its dignity are the main objects of the proceeding and those where a more effective remedy to private litigants is after all the purpose of what is done. Thus in In Re Nevitt, 117 Fed. 448, 458, quoted with approval in Bessette v. Conkey Co., 194 U. S. 328, it is said: "Proceedings for contempt are of two classes,—those prosecuted to preserve the power and vindicate the dignity of the courts, and to punish for disobedience of their orders, and those instituted to preserve and enforce the rights of private parties to suits, and to compel obedience to orders and decrees made to enforce the rights and administer the

remedies to which the court has found them to be
1 entitled. The former are criminal and punitive in
their nature, and the government, the courts, and the people are interested in their prosecution. The latter are
civil, remedial, and coercive in their nature, and the
2 parties chiefly in interest in their conduct and prosecution are the individuals whose private rights and remedies they were instituted to protect or enforce."

So in State v. Bland, 189 Mo. 197, 206, it is said: "Contempts have been divided into civil and criminal, into direct and constructive, into contempts which affect alone the dignity of the court and those which affect the beneficial rights of a party litigant, and there is a class of contempts in which both elements appear."

And referred to the difficulty of distinguishing between civil and criminal contempts the Missouri court in the same case (page 206) says: "An examination of the authorities will show that the line of demarcation between the different classes of contempts is often shadowy and does not run true, and that the learning on the question abounds with fine as well as superfine distinctions."

Among the *indicia* of criminal contempt, which have been deemed controlling in doubtful cases, are whether the
respondent is or is not a party to the suit, whether the
3 cause has gone to final decree, whether the punishment
imposed is fine or imprisonment, and if a fine whether it is paid to the adverse litigant or to the public. A reference to some of the federal cases will illustrate the distinguishing features of the two classes of contempts. In ex parte Kearney, 7 Wheaton 37, the contempt consisted in improperly refusing to answer a question propounded the defendant as a witness. This was held to be a criminal contempt, since it struck at the very power of the court to proceed with its business. In New Orleans v. Steamship Co., 20 Wall. 392, upon like principle, the proceeding was held to be criminal where the mayor of the city of New Orleans had invoked the interposition of the state court in a matter within the scope of litigation already pending in the federal court, thus having been guilty of what was de-

clared to be an act "unnecessary, unwarranted in law and grossly disrespectful to the circuit court."

In Worden v. Searls, 121 U. S. 14, two fines were imposed for violation of the preliminary injunction, one for $250 to be paid directly to the complainant and the other for $1,182, "to be paid to the clerk of the court and by him to be paid over to the plaintiff for damages and costs." The court, influenced by the fact that these fines while nominally for contempt, were really to reimburse the plaintiff for his expenses and damages incident to a violation of the injunction, treated the contempt as civil and not criminal.

In O'Neal v. United States, 190 U. S. 36, where the act charged was an assault upon the referee in bankruptcy, the cause was deemed criminal. In Bessette v. Conkey Co., 194 U. S. 324, where the defendant was fined for violating a restraining order, it does not appear whether or not the fine went to the opposing party, but the court held it on the other grounds to be a criminal proceeding. The court said: "A significant and generally determinative feature (stamping it as civil) is that the act is by one party to a suit in disobedience of a special order made in behalf of the other," but added: "Yet sometimes the disobedience may be of such a character and in such a manner as to indicate a contempt of the court rather than a disregard of the right of the adverse party."

The court further said (p. 329): "In the case at bar the controversy between the parties to the suit was settled by final decree and from that decree so far as appears no appeal was taken. An appeal from it would not have brought up the proceeding against the petitioner for he was not a party to the suit. Yet being no party to the suit he was found guilty of an act in resistance of the order of the court. His case therefore comes more fully within the punitive than the remedial class. It should be regarded like misconduct in a court room or disobedience of a subpoena, as among those acts primarily directed against the power of the court."

The ground of the court's conclusion that the proceeding was essentially criminal is shown by the concluding

portion of the opinion where the court limits its conclusion only to "such cases of contempt as the present—that is, cases in which the proceedings are against one not a party to the suit and cannot be regarded as interlocutory."

In the Matter of Christensen Engineering Co., 194 U. S. 458, the court thus distinguishes the facts of that case from the case just discussed: "In that case Bessette was not a party to the suit, and the controversy had been settled by a final decree, from which, so far as appeared, no appeal had been taken. He was found guilty of contempt of court, and a fine of $250 imposed, payable to the United States, with costs. In this case the Christensen Engineering Company was a party. The contempt was disobedience of a preliminary injunction and the judgment in contempt was intermediate the preliminary injunction and the decree making it permanent. The fine was payable, one-half to the United States, and the other half to the complainant."

In the Christensen case, however, the court held the contempt to be criminal upon the ground that the fine, being partly payable to the United States, "was clearly punitive and in vindication of the authority of the court," and as such dominated the proceedings and fixed its character. In that case the court refers to ex parte Debs, 159 U. S. 259, and says: "In that case there was nothing of a remedial or compensatory nature. No fine was imposed but only a sentence of imprisonment." These expressions clearly show that the nature of the punishment is a controlling consideration in stamping the character of the proceeding. The cases in the inferior federal courts, as for instance Gould v. Sessions, 67 Fed. 163, are simply illustrative of the foregoing and do not call for special discussion.

The only case in this court dealing with this question is Marinan v. Baker, 12 N. M. 451 *supra*. There the defendants, who were parties to the original suit, had been proceeded against after final decree for violating the injunctive features of that decree and in punishment committed to the county jail. The court held the contempt a criminal one; and very properly so, under Bessette v.

Conkey, since after final decree, and especially so, under in re Christensen, since, as there remarked, a jail sentence is manifestly punitive rather than "remedial or compensatory."

Comparing the present case with those above outlined—and especially Worden v. Searls, 121 U. S. 14,—we are of opinion that the contempt here dealt with was civil rather than criminal. The defendants were parties to the suit, the fine was imposed prior to final decree, the fine went not to the public but to the plaintiff. The size of the fine is not such as to suggest punishment, as was the case in Christensen Co. v. Westinghouse Co., 135 Fed. 774, but rather a moderate reimbursement to plaintiff for the very evident expenses of enforcing obedience to the preliminary injunction. The fact that the court's decision provides for a commitment in case the fine is not paid is of no relevancy as designating the proceeding. That was the provision in Worden v. Searls, 121 U. S. 14, which, as we have seen, was nevertheless declared a civil proceeding. Such provision is to be deemed simply a means of executing collection of the fine or as it is expressed in In re Nevitt, 117 Fed. 448, 458, *supra*, "The commitment is in the nature of an execution to enforce the judgment of the court and the party in whose favor the judgment was rendered is the real party in interest in the proceedings."

We hold therefore, that the contempt here punished was civil and not criminal and that the case is not ruled by Marinan v. Baker, *supra*. The motion to dismiss must therefore, as to this ground, be overruled.

It remains to be declared whether the decision appealed from was interlocutory or final. We deem it settled by the controlling authority that it is the former. In Hayes v. Fischer, 102 U. S. 122, the defendant was ordered to pay the clerk $1,389.99 as a fine for violating an interlocutory judgment, to stand committed until the order was obeyed. The court said (the italics ours): "If the order complained of is to be treated as part of what was done in the original suit it cannot be brought here for review by writ of error. Errors in equity suits can only be corrected in this court on appeal *and that after a final decree*. This

order, if part of the proceedings in the suit, *was interlocutory only.*"

In Worden v. Searls, 121 U. S. 14, 26 *supra,* which as we have seen was a case of civil contempt, the court upon appeal from the final decree in the cause treated the orders fining the defendant as interlocutory and as made "in the course of the cause based on the questions involved as to the legal rights of the parties." Considering them as such the court said: 'Although the court had jurisdiction of the suit and of the parties the order for the preliminary injunction was unwarranted as a matter of law and the orders imposing the fines must, so far as they have not been executed, be held under the special circumstances of this case to be reviewable by this court, under the appeal from the final decree. The result is that they cannot be upheld."

That the view above expressed as to the purport of these authorities is correct is shown by Matter of Christensen Engineering Co., 194 U. S. 458, 460, where, after referring to these and other cases, it is said: "These authorities show that when an order imposing a fine for violation of an injunction is substantially one to reimburse the party injured by the disobedience, although called one in a contempt proceeding, it is to be regarded as merely an interlocutory order and to be reviewed only on appeal from the final decree."

We hold, therefore, that the present appeal must be
5 dismissed because prosecuted from an interlocutory not a final decision.

We are not inattentive, in making this disposition of the case, to the argument that the conclusions announced here and in Marinan v. Baker, leave great power of oppression in a trial court. The answer to this is the familiar one that this is a matter for legislative rather than judicial redress. In many cases, however, such hardship will, as a practical matter, be obviated by bringing the case to speedy final decree when, as above indicated, ample right to review at least in civil contempt exists against improvident or oppressive interlocutory orders. The injunction bond can be made to avail for the enforced return of

fines improperly exacted and in very doubtful cases a court will no doubt be open, as was the court in Worden v. Searls, *supra,* to the suggestion that pending final decree the payment of a fine imposed purely for purposes of compensation or reinbursement may be deferred, upon a proper bond, for payment in case of an adverse final decision. And if upon final hearing the decision be for the alleged contemner it is inconceivable that a righteous court will not by the decree protect against a fine that may have been unjustly exacted. But, however this may be, we cannot allow the suggestion that action of a trial court may impose hardships in some instances to operate against our declaration of what we find to be the law. We find adapted to present day conditions, equally with when written in 1822, the words of Mr. Justice Story, as recorded in ex parte Kearney, 7 Wheaton 37, *supra,* where it is said: "The argument of inconvenience has been pressed upon us with great earnestness. But where the law is clear, this argument can be of no avail; and it will probably be found, that there are also serious inconveniences on the other side. Wherever power is lodged, it may be abused. But this forms no solid objection against its exercise. Confidence must be reposed somewhere; and if there should be an abuse, it will be a public grievance, for which a remedy may be applied by the legislature, and is not to be devised by courts of justice."

The appeal is dismissed.

[No. 1302, August 23, 1910.]

TERRITORY OF NEW MEXICO, Appellee, v. REYNEL GARCIA, Appellant.

SYLLABUS (BY THE COURT.)

1. The protection against needless humiliation through questions put in cross examination which courts should extend to witnesses testifying before them should not be carried so far as to exclude questions as to facts clearly affect-

ing the credibility of the testimony which the witness has given on the direct examination.

2. When conviction of a criminal offense is shown, in accordance with the provisions of Sec. 3025, C. L. 1897, to affect the credit of a witness, such conviction must stand as a fact not open to explanation by the witness.

Appeal from the District Court for Rio Arriba County before JOHN R. MCFIE, Associate Justice. Reversed.

RENEHAN & DAVIES for Appellant.

Anything tending to show bias or prejudice on the part of the witness or anything which shows his friendship or enmity is a proper subject of inquiry. Blitz v. U. S., 153 U. S., L. ed. 727; Moore v. U. S., 150 U. S. 57, 37 L. ed. 996; Thiede v. Utah, 159 U. S. 518, 40 L. ed. 242; Goldsby v. U. S., 160 U. S. 70, 40 L. ed 343; Mexia v. Oliver, 148 U. S. 664, 37 L. ed. 602; Deery v. Cray, 5 Wall. 795; Gilmore v. Higley, 110 U. S. 47; Smith v. Shoemaker, 17 Wall. 630; Railroad Co. v. O'Brien, 119 U. S. 108; 1 Digest of U. S. Sup. Ct. Rep. 683, sec. 5035; Brann v. U. S., 168 U. S. 532, 42 L. ed. 568; Gregg v. Moss, 14 Wall. 564; Origet v. Heddin, 155 U. S. 228; Fidelity and Deposit Company v. Courtney, 186 U. S. 351; Shephard v. Railroad Co., 130 U. S. 426; 3 Enc. Ev., pp. 850-858; Santa Ana v. Harlin, 99 Calif. 538; Mayhew v. Taylor, 8 Gray, Mass., 172; Stark v. People, 5 Denio 106.

The fact of conviction is not conclusive impeachment but is rebuttable, in other words, the conviction may be explained. Sims v. Sims, 75 N. Y. 466; Smith v. State, 64 Md. 752; Read v. State, 66 Nebr. 184; Railroad Co. v. Runnells, 46 S. W. 394; Scott v. State, 47 S. W. 731; Wolkoff v. Teft, 12 N. Y. Sup. 464; Gertz v. R. R. Co., 137 Mass. 79; Railroad Co. v. McCleish, 115 Fed. 268; 7 Enc. Ev. 242; in re Noble, 124 Ill. 267; Winter v. Judkins, 106 Ala. 261; The People v. Shaver, 120 Calif. 354; Fairfield Packing Co. v. Fire Insurance Co., 44 Atl. 317;

Commonwealth v. Knapp, 9 Pick. 496, 511; Russell v. Coffin, 8 Pick. 143, 154; Rex v. Clark, 2 Stark, 241; Webb. v. State, 29 Ohio St. 351.

FRANK W. CLANCY, Attorney General, for Appellee.

There were two grounds upon which the exclusion of the questions by defendant's counsel was justifiable, first, because it was sought thereby to inject into the case a collateral issue which could not properly be tried, and, second, because the questions were of an insulting character, tending to humiliate and degrade the witness, and it was within the sound discretion of the court not to permit such examination. 2 Wigmore on Evidence, sec. 983; Turnpike Coal Co. v. Loomis, 32 N. Y. 132.

When the witness admitted the fact of his conviction of an infamous crime in the district court, he admitted, necessarily, the existence of a record of that fact. Such a record is conclusive as to everything appearing therein. 2 Wigmore on Evidence, secs. 980, 1116.

The opinion includes a statement of the essential facts.

OPINION OF THE COURT.

ABBOTT, J.—The defendant, Reynel Garcia, was tried and convicted in the First Judicial District Court of Rio Arriba County of an assault with intent to murder his wife, Teresa Lobato de Garcia.

The errors assigned are all, with one unimportant exception, based on the exclusion of testimony against the objection of the defendant.

One class of excluded questions consists of those which relate to the refusal of the trial court to allow defendant's counsel to ask Teresa Lobato de Garcia, on whom it was alleged the assault was committed, and her father, Jose Ignacio Lobato, witnesses for the Territory, on cross examination, whether at the place and just before the time when the shots were fired, by which it was claimed the assault was made, the defendant charged Lobato in the presence of his, the defendant's wife, with aiding and abetting her in living in adultery with his, the defendant's

brother in the absence of the defendant, and whether that did not lead to an attack on the defendant by Lobato, armed with a knife, the claim of the defendant being that in self defense against such an attack he fired shots at Lobato, that his wife rushed between them and was hit accidentally.

Neither witness had, in giving an account of the shooting on direct examination, testified to any talk or fact of the kind but each had given what purported to be a complete account of what was said and done at the time and place of the shooting.

An examination of the record makes it clear that the trial judge must have believed that the object of the question thus put was to divert the attention of the jury from the real issue in the case, which was whether the defendant assaulted his wife with intent to kill her, to the question whether she had been guilty of infidelity to him, that the evidence was calculated to mislead and prejudice the jury and was besides an invasion of the rights of the witnesses to be protected from insult under the guise of cross examination, which was not directed to material issues, and the record discloses reasonable ground for that belief.

The defendant was not claiming that he shot at his father-in-law because of his exasperation at the part he claimed the latter had played in the infidelity of his wife and he was denying that he shot at his wife at all, notwithstanding what he claimed to know of her infidelity.

It is urged in behalf of the Territory that the exclusion of such questions on cross examination was properly within the discretion of the trial court and to that effect the Attorney General cites 2 Wigmore on Evidence, Section 983, et seq. and cases there cited, especially Gt. W. Turnpike Co. v. Loomis, 32 N. Y. 132.

While we fully agree with the learned author that witnesses should be protected from insult and unnecessary humiliation through cross examination and that courts should not permit the attention of the jury to be diverted in that way from the real issues to immaterial matters,

we must hold that this principle should not be so ex-
1 tended as to prevent the admission of evidence tending to aid in arriving at the truth of the matter under inquiry, merely because it would be humiliating to a witness to give such evidence. Since Teresa Lobato de Garcia and her father testified on their direct examination to what was said and done at the time and place of the shooting they were open to cross examination as to whether other things were said and done there as a part of the transaction by the parties to it. 3 Wigmore on Ev., Sec. 1768 et seq. But whatever of error there was in excluding questions of this kind may be considered cured by the subsequent admission of the defendant's testimony covering the occurrence of the shooting and affirming the matter contained in the excluded questions. On rebuttal his wife and her father denied his testimony in that respect and were of course subject to cross examination on their denial. But in the course of his testimony the defendant said that shortly before the time of the shooting his wife told him she was then pregnant by another man. In rebuttal she denied having so told him. Defendant's counsel then asked her if it was not true that she was then so pregnant, but, on the objection of the district attorney, the question was excluded. One of he questions put to her on her original cross examination and excluded, although somewhat ambiguous, may fairly be held to make the same inquiry of her, that is whether she was, at the time of the shooting, pregnant by a man not her husband.

On that point she did not, at any stage of the case, testify. Yet, if she was then so pregnant the fact must have had a most important bearing on her feelings toward her husband and the credibility of her evidence against him.

She might naturally have wished him to be in the penitentiary and have been willing to color her testimony to that end.

The principle of exclusion at the discretion of the court, to which we have already referred, cannot be extended to the exclusion of evidence on a fact so vitally affecting the credit of the witness.

We do not understand Wigmore's argument to go that

far, and certainly some of the cases he cites in support of his view do not sustain a position so extreme. One of those cases is Territory v. Chaves, 8 N. M. 528, and we repeat here the quotation made in Wigmore from the opinion of Bants, J., in that case as well expressing what we understand to be the prevailing and correct view of that question:

"The extent to which cross-examination will be permitted is no doubt, in a large measure, in the discretion of the trial court; and it is difficult to draw the line as to where the legal discretion as to the admission or the exclusion of such testimony commences, and where it ends. The truth is the thing to be sought. Assaults upon a witness by cross-examination into collateral matters cannot be allowed to gratify the caprice or the displeasure of those against whom he testified; and intrusions into private affairs, which are calculated merely to wound the feelings, humiliate, or embarrass the witness, will not be permitted. * * * But clear distinction is to be taken between those matters against the witness, as tend to humiliate him or wound his feelings, and those matters, on the other hand, which are calculated, in an important and material respect, to influence the credit to be given to his testimony. As to the latter class, the witness cannot be shielded from disclosing his own character on cross-examination, and for this purpose he may be interrogated upon specific acts and transactions of his past life; and if they are not too remote in time, and clearly relate to the credit of the witness, in an important and material respect, it would be error to exclude them. How far justice may require such examinations to go, how much time should be spent upon them, what should be excluded for remoteness of time, and what for being trivial or unimportant, must depend in some measure upon the circumstances of each case; and these are questions addressed primarily to the discretion of the trial court; but the discretion should be liberally exercised."

Tla-Klo Yel Lee v. United States, in 167 U. S. 274, is a case directly in point on this question. See also 7 Enc. of Evidence, 170-173, and cases cited.

The only other allegation of error which requires

special mention is that a witness for the defense, Jose Ignacio Garcia, against whom a conviction of a criminal offense was shown, by his admission, for the purpose of affecting his credit as a witness, should have been allowed to explain the circumstances of the conviction.

To pursue that course in such a case would lead practically to a retrial of the case in which the conviction was had since if the defendant is allowed to explain the
2 prosecution should have the right to give a counter explanation. The defendant had his day in court and was convicted. That must be taken as a settled fact and as much can be introduced in evidence under our statute, Sec. 3025, C. L. 1897; Com. v. Gallagan, 155 Mass. 56, and cases cited; L. v. Railroad, 169 Mass. 340, and cases cited.

The judgment of the trial court is reversed and the cause remanded.

[No. 1276, August 25, 1910.]

SOFIA GARCIA DE VIGIL, Administratrix of the Estate of Eslavio Vigil, Deceased, v. ANDREW B. STROUP, Appellee.

SYLLABUS.

1. A de jure officer may recover from a de facto officer, fees and emoluments of the office which the de facto officer had wrongfully intruded upon and held. Albright v. Sandoval, 14 N. M. 345.

2. In this Territory the writ of quo warranto is a writ of grace and not of right and can only be obtained by permission of the attorney general, and a private person cannot have the writ to adjudicate his title to an office. The proceeding in the nature of a quo warranto goes only to removing the intruder.

3. A de jure officer may maintain an action to recover from a de facto officer the fees and emoluments of the office

without having first his title established by a proceeding in quo warranto.

4. The effect of a judgment of ouster in quo warranto would only have put the intruder out of office and would not have put plaintiff in.

5. If the commission of the governor reciting a vacancy and appointing defendant to fill it, was a nullity, it should not be permitted to stand unless grave public interests require it, and certainly not as between individuals. No such public reasons exist why the title of the defendant should stand unimpeachable.

Appeal from the District Court for Bernalillo County, Reversed.

BACA & LOUGHARY for Appellant.

The de jure officer may recover from the de facto officer the salary and fees of the office received by the latter. Sandoval v. Albright, 93 Pac. Rep. 717, N. M., and cases cited pp. 718, 719; 1 Selwyn's Nisi Prius. 81; Boyter v. Dodsworth, 6 Term Rep. 681; Allen v. McKean, 1 Sumner 317; Powell v. Milbank, 1 Term Rep. 399; Glasscock v. Lyons, 38 Am. Dec. 299; Howard v. Wood, 2 Lev. 245; Lightly v. Clounston, 1 Taunt. 112; Dolliver v. Parks, 136 Mass. 499; Schlencker v. Risley, 3 Scammon 483, 38 Am. Dec. 101; Mayfield v. Moore, 53 Ill. 428; Wenner v. Smith, 9 Pac. Rep. 293, 298 and authorities cited; Pooler v. Reed., 73 Maine, 129-130; People v. Webber, 89 Ill. 348, 384; Territory ex rel. Hubbell v. Armijo, 89 Pac. Rep. 267; South Ottawa v. Perkins, 94 U. S. 260, 24 L. ed. 158; Stadler v. City of Detroit, 13 Mich. 346, 349; People v. Norstrand, 46 N. Y. 375, 382, 383; Waterman v. Chicago and Iowa R. R. Co., 32 Am. St. Rep. 235; Inhabitants of Springfield v. Butterfield, 56 Atl. Rep. 581, 582; Bates v. Clark, 95 U. S. 204, 24 L. ed. 471, 473; Poindexter v. Greenhow, 114 U. S. 270; Short v. Symmes, 150 Mass. 299; Fowler v. Bebee, 9 Mass. 234; Howard v. Wood, 2 Lev. 245; People v. Tieman, 30 Barb., N. Y.

193, 194; Stratton v. Oulton, 28 Cal. 45, 51, 58; Pearce v. Hawkins, 2 Swan, Tenn. 89; Conklin v. Cunningham, 7 N. M. 445, 454, 455; Eldodt v. Territory, 10 N. M. 141, 145, 149; Hubbell v. Armijo, 13 N. M. 490; Hunter v. Chandler, 45 Mo. 452, 454, 456, 457; Bradshaw v. Sherwood, 42 Mo. 179; Turnipseed v. Hudson, 19 Am. Rep. 663.

The action of the Governor in attempting to remove appellant from the office of superintendent of schools, is reviewable in this action. Territory v. Ashenfelter, 4 N. M. 93; Territory ex rel. Hubbell v. Armijo, 98 Pac. 267; 23 Cyc. 681, and authorities cited at note 86; Waldron v. Harvey, 46 S. W. Rep. 603; Rice v. Allen, 95 N. W. Rep. 404; Beaudroit v. Murphy, 30 S. E. Rep. 825, 826; Kingsborough v. Tousley, 47 N. E. Rep. 541, Ohio; C. L. 1897, sec. 2685, sub-sec. 45; Hallack v. Loft, 34 Pac. Rep. 568, Colorado; Starbuck v. Murray, 5 Wend., N. Y. 158, 159; ex parte Neilson, 131 U. S. 178; Board of Com. Lake Co. v. Platt, 79 Fed. 567; People v. Liscomb, 60 N. Y. 559; State v. Seay, 64 Mo. 89; Shanborn v. Fellows, 22 N. H. 473, 489; De Baca v. Wilcox, 11 N. M. 353.

HUGH J. COLLINS for Appellee.

Where one has received an appointment to a public office, from an authority vested with power to make such appointment, and is qualified in accordance with the statutory requirements, the law will presume, in the first instance, that appointment was legal, and that appointee is the rightful incumbent to the office designated. Conklin v. Cunningham, 7 N. M. 445; Eldodt v. Territory, 10 N. M. 141; Hubbell v. Armijo, 13 N. M. 490; 12 A. & E. Enc. Law 147, 1 ed.; Werner v. Smith, 9 Pac. Rep. 297; Bradshaw v. Sherwood, et al., 42 Mo. 179; Hunter v. Chandler, 45 Mo. 457, 458; Waterman v. Chicago & Iowa Ry. Co. 32 Am. St. Rep. 228; McManus v. City of Brooklyn, 5 New York, Supp. 424; Hagan v. City of Brooklyn, 5 N. Y., Supp. 425; 17 Iowa 525; 17 Conn. 585; 22 Mo. 180; 38 Mo. 544; 35 Mo. 156; 36 Mo. 71; 34 Mo. 395.

Quo warranto is the proper action when the person

proceeded against is either a de facto or de jure officer in possession of the office. Eldodt v. Territory, 10 N. M. 141; People v. Quail, 2 Wend. 12; People ex rel Peter Rumple v. Board of Supervisors Kings County, 96 N. Y., Sup.; Court Reports, 89 Hun. 38; Wood v. Peake, 8 Johns 69; Wyldie v. Washburn, 16 Johns 49; The People v. ex rel Seeman, 5 Denio 109; People v. Head, 25 Ill. 290; High on Legal Remedies, secs. 73, 75; Cornwall v. Lambert, 10 Minn. 369; Cornwell v. Athren, 3 Mass. 268; Re Strong Petitioner, 20 Pick 495; Ewing v. Turner, 35 Pac. 951; State ex rel v. Churchill, 75 Minn. 455; People ex rel Kelly v. Common Council, N. Y. 503; People ex rel Hodgkinson v. Stevens, 5 Hill 628; Morris v. People, 3 Den. 396; People v. Lane, 55 N. Y. 217; Wren v. Goetting, 133 N. Y. 569; Auditors Wayne Co. v. Benoit, 20 Mich. 176; Hubbell v. Armijo, 13 N. M. 490; Griebel v. State, 111 Ind. 369, 12 N. E. Rep. 700; Williams v. State, 6 S. W. 845; State v. Owen, 63 Tex. 261; Owen v. State, 64 Tex. 500; State v. Meehan, 45 N. J. 189; Territory v. Ashenfelter, 4 N. M. 85, 12 Pac. 879; People v. Waite, 70 Ill. 25; Algood v. Jones, 60 N. H. 543; People v.Callahan, 83 Ill. 128; State v. Hickson, 27 Ark. 398; Colwell v. Bell, 6 Ark. 227; Hull v. Superior Court, 63 Cal. 174; People v. Scannell, 7 Cal. 433; Palmer v. Woodberry, 14 Cal. 43; State v. Buckley, 61 Conn. 290; Harrison v. Simmons, 44 Conn. 318; Duane v. McDonald, 41 Conn. 517; State v. North, 42 Conn. 86; Smith v. People, 140 Ill. 167; People v. Whitcomb, 55 Ill. 172; State v. Gallagher, 81 Ind. 558; Babriel v. State, 111 Ind. 369; Brown v. Cohen, 122 Ind. 113; Parson v. Durand, 150 Ind. 203; State v. Wilson, 30 Kan. 666; Neilson v. State, 39 Kan. 154; Tillman v. Otter, 93 Ky. 600; French v. Cowan, 79 Me. 426; Commonwealth v. Allen, 128 Mass. 310; Atty. Gen'l. v. Surmon, 111 Mass. 258; Con. v. Hawks, 123 Mass. 525; Atty. Gen'l. v. Salem, 103 Mass. 138; Fuller v. Ellis, 98 Mich. 96; Lindsey v. Atty. Gen'l., 33 Miss. 338; Loper v. Millville, 53 N. J. L. 362; Robersin v. Bavonne, 58 N. J. L. 325; Brown v. Meehan, 45 B. J. L. 189; People v. Lane, 55 N. Y. 219.

Where the title of an office is in dispute, the right

to the salary, fees and emoluments thereof, cannot be tried until the right to the office itself has been finally determined. Meredith v. Sacramento Co., 50 Cal. 433; Dorsy v. Smyth, 208 Cal. 21; Carroll v. Seibenthaler, 37 Cal. 193; Lee v. Wilmington, 1 Mary, Del. 65; Garley v. Louisville, 47 S. W. 265; Dickerson v. Butler, 27 Mo. App. 9; Hagan v. Brooklyn, 126 N. Y. St. Rep. 944; Selby v. Portland, 14 Oregon, 243, 58 Am. Rep. 307; 17 Enc. of P. & P., pp. 163, 407; Conklin v. Cunningham, 7 N. M. 445; Eldodt v. Territory, 10 N. M. 141; McVeany v. New York, 80 N. Y. 185; 14 Barb., N. Y. 173; Brady v. Theritt, 17 Kan. 471; Desmond v. McCarty, 17 Iowa, 525; Gilray's Appeal, 100 Pa., State Past 5; Commonwealth v. Graham, 64 Past 342; Jenkins v. Baxter, 160 Past 200; 25 Ill. 325; 41 Mo. 247; 9 Pac. 297; 52 Ala. 559; 14 Am. & Eng. Enc. of Law, 3 P. 143; Deane v. State, 56 Neb. 302; Hubbell v. Armijo, 89 Pac. Rep. 267; Glasscock v. Lyon, 38 Am. Dec. 299; Allen v. McKeen, 1 Fed. Cases 489; Dolliver v. Parks, 136 Mass. 444; Schlenkner v. Risley, 3 Scammon 483, 38 Am. Dec. 101; Mayfield v. Moore, 53 Ill. 428; Werner v. Smith, 9 Pac. 293; Pooler v. Reed, 73 Me. 128, 130; People v. Weber, 89 Ill. 348; Stevens v. People, 89 Ill.; South Ottawa v. Perkins, 94 N. S. 260; Stadler v. City of Detroit, 13 Mich. 346; People ex rel. Norstrand, 46 N. Y. 375; Waterman v. Chicago & Iowa Ry. Co., 32 Am. States Rep. 235; Springfield v. Butterfield, 55 Atl. 581; Bates v. Clark, 95 U. S. 204; Poyndexter v. Greenhow, 114 U. S. 270; Fowler v. Basbe, 9 Mass. 243; People v. Tienan, 30 Barb., N. Y. 193; Stratton v. Oulton, 28 Cal. 45; Pearce v. Hawkins, 2 Swan, Tenn. 89; Baca v. Parker, 13 N. M. 466; Deane v. State, 56 Neb. 302; Albright v. Territory, 13 N. M. 72.

The action of the Governor in attempting to remove appellant from office of superintendent of schools is not reviewable in this action. Conklin v. Cunningham, 7 N. M. 459, 460; Eldodt v. Territory, 10 N. M. 148, 149.

STATEMENT OF THE FACTS.

Vigil who was plaintiff below, alleged in his complaint that at the November election, 1904, he had been

duly elected superintendent of schools for the County of Bernalillo for the term beginning January 1st, 1905, and ending December 31st, 1906; that he duly qualified and entered upon the discharge of the duties of said office and continued in the discharge thereof until September 7, 1905, when the defendant with force and arms and intimidation wrongfully took possession of said office against the protests of plaintiff, and that the defendant collected the fees of said office for the unexpired portion thereof; and the plaintiff prayed a recovery of such fees from the defendant. The defendant answered admitting the election and qualification of the plaintiff, but denied that he did with force and arms take possession of the office, alleging, however, that there was a vacancy in said office on August 31, 1905, and that the governor of the Territory duly commissioned and appointed defendant to fill such vacancy, and further denied owing plaintiff any sum of money whatever. To which answer the plaintiff made reply admitting the issuance of the commission of appointment and the appointment by the governor, but denied that at the time alleged in the answer there was a vacancy in said office and also denied that the governor had any right, power or authority to appoint defendant to the office, or to remove plaintiff therefrom, and charged the defendant's appointment so made was without legal force or effect and was void.

To the reply and complaint defendant filed a demurrer stating as grounds thereof that this action is not maintainable:

(a) Because it necessarily involved the trial of the title of the office of superintendent of schools of Bernalillo County.

(b) Because the possession of the commission of the governor gave defendant a prima facie title to the office, which title could not be questioned except in proceedings in the nature of a quo warranto.

The court below sustained the demurrer and entered judgment dismissing the complaint, from which judgment the plaintiff appeals.

OPINION OF THE COURT.

MECHEM, J.—I. It was settled in Albright v. Sandoval, 14 N. M. 345; 216 U. S. 340, that a de jure officer might recover from a de facto officer, fees and emolu-
1 ments of the office which the de facto officer had wrongfully intruded upon and held. But in that case it was not necessary to advert to the question of title because therefore Albright had been ousted in a quo warranto proceeding brought by the attorney general to try his title.

The question here is, can a de jure officer recover from a de facto officer the fees and emoluments of the office without having first had his title established by a proceeding in the quo warranto?

It will be observed that in this case at the time this suit was brought the term of office to which Vigil had been elected had expired.

This is an action solely for the recovery of the fees of an office.

In the case of Allen v. McKeen, 1 Sumner 276, in which Allen sought to recover from the treasurer of the college fees and emoluments of the office of the president, of which office he, Allen, had been unjustly deprived and another intruded upon him, Justice Story said:

"It is a very clearly established principle of the law that if one man receive money, which ought to be paid to another or belongs to him, this action for money had and received will lie in favor of the party to whom of right the money belongs, so it is laid down by Lord Chief Justice Willes in Scott v. Surnam, Willes R. 400, and the doctrine has since been adhered to. Nor is there any difficulty in maintaining such a suit, simply because it involves a trial of the title to office, if the party has been once in possession. Upon this point nothing more is necessary than to refer to Arris v. Stuckley, Mod. R. 206, and Boyter v. Dodsworth, 6 Term R."

In the case of Glascock v. Lyons, 20 Ind. 1, which was a suit brought by a de jure officer against a de facto officer to recover fees, the court said:

"As before observed, the office had been rightly in the

possession of the person entitled thereto, and he had been ousted by an intruder, an action for money had and received would lie in his favor against the usurper to recover the fees, when fixed or customary fees are incident to the same; and in that action the title to the office may be determined. This was settled as long ago as the time of Charles the Second, Howard v. Wood, 2 Levinz's Rep. 245, see Lightly v. Clounston, 1 Taunton 112, in which Heath, J., lays down the broad proposition, that the title of an office under an adverse possession, may be tried in an action for the fees of the office had and received."

In Hunter v. Chandler, 45 Mo. 456, suit was brought by a de jure officer to recover of the de facto officer, the de jure having under a statute allowing a private person to have his rights to an office adjudicated, to exhibit an information and on his own motion have proceedings in the nature of a quo warranto; plaintiff had commenced proceedings to adjudicate his title but before final determination the defendant had voluntarily withdrawn, after which plaintiff dismissed his information and brought suit for money had and received and the court in its opinion after citing Glasscock v. Lyons, *supra,* Allen v. McKeen, *supra,* and the other cases cited by them as authority for holding that:

"An action for money had and received would lie in favor of a person really entitled to an office, against one who had usurped and intruded into the same, for the recovery of the known and fixed fees that such intruder may have received."

Further said that: "Where a party had once been in possession, and he was unlawfully ousted by an intruder, there might be no difficulty in applying the rule laid down by Justice Story, in Allen v. McKeen. But where such is not the fact, and the title was in doubt, such a principle would be productive of the greatest confusion and would lead to unnecessary litigation. I am aware that there are very respectable authorities holding that the title to an office may be determined in a suit for fees. The old English cases strongly sustain this view; but I think the better doctrine and reason is to the contrary. In the case of

the state to the use of Bradshaw v. Sherwood et al., 42 Mo. 179, we decided that an action would not lie to recover damages for being deprived of an office where the plaintiff did not claim the office and another was in possession; that it was necessary for the plaintiff first to establish his right in a proceeding for that purpose in order to show that he was damnified. With that decision we are satisfied, and see no good reason for departing from it. The right or title to an office ought not to be determined in a civil action of this kind. A party should not be permitted to sleep on his right and let another person perform services and then claim the compensation which was the result of the labor performed. When the defendant obtained possession of the office, the plaintiff should have either proceeded to contest his right, or resorted to his quo warranto; and upon judgment rendered in his favor, he then might have maintained his action for the recovery of the fees and emoluments of which he had been unjustly deprived."

In this Territory, however, the writ of quo warranto is a writ of grace and not of right and can only be obtained by permission of the attorney general, and a private
2 person cannot have the writ to adjudicate his title to an office and indeed the proceeding in the nature of a quo warranto goes only to removing the intruder and no further. Albright v. Territory, N. M.

Also in this case Vigil had been in possession so that the Missouri cases cited by appellee seem to be rather favorable authority for the appellant's contention.

Our attention is called by counsel for appellee to numerous cases which in his view sustain the proposition that, where the title to an office is in dispute, the right to the salary, fees and emoluments thereof cannot be tried until the right to the office itself has been determined. All of them differ from the case at bar in, first, being cases where the term of office had not yet expired; second, being in states where the person out of possession might on his motion have the writ of quo warranto and under the same statutes in the same proceedings recover his fees.

"When granting relief against one exercising a public office, the court will go no further under its common law

powers than to oust the wrongful possessor of the office and will not give possession thereof to the relator or any other person; but it is generally provided by statute that in addition to a judgment of ouster of the holder of the office, the relator may be installed upon a clear showing that he is entitled to that office, and statutes sometime allow a judgment to be rendered for damages against respondent for loss of fees or salary to relator by reason of being deprived of his office." 32 Cyc. 1464.

And it may be said that no good reason can be given why an action of this kind should not of right be maintained. The defendant, if the complaint and reply,
3 are taken to be true as they must be on demurrer was an usurper and a wrongdoer from the moment he took possession of the office. The plaintiff could only through the grace of the then attorney general have a writ of quo warranto. By such a writ it is true the title of the defendant might have been investigated and held bad, but as outlined in Albright v. Territory, 13 N. M. 64-77, the effect of a judgment of ouster even if the plaintiff had been successful in inducing the attorney general to act,
4 would only have put Stroup out of office and would not have put him in, and after a judgment of ouster against Stroup, the plaintiff might have had to sue out a writ of mandamus, and perhaps if counsel had been sufficiently contentious appeals would have been taken in both cases and the plaintiff after an expensive and tedious litigation would have received a title, or rather his title to the office would have been established. Then if he thought the defendant had not spent all the fees of the office in the precedent litigation, plaintiff could have brought this suit.

II. It is further contended by the appellee, and he raised the point by his demurrer, that this case comes squarely within the rule laid down in the case of Hubbell v. Armijo, 13 N. M. 482, 490, for the reason that the reply admits that the defendant had in his possession the appointment and commission of the governor of the Territory to the office of superintendent of schools.

In Hubbell v. Armijo, Hubbell who had been duly elected treasurer of Bernalillo County sought by injunc-

tion to restrain Armijo, who, as Hubbell alleged in his complaint, held a commission from the governor of the Territory of New Mexico, reciting a vacancy in the office of treasurer of Bernalillo County and appointing Armijo thereto, from exercising the duties of that office or obtaining the paraphernalia, books, papers, etc., belonging to the said office. This court held that the complaint itself containing as it did a commission issued by the governor of New Mexico brought that case within the rule laid down by this court in the case of Territory v. Eldodt, 10 N. M. 141, and Conklin v. Cunningham, 7 N. M. 445, and therefore applying that rule this court said that it would not go behind the recitals of said commission in a collateral proceeding and that Armijo was prima facie the treasurer of Bernalillo County and his right thereto could only be questioned by an action in the nature of a quo warranto. But this court further said:

"Whatever we may think of the authority upon which the cases of Territory v. Eldodt and Conklin v. Cunningham, are grounded, it is nevertheless true that the principle of those cases has become the settled law of this Territory under the decision of this court, and we are loath to disturb them. While those cases may not be upheld by the weight of authority elsewhere we believe that the doctrine of these decisions should be applied and that greater harm would be done to the interests of the public in this Territory by overruling them than by adhering to them." 13 N. M. 490.

In the Territory v. Eldodt and Conklin v. Cunningham cases, both were actions in mandamus by which the holders of prima facie titles, as represented by the governor's commission, sought to compel the delivery to them of the books and other paraphernalia of the offices to which they had been appointed. The doctrine of these cases is summed up in the Eldodt case, 10 N. M. 145, 6, as follows:

"The functions of the writ in such cases are narrow, but they are of vast importance in the orderly administration of government. It is in this very narrowness that the peculiar power and efficacy of the remedy are founded.

There must be some means afforded by the law whereby officials, legally created and qualified may be enabled to enter, without the delay upon the performance of the duties as the law required, and the welfare of society demands that they fulfill, otherwise the course of public administration must be constantly obstructed, and its regularity and usefulness greatly impaired. It is, therefore, the established rule, in this jurisdiction, that the mandamus lies to assist to the possession of the insignia and appurtenances of an office one who shows a clear, prima facie right to it, and that the only question proper to be raised in the proceedings is the question whether a sufficient showing of a prima facie right has or has not been made. The question of the actual or ultimate title is not an issue in the case, and no rival claimant may be permitted to delay the relief sought by raising that issue. Conklin v. Cunningham, 7 N. M. 445.

"If it be argued that this rule, which forbids a full consideration of the legal rights of the respective parties, and refuses to go behind the prima facie showing adduced by the relator, may sometimes work injustice, by ejecting from office one who is actually and lawfully in possession of it, and inducting into his place another whose title thereto is defective and illusory, the answer is plain; the object of the rule is, solely, to secure the systematic and orderly administration of government, and not to adjust disputes of individuals. In the great majority of cases, it is actually true that he who exhibits the prima facie right has also the legal title to the office, and that his opponent is an usurper. In some cases, this is not true; and yet, even here, the general rule must be adhered to though it work temporary individual hardship; for, were it to be departed from in one case, it must be ignored in all; the special value of the proceedings by mandamus —its rapidity would be lost; the relief by mandamus and quo warranto would become, in all practical aspects the same; and there would be no agency known to the law whereby in a grave and critical emergency, the implements, paraphernalia and property of a public office could be speedily delivered over to the lawful incumbent."

No such reasons exist in this case as existed in the three cases above mentioned, nor can any be suggested why the prima facie title of the defendant should stand
5 unimpeachable. The reasons for the doctrine laid down in the Eldodt case are public reasons pure and simple. It is the interest of the public which is being considered in that case and that interest must be subserved even though it may sometime work an injustice and hardship as far as the parties are concerned. These remedies necessarily, according to the view of the court, forbade "a full consideration of the legal rights of the respective parties." But here the public has absolutely no interest. If the commission of the governor reciting a vacancy and appointing Stroup to fill it was a nullity, it should not be permitted to stand unless grave public interests require it, and certainly not as between individuals. As far as the rule announced in Hubbell v. Armijo, *supra,* Territory v. Eldodt, *supra,* and Conklin v. Cunningham, is concerned, its application will not be by this court extended any further than to such conditions as obtained in those cases.

For the foregoing reasons the judgment of the lower court is reversed with instructions to reinstate this cause on the docket and proceed in accordance with this opinion.

[No. 1304, August 25, 1910.]

TERRITORY OF NEW MEXICO, Appellee, v. JAMES M. KENNEDY, Appellant.

SYLLABUS (BY THE COURT.)

1. In a trial for murder the only evidence offered in behalf of the defendant was that he was insane at the time of the alleged homicide.

2. The trial court gave appropriate instructions as to the presumption of innocence and the burden of proof resting on the Territory, and provided for the jury three forms for a verdict; by one of which they could find the defendant

guilty, as charged; by one not guilty on the ground of his insanity at the time of the alleged homicide; and by one not guilty on the ground of insanity at the time of the trial, but provided no form for a verdict of not guilty independent of the question of insanity, and, as appears by the record, refused the request of the defendant's counsel to provide such a form. Held reversible error.

3. If, in the progress of a trial on a criminal charge, the trial judge concludes from observation or otherwise that there is reason to doubt the sanity of the defendant at that time he should submit that question to the jury along with the principal issue requiring a special verdict on that point.

4. It is error to instruct a jury, in a criminal case, that if they believe from the evidence the defendant is insane at that time they should acquit him, but no error of which the defendant can, with reason, complain since it gives him a chance of acquittal to which he is not entitled.

5. The word "frenzy" as used in an instruction on insanity may have been misleading and might better have been avoided.

Appeal from the District Court from Grant County before FRANK W. PARKER, Associate Justice. Reversed and remanded.

R. F. HAMILTON and JAMES R. WADDILL for Appellant.

Evidence improperly admitted. Crawford v. Christian, 102 Wis. 51.

Testimony of physicians to the effect that defendant was insane was relevant on the question of sanity at the time of the alleged crime. Freeman v. People, N. Y., 4 Denio 9, 47 Am. Dec. 216; People v. Farrel, 31 Cal. 576; 2 Greenleaf Ev. 690.

Instruction requested by defendant but refused and

which correctly stated the law, should have been given. Aquilar v. Ty., 8 N. M. 496; Ty. v. Baca, 11 N. M. 559; Davis v. U. S., 160 U. S. 469; Coffin v. U. S., 156 U. S. 432; Ty. v. Lucero, 8 N. M. 543, 558; Ty. v. Anderson, 4 N. M. 213.

Definition of insanity. Davis v. U. S., 165 U. S. 373, 41 L. ed. 750; Ritter v. L. Ins. Co., 169 U. S. 149; Butler v. State, 102 Wisconsin 364, 367; Guiteau's Case, 10 Fed. Rep. 161.

Although sanity is presumed to be the normal state of the human mind, yet where insanity is once proven to exist, it is presumed to continue until the presumption is overcome by contrary or repelling evidence. State v. Wilner, 40 Wis. 304; State v. Spencer, 21 N. J. L. 196; 7 Enc. of Ev. 456, 462; 12 Cyc. 165.

The common law forbids the trial, the sentencing, or the punishment of an insane person. Freeman v. People, 4 Denio 9; Cases cited in Cen. Dig., Title Crim. Law, secs. 1391, 1392; C. L. 1897, sec. 1929; State v. Gould, 40 Kan. 258, 19 Pac. 739; Weber v. Commonwealth, 119 Pa. St. 223, 4 Am. St. Rep. 634.

In criminal cases where a defendant pleads not guilty, the court has no power to direct a verdict of guilty even where the incriminating evidence is conclusive or uncontradicted. 12 Cyc. 373, 595; Territory v. Kee, 5 N. M. 510; C. L. 1897, sec. 1929.

The presumption of innocence was itself to be considered as evidence in favor of the defendant under his plea of not guilty. Coffin v. U. S., 156 U. S. 432; Davis v. U. S., 160 U. S. 469; Territory v. Lucero, 8 N. M. 543; 22 Enc. Pl. & Pr. 894, 895.

FRANK W. CLANCY, Attorney General, for Appellee.

The practice of singling out small portions of a charge and attempting to predicate reversible error thereon without reference to the other instructions is condemned. Pinkerton v. Ledoux, 3 N. M. 410; Territory v. Garcia, 12 N. M. 98; Territory v. Livingston, 13 N. M. 318; U. S. v. Densmore, 12 N. M. 106.

The essential facts are stated in the opinion.

OPINION OF THE COURT.

ABBOTT, J.—The defendant, here the appellant, was tried for murder in the first degree in the District Court of Grant County, and was found guilty on the charge in the indictment.

A motion for a new trial was duly made and was overruled, and the case is here on appeal.

The defendant and two others were with Francis G. Evans, the man who was killed, and in his employ, on a trip with a lot of cattle which Evans was driving from one point to another in the county.

Kennedy was acting as cook for the party. On the day preceding the homicide he failed to bring the water from their last camping place, and, as Edward Koen, one of the party, testified Evans told him he had been obliged to reprimand Kennedy for his neglect, or as he expressed it "jack him up pretty sharp" for it and send him back for the water. That night or about three o'clock the next morning. Koen, who was sleeping close by Evans, awoke and found Kennedy standing over Evans, holding an axe with which he struck Evans three blows from which he died without regaining consciousness.

The defense was insanity and the only evidence offered
1 in behalf of the defendant was on the question of his sanity at the time of the homicide.

As bearing on that question, however, testimony was offered that he was taken, at the time of the trial, insane. That led the trial judge to state, in the presence of the jury, in substance, that the law did not tolerate the trial of an insane person and if he was then insane the trial could proceed no further at that time. He then sent out the jury and examined witnesses as to the sanity of the defendant but came to the conclusion that the question should be submitted to the jury with the other questions in the case, recalled the jury and proceeded with the trial.

The course which the trial court pursued in submitting to the jury, with the other issues in the case, the question whether the defendant was then insane, is, we think, required by our statute, Sec. 1929, C. L. 1897, when the question is first raised after the trial has begun.

In Youtsey v. United States, 97 Fed. 937, in an opinion which exhaustively reviews the decisions on the subject, Lurton, then Circuit Judge, declared that a trial judge might, in his discretion, determine the question for himself or "submit it to the jury along with the principal issue requiring a special verdict, as to the competency of the defendant to understand the proceedings and intelligently defend himself." "But if the jury find insanity to exist," he continues, "a verdict upon the issue of not guilty should be quashed," citing Reg. v. Berry, 12 B. Div. 447, and 2 Bish. Crim. Proc., Sec. 666. That the conclusion was, however, based on the Common Law and in this jurisdiction would have to be modified to conform to the statute referred to.

After the evidence was in the court gave the jury other instructions appropriate to the different features of the case and instruction No. 20, thus:

"You will observe from the foregoing instructions that there are three issues presented in this case for your determination, viz: First, did the defendant commit the
2 acts charged against him in the indictment in the manner therein alleged. Second, was the defendant sane or insane at the time of the commission of those acts, if he committed them. Third, is the defendant sane or insane at the present time and has he been such during the progress of this trial."

"If you find the defendant not guilty, it will become your duty to find specially upon the last two issues mentioned and forms of verdict will be submitted to you for that purpose."

And instruction No. 24, in these words:

"I hand you three forms of verdict; one, guilty of murder in the first degree as charged in the indictment; one, not guilty, together with a finding that the defendant was at the time of the commission of the crime charged insane and that he is acquitted for that reason; and one, not guilty, together with a finding that the defendant has been throughout this trial and is now insane and for that reason that he is acquitted."

To each of which the defendant duly excepted.

The three forms for a verdict delivered to the jury by the court were these:

(1) "Guilty of murder in the first degree."

(2) "Not guilty, together with the finding that the defendant was, at the time of the crime charged, insane and that he was acquitted for that reason."

(3) "Not guilty, together with the finding that the defendant has been, throughout the trial, insane and that he was acquitted for that reason."

The defendant's attorney, according to the record, excepted to these forms of verdict prepared by the court and requested that a general form for a verdict of acquittal be provided by which the jury might find the defendant not guilty, independent of the question of his sanity.

This the court refused to do, and to this refusal exception was duly taken.

We are of the opinion that this refusal, probably made
3 inadvertantly, was, on principles too familiar to require discussion, an error which entitles the defendant to a new trial. Coffin v. United States, 156 U. S. 432, 459.

It is true that the court gave the jury correct instructions as to the presumption of innocence and the necessity that the Territory should satisfy them beyond a reasonable doubt of the truth of every material allegation in the indictment in order to warrant a verdict of guilty. It is also true that the court need not have provided the jury with any forms for a verdict and that although such forms were provided, by the court, the jury might have disregarded them and rendered a verdict in its own way.

But the jury was not informed that such was the case and naturally must have supposed that it was limited to the forms which were furnished by the court.

There was no form which enabled the jury to find the defendant not guilty, independent of the question of insanity. The effect was to deprive him of the benefit of the presumption of innocence to which he was entitled throughout the trial. 22 Enc. Plead. and Prac., pp. 894, 895.

In view of the conclusion reached we will consider only two of the other errors assigned, and that mainly in

order to aid in further proceedings in the cause in the District Court.

Insanity at the time of the trial alone is not a ground of acquittal and should not have been submitted to the jury as such ground in this case. That, however, is
4 not an error of which the defendant could complain since it gave him a chance of acquittal to which he was not entitled.

The instructions on the question of the defendant's insanity, at the time of the homicide, Nos. 14 and 15, p. 18, of the record, while in the main sound and adequate contain the statement, in instruction 14, that if the defendant "although he was conscious of the act he was doing and knew its consequences, but was in consequence of his insanity wrought up to such a frenzy as rendered him incapable and unable to control his actions or direct his movements, then you are instructed that the defendant will not be legally responsible for his acts and you will in that case acquit him."

There are conditions of insanity, without doubt, which deprive the will of its normal governing power, yet fall far short of amounting to "frenzy" in the ordinary acceptation of that word; the sense in which it would natu-
5 rally be understood by a jury, and we think it, for that reason, a misleading and unsafe expression to use in an instruction.

The judgment of the lower court is reversed and the cause remanded for a new trial.

[No. 1317, August 25, 1910.]

AMARILLO HARDWARE COMPANY, Appellee, v. J. F. McMURRAY, Appellant.

SYLLABUS.

1. Where it was impossible to test a plow purchased by appellant in accordance with the warranty first given, and it is mutually agreed that it should be tested on other lands, this amounts to the making of a new contract and a

substitution of the place of test of the implement, all other terms of the sale remaining the same.

2. This court will not disturb findings supported by substantial evidence.

Appeal from the District Court for Chaves County before WILLIAM H. POPE, Chief Justice. Affirmed.

ED. S. GIBBANEY and GEORGE H. PEET for Appellant.

Warranty survives acceptance. Young v. Van Natta et al, 88 S. W. 123; Long v. J. K. Armsby Co., 43 App. Mo. 253, reaffirmed in 46 App. 537; 65 Mo. App. 229; 72 Mo. App. 556; 81 Mo. App. 545; 89 Mo. App. 411; McManus v. Watkins, 55 Mo. App. 82, reaffirmed 60 Mo. App. 117; 77 Mo. App. 301; Day v. Pool, 52 N. Y. 416; Briggs v. Hilton, 99 N. Y. 517; Fairbanks Canning Co. v. Metzger, 118 N. Y. 260; Hoe v. Sanborn, 21 N. Y. 552; Bierman v. City Mills, 151 N. Y. 482.

Acceptance is no waiver in case of executory contracts. A. & E. Enc., vol. 30, p. 186, 2 ed., Warranty; Tacoma v. Bradley, 2 Wash. 600; Haven v. Neal, 43 Minn. 315; Weed v. Dyer, 53 Ark. 155; Halley v. Falsom, 1 N. Dak. 325; Nash v. Weidenfeld, 41 N. Y. App. Div. 511, affirmed 166, N. Y. 612; Brown v. Baird, 5 Okla. 133; Hume v. Sherman Oil, etc., Co., 27 Tex. Civ. App. 366.

Courts regard warranty and condition precedent alike, as matters of good defense, upon suit by vendor for purchase price and breach. Morse v. Moore, 13 L. R. A. 224; Cleveland Linseed Oil Co. v. Buchanan & Sons, 120 Wend. 909; Northwestern Cordage Co. v. Rice, 5 N. Dak. 434, 67 N. W. 298; English v. Spokane Commission Co., 48 Fed. 197; 104 N. Y. 451.

It is a presumption of law that if something remains to be done for the purpose of testing the property, or of fixing the amount to be paid by weighing, measuring or the like, title does not pass until such act is done. 24 A. & E. Enc. 1049; McFadden v. Henderson, 128 Ala. 221; Clarke v. Wolfe, 115 Ga. 320; Platter v. Acker, 13 Ind.

App. 417; McClung v. Kelley, 21 La. 508; Larkin v. Johnson, 8 Kan. App. 144; Tyler Lumber Co. v. Charlton, 128 Mich. 299; Simpson v. State Bank, 55 Neb. 240; Hopkins v. Davis, 23 N. Y. App. 235; Wadhams v. Balfour, 32 Oregon 313; Parman v. Marshall, 51 S. W. 116 Tenn.; Edwards v. Irvin, 45 S. W. 1026, Texas; Cornell v. Clark, 104 N. Y. 451.

Waiver under the law must be founded upon estoppel. Williams v. Neeley, 69 L. R. A. 232.

MADDEN & TRULOVE, REID & HERVEY and J. M. O'BRIEN for Appellee.

Until a contract is executed upon one side, the parties may change, alter or rescind same by mutual agreement, and may substitute a new agreement or new terms in place of the old. McCreery v. Day, 119 N. Y. 1, 23 N. E. 198, 16 Am. St. Rep. 793, 6 L. R. A. 503; Hathaway v. Lynn, Wis., 43 N. W. 956, 6 L. R. A. 551; Perkins v. Hoyt, 35 Mich. 506; Fine v. Rogers, 15 Mo. 316; Chouteau v. Jupiter Iron Wks., 83 Mo. 73; 35 Cyc. p. 124; Cutter v. Cochrane, 116 Mass. 408; Langford v. Cummings, 4 Ala. 46; Miles v. Roberts, 34 N. H. 245.

The mutual promises of the parties to substitute the new agreement are sufficient consideration for each other. Perkins v. Hoyt, 35 Mich. 506; Hathaway v. Lynn, Wis., 6 L. R. A. 551; Cutler v. Cochrane, 116 Mass. 408; Fine v. Rogers, 15 Mo. 316; Ruege v. Gates, 71 Wis. 634; McClay v. Gluck, Minn., 72 N. W. 875.

The question of intention to rescind a contract, or to mutually alter same or its terms, or to substitute new terms for old, is a question of fact. Manhattan, etc., Co. v. Allis, etc., Co., Kan., 54 Pac. 689; Eppens v. Littlejohn, N. Y., 58 N. E. 19, 52 L. R. A. 811; Chauteau v. Jupiter Iron Works, 83 Mo. 73; Rogers v. Rogers, Mass., 1 N. E. 122; Fine v. Rogers, 15 Mo. 316; McClay v. Gluck, Minn., 42 N. W. 875.

Distinction between methods of acceptance. Estep v. Fenton, 66 Ill. 467; Mears v. Nichols. 41 Ill. 207, 89 Am.

Dec. 381; Underwood v. Wolf, 131, Ill. 425, 19 Am. St. Rep. 40; 35 Cyc. 141.

Findings of fact of the trial court will not be disturbed by the appellate court where they are based on substantial evidence to sustain them. Hancock v. Beasley, 14 N. M. 239, 91 Pac. 735; Eagle Mining Co. v. Hamilton, 14 N. M. 271, 94 Pac. 949; Richardson v. Pierce, 14 N. M. 334, 93 Pac. 715; Candelaria v. Miera, 13 N. M. 360, 84 Pac. 1020.

If a warranty is conditioned upon a trial for a limited time, and the trial within that time is satisfactory to the buyer or if the warranty is conditioned upon a test and the test proves satisfactory, the warranty is deemed fulfilled. Thesler v. Hopkins, 85 Ill. App. 207; Scroggen v. Wood, Iowa, 54 N. W. 437; Bayliss v. Hennessey, Iowa, 6 N. W. 46; McParlin v. Boynton, 8 Hun., N. Y., 499, affirmed in 71 N. Y. 604.

OPINION OF THE COURT.

PARKER, J.—Appellee brought an action in the court below for goods sold and delivered, the principal item of which was a three section Emerson disk plow operated by means of a steam engine. Appellant defended upon the ground that the plow was sold upon the express warranty that the said plow would break up and properly turn over the salt grass sod of the defendant upon his farm east of Roswell. He also pleaded an implied warranty to the same effect and charged that the plow failed to do the work in compliance with the warranty. Appellee replied, denying the warranties alleged in the answer. The cause was tried by the court without a jury and the court made the following findings of fact:

"1. That the steam plow which constitutes the chief item of the account sued upon was bought upon the agreement that it was satisfactorily to plow the salt grass land on defendant's farm near Roswell, and if not satisfactory for this it was not to be accepted.

"2. Subsequently, to-wit, in December, 1906, the plaintiff's representative came to Roswell on a telegram from defendant to make the test and the roads to defend-

ant's farm being impassable for the plow by reason of snow and mud, and it being apparent that this condition would continue for some time, it was mutually agreed that the test of the plow should be made instead on Hondo land, southwest of the city of Roswell.

"3. That thereupon a test was made upon such land in the presence of plaintiff's agent and the defendant in person which test proved satisfactory to the defendant and said plow was thereupon accepted by defendant as complying with the terms of sale and the sale thereupon became thereby consummated."

It appears from the findings and evidence that after the plow had been shipped from Amarillo, Texas, to Roswell, New Mexico, the appellant requested appellee to send its representative to Roswell to set up and start the plow; that by reason of the condition of the roads to appellant's farm, it was impossible to make the test of the plow upon appellant's farm in accordance with the warranty first given; that thereupon it was mutually agreed between the appellant and appellee's representative that the test of the plow should be made on other lands not on appellant's farm. This amounted to the making of a new con-
1 tract and a substitution of the place of test of the implement. It is urged that there is no consideration for this change of place of test, but we are unable to understand how any consideration was required. If a consideration was required, then a consideration for the making of the original contract of sale would be required. There was simply a substitution of terms of the contract in so far as the place of the test of the implement is concerned, all other terms of sale remaining the same. This disposes of all of the questions raised in appellant's brief, except one, which we will notice hereafter.

Appellant complains of the findings of the court as being contrary to the weight of the evidence. We have carefully examined the transcript and find that they
2 are supported by substantial evidence, and, consequently, cannot be disturbed. Candelaria v. Miera, 13 N. M. 360.

There being no error in the judgment, it will be affirmed; and it is so ordered.

[No. 1256, August 29, 1910.]

THE SACRAMENTO VALLEY IRRIGATION COMPANY, Plaintiff in Error, v. OLIVER M. LEE, et al, Defendants in Error.

SYLLABUS (BY THE COURT.)

1. Where the plaintiff in error files a transcript of the record, but not, as required by Sec. 20, Chapter 57, of the Laws of 1907, ten days before the return day of the writ, and also files assignments of error, but not before the return day of such writ, a motion to dismiss the writ of error, on those grounds, not made until after such filing, will be denied. Armijo v. Abeytia, 5 N. M. 533.

2. Sec. 1, Chapter 120 of the Laws of 1909, amending Sec. 20, Chapter 57, of the Laws of 1907, making the return day of a writ of error 130 days from date of the writ instead of 90 days as formerly, deals with procedure only, and prima facie, applies to all actions—those which have accrued or are pending and future actions.

3. A decree granting an injunction and appointing a receiver for an insolvent corporation under the provisions of Sections 72 and 73, of Chapter 79 of the Laws of 1907, is a final decree within the terms of the Organic Act relating to appeals and writs of error.

4. The complaint in a proceeding under the provisions of Sec. 72, Chapter 79 of the Laws of 1907, which merely alleges: "That the said corporation is insolvent and has suspended its ordinary business for want of funds to carry on the same," does not sufficiently state the facts and circumstances of such insolvency to make a case within the purview of the statute. The facts and circumstances must be set out in the complaint from which the insolvency of the company shall appear.

Error to the District Court for Otero County before EDWARD A. MANN and JOHN R. MCFIE, Associate Justices. Reversed and remanded.

A. B. RENEHAN and GEORGE W. PRICHARD for Plaintiff in Error.

The judgment granting an injunction and appointing a receiver, with or without the subsequent order of sale, was a final and therefore an appealable judgment. Insurance Co. v. Comstock, 16 Wall. 258; First National Bank v. Shedd, 121 U. S. 74; Railroad Co. v. Bradley, 7 Wall. 575; Railroad Co. v. Express Co., 108 U. S. 29; Thompson v. Dean, 7 Wall. 345; Railroad Co. v. Bradley, 7 Wall. 575; Bank v. Sheffey, 140 U. S. 445, L. ed. 496; Forgey v. Conrad, 6 How. 204.

A motion made to set aside a judgment suspends the operation thereof so that it does not take final effect for the purpose of a writ of error until the motion is disposed of. Menthes v. Brown, 94 U. S. 717.

Insolvency is a fundamental jurisdictional fact to be found. Laws of 1905, ch. 79, art. 7; Atlantic Trust Co. v. Storage Co., 49 N. J. Eq. 405; Construction Co. v. Schack, 13 Stew. Eq. 222, 226; Brundred v. Patterson Machine Co., 3 Gr. Ch. 294, 305; Cook v. Pottery Co., 53 N. J. Eq. 29.

Insolvency alone is not enough but the absence of probability of resumption must appear if a corporation has suspended its ordinary business before the court can issue an injunction or appoint a receiver. Cook v. Pottery Co., 53 N. J. Eq. 29; Atlantic Trust Co. v. Storage Co., 49 N. J. Eq. 402; Electric Corporation v. Light Co., 40 Atl., N. J. 441; Trust Co. v. Trustees, 60 Atl. 940.

The complaint did not state facts sufficient to constitute a cause of action under the statute, and therefore to invest a court with jurisdiction. Atlantic Trust Co. v. Storage Co., 49 N. J. Eq. 402; Cook v. Pottery Co., 53 N. J. Eq. 29.

H. M. DOUGHERTY for Defendant in Error.

An assignment of error must be made and filed within the time provided by the statute, and the filing of an assignment of errors after such time, but without leave of the court is a nullity. Laws 1907, ch. 57, sec. 21; Elliot on Appellate Procedure, secs. 303, 304, and cases cited; Meyers v. Ty., Wash., 20 Pac. 685; Malone v. Hedford, Tex., 1895, 31 S. W. 685; McLuen v. Dist. Tp. of Bear Grove, 83 Iowa 742, 48 N. W. 76; Wood v. Woods, 82 S. W. 878; Roush v. Darmstaetter, Mich., 71 N. W. 867; Ind. Dist. of Crocker v. Ind. Dist. of Ankenig, 48 Iowa 206; U. S. v. Goodridge, 54 Fed. 21; Flaherty v. U. P. Ry., 56 Fed. 908; Crabtree v. McCurtain, 61 Fed. 808; Smythe v. Boswell, Ind., 20 N. E. 263; Lamy v. Lamy, 4 N. M. 291; Deemer v. Faulkenburg, 4 N. M. 149; Martin v. Terry, 6 N. M. 491.

A bill of exceptions not served, signed and filed within the time prescribed by section 2198 of the Compiled Laws of 1884, and Rule 24 of the Supreme Court, will on motion on appeal be stricken from the files unless the time is extended by the court or judge. Evans Bros. v. Baggs, 4 N. M. 67; Jennison v. Boss, 4 N. M. 71; Grigsby v. Purcell, 99 U. S. 505; Killian v. Clark, 111 U. S. 784; Fayocle v. Railroad Co., 124 U. S. 523; Tornado v. Atlantic Mutual Co., 109 U. S. 117; Northern Pacific v. Commercial Bank, 123 U. S. 727; State v. Demerest, 110 U. S. 400; Norton v. Commonwealth, 129 U. S. 506; Caillot v. Deetken, 113 U. S. 215.

The judgment in this case is not final and therefore not appealable. Laws of 1905, ch. 79, secs. 72, 76; Humiston v. Stainthorp, 2 Wallace 107; Barnard v. Gibson, 7 Howard, 649; Grant v. Phoenix Insurance Co., 106 U. S. 429; Bostwick v. Brinkerhoff, 106 U. S. 3; Green v. Fisk, 103 U. S. 519; St. L. & Y. R. R. Co. v. Southern Express Co., 108 U. S. 29; Dainese v. Kendall, 119 U. S. 53; California National Bank v. Stateler, 171 U. S. 448; Covington v. Covington Nat'l Bank, 185 U. S. 271; Butterfield v. Usher, 91 U. S. 246; American Construction Co. v. Jacksonville Railway Co., 148 U. S. 379; Forgay, et al. v. Conrad, 6 Howard, 204; Keystone Iron Co. v. Martin, 132 U. S.

91; Hentig v. Page, 102 U. S. 219; Lodge v. Twell, 135 U. S. 232; Sandusky v. National Bank, 23 Wallace 288; McCollum v. Eager, 2 Howard 61; Hiriat v. Ballon, 9 Peters 166; Moses v. The Mayor, 15 Wallace 387; Jung v. Meyers, 11 N. M. 378.

The statement of facts appears in the opinion.

OPINION OF THE COURT.

WRIGHT, J.—The defendants in error herein submit two questions for dismissal of the writ of error which must be first considered.

1. The appeal was not perfected within the time required by law.

(a) Because no assignment of error was filed within the time required by law.

(b) Because the transcript of the record was not filed within the time required by law.

Section 21 of Chapter 57 of the Laws of 1907, requires that the plaintiff in error shall file in the office of the clerk of the Supreme Court at least ten days before the return day of any writ of error a complete transcript of the record and shall assign error and serve such a copy of such assignment of error on the opposite party, and file a copy with the clerk of the Supreme Court on or before the return day to which the writ is returnable, which said assignment of error shall be written on a separate paper and filed in the cause, and shall also be copied in the brief of the plaintiff in error. In default of such assignment of error in filing the same the appeal or writ of error may be dismissed and the judgment affirmed unless good cause for failure be shown.

No attempt was made by plaintiff in error in this case to comply with this requirement of the statute within the time provided, nor was there any excuse made by him for not so doing. This writ was returnable under the law on the 21st day of March, A. D., 1909.

On March 18, 1909, six days after the time required for filing transcript, plaintiff in error filed its transcript. On April 12, 1909, defendants in error filed their motion to dismiss the writ of error for failure to file transcript and

assignments of error within the time provided by law. However, on March 18, 1909, the legislature passed an act enlarging the return date on appeals and writs of error from ninety to one hundred and thirty days thereby extending the return day of the writ of error herein forty days from March 21, 1909, and beyond the 12th of April, 1909, the same being the date on which the defendants in error filed their first motion to dismiss. "Where a new statute deals with procedure only, *prima facie,*
2 it applies to all actions—those which have accrued or are pending and future actions." Sutherland's Statutory Construction, Sec. 674, and cases cited.

Plaintiff in error filed its assignments of error on July 14th, 1909, and defendants in error renewed their motion to dismiss on August 2, 1909.

Under the foregoing statements of facts it appears that the defendant in error permitted the plaintiff in error to cure its default both as to the transcripts and assign-
1 ments of error before taking any action and under the decision of this court, in Armijo v. Abeytia, 5 N. M. 533, the motion to dismiss for failure to file transcripts and assignments of error within the time fixed by law must be overruled.

II. The second ground for dismissal is that the judgment and decree granting the injunction and appointing a receiver in this case is not final and therefore not appealable.

Under the Organic Act appeals from the District Court to the Supreme Court are limited to final judgments and decrees. A determination of what is a final judgment or decree is often a close question. The leading case in the United States courts is Fogary et al., v. Conrad, 6 Howard 200:

"And when the decree decides the right to the property in contest, and directs it to be delivered up by the defendant to the complainant, or directs it to be sold, or directs the defendant to pay a certain sum of money to the complainant, and the complainant is entitled to have such decree carried immediately into execution, the decree must be regarded as a final one to that extent, and authorizes

an appeal to this court, although so much of the bill is retained in the Circuit Court as is necessary for the purpose of adjusting by a further decree the accounts between the parties pursuant to the decree passed."

The court recognizes the doctrine laid down in this case and approves it in Thompson v. Dean, 7 Wall. 345; Railroad Co. v. Bradley, 7 Wall. 575, and in Lewisbury Bank v. Sheffey, 140 U. S. 445.

In the case of Keystone Manganese & Iron Co. v. Martin, 132 U. S., Mr. Justice Blatchford collects and discusses the various decisions upon this question as to what is a final decree. In the case of Lewisbury Bank v. Sheffey, cited *supra,* the court, in referring to Keystone Manganese & Iron Co. v. Martin says:

"It is there shown that where the entire subject matter of a suit is disposed of by a decree, the very fact that accounts remain to be adjusted and the bill is retained for that purpose does not deprive the adjudication of its character as a final and appealable decree."

The Supreme Court of Michigan considered this question of what is a final decree in the case of Barry v. Briggs, 22 Mich. 201. (Syllabus).

"Appeal in chancery: Interlocutory order or decree. The effect produced by adjudication in a chancery suit upon the rights and interests of the parties is a better test of its character—whether it be a merely interlocutory order or a decree—than the stage of the cause at which it is made; and whenever a legal right is divested by an order of a court of chancery, an appeal lies to determine whether it is legal or unauthorized."

This is the leading case in Michigan and is universally followed by the courts of that state. In the case of Ogden City v. Bear Lake & River Water Works & Irrigation Co., 16 Utah 440, 52 Pac. 697, the Supreme Court of Utah went into this question very fully and, while the facts in that case are not identical with the facts of the case at bar in that the receivership in the Utah case was ancillary to the main case, while in the case at bar the proceeding for the appointment of a receiver is statutory

and the sole and only proceeding before the court; the reasoning of the court therein applies to the case at bar.

It appears, therefore, that there are two distinct lines of cases upon the question of what constitutes a final decree. The United States cases, which of course are the controlling authority in this jurisdiction, hold that no judgment or decree will be regarded as final within the meaning of the statutes in reference to appeals unless all issues of law and fact necessary to be determined were determined and the case completely disposed of so far as the court had power to dispose of it. United States cases cited *supra*. See also Jung v. Meyer, 11 N. M. 378.

This rule, however, has been qualified to the extent that the retention of the case by the court after decree for the purpose of distribution of funds, etc., even though other and incidental decrees relating to the subject matter of the original decree and involving some of the same issues may be necessary in order to finally dispose of the case, (Keystone Manganese and Iron Co. v. Martin; Lewisbury Bank v. Sheffey, cited *supra*,) will not destroy its character as a final decree from which an appeal may be taken.

On the other hand the rule laid down by the Michigan cases looks rather to the effect produced by the adjudication and decree upon the rights and interests of the parties than the stage of the cause at which the decree is made.

In the case at bar the application for an injunction and the appointment of a receiver is an original statutory proceeding. The granting of the injunction and the appointment of the receiver depends solely upon the finding of the court, upon the jurisdictional question of the insolvency of the corporation, coupled with the finding as to the ability of said corporation and its officials to resume its business in a short time with safety to the public, its stockholders and creditors. The main jurisdictional question is that of insolvency. The court having found these facts may thereafter enjoin further exercise of corporate powers and franchises by the corporation and appoint a receiver to take possession, manage, control and dispose of all of the property and assets of such corporation. Secs.

72, 73, Chapter 79, Laws of 1905. The court having found the corporation insolvent and unable to resume its business, may thereafter, in case of necessity, order a reference to determine the indebtedness of the incorporation, direct a sale by the receiver of any and all of the properties of the corporation and pay off and discharge all claims against the corporation. Secs. 78, 92, Chapter 79, Laws of 1905. When the debts have been paid or provided for, there remain two methods of finally disposing of the affairs of the corporation, namely: the court, upon showing made by the officers and stockholders that additional funds have been raised to rehabilitate the corporation, may direct the receiver to reconvey to the corporation all of its property, franchises, rights and effects, and thereafter the corporation may resume control of and enjoy the same as fully as if the receiver had never been appointed. On the other hand, in case of no such reconveyance, the court may in its discretion dissolve the corporation. Sec. 76, Chapter 79, Laws of 1905.

The sections of the statute above referred to place extraordinary power in the hands of the court. The finding of insolvency, together with the finding that the corporation cannot resume its business within a short time with safety to the public, its stockholders and creditors, is a final determination of such facts. It is upon such finding by the court that the right to the injunction and receivership is predicated. No further action of the court is contemplated with respect thereto. Errors of the trial court, if any, in the granting of such injunction and the appointment of a receiver and in the findings necessarily precedent thereto can only be reviewed on appeal or writ of error. In the case at bar, if the plaintiff in error were compelled to wait until after there had been either a decree of reconveyance or a dissolution of the corporation before an appeal would lie the order of receivership would have spent its force and the errors, if any, in the appointment of the receiver and the injury resulting therefrom would be so far in the past as to be beyond the power of the appellate court to correct. In other words, the corporation would be helpless, its business destroyed, its properties and

franchises gone beyond the hope of recovery. The order granting the injunction and appointing the receiver was final as to such matters. It finally disposed of the question of insolvency which was and is the main jurisdictional fact; and further, finally determined the rights of the corporation to the possession and control of its properties and franchises under the finding of insolvency. It divested them of all their rights and properties, and ousted its officers, all as a result of the finding in the original decree upon the jurisdictional fact of insolvency.

Our corporation act is copied from the New Jersey Act. Upon this question of the finality of the decree granting an injunction and appointing a receiver under the statutory proceeding authorized by such acts, Stevenson, V. C., in the case of Pierce v. Old Dominion Copper Mining and Smelting Co., 58 Atlantic (New Jersey Chancery) page 319, gives a complete review and history of the New Jersey corporation act. In passing upon this question the court uses the following language:

"The order appointing a receiver is not necessarily a part of the final decree. The final decree is the decree for an injunction, this most effective and fatal decree, which virtually destroys the corporation, like a judgment of ouster in a quo warranto case, and prevents the corporation from perpetrating fraud. The order appointing a receiver may be made in connection with and as a part of the final decree, or may be made at any time after the final decree, as the statute expressly provides. The order appointing a receiver may be embodied in the final decree, or may constitute the subject-matter of a separate subsequent order. Considered by itself, the order appointing a receiver is properly to be classified among interlocutory orders. It has never been intimated, so far as I am aware, that the decree of the court of chancery, made upon the summary hearing prescribed by the statute, either dismissing the petitioner's petition or the complainant's bill or ordering that the statutory injunction be issued, disabling the corporation from the exercise of its franchises, is not a final decree."

In the case at bar the order granting the injunction

and appointing a receiver is one order so that they must be considered together in discussing this case. In the case of Rawnsley v. Trenton Mutual Life Ins. Co., 9 N. J. Eq. 95, it is held that:

"The exercise of the powers conferred by the statute upon the court of chancery with respect to the issuing of an injunction against an insolvent corporation was 'a summary proceeding, and in its nature and effect a final hearing upon' the merits of the bill of complaint."

Pierce v. Old Dominion Copper Mining and Smelting Co., 58 Atlantic, page 323:

"On the return day of the order to show cause the statute prescribes a 'summary' hearing of the 'affidavits, proofs, and allegations which may be offered on behalf of the parties!' Under our modern practice in the vice chancellors' courts this summary hearing often is, and always will be where justice so requires, a complete trial of the issues presented by the pleadings. The defendant corporation may present an answer, or only affidavits, or may, without answer or affidavits, contest the charges contained in the complainant's petition or bill. Under the old practice, where the proofs in equitable actions were in the form of depositions the very sharp distinction between an interlocutory motion for a receiver in an ordinary equity suit and this summary final hearing in our statutory action would naturally not be so perceptible as it is at the present time. If, upon the summary hearing (the witnesses on both sides, for instance, being sworn in open court, and the proceeding being indistinguishable from an ordinary final hearing), the decree goes that the corporation be enjoined from exercising its franchises, the proceeding as a suit *inter partes* is ended, and what follows is the administration of a trust under the direction of the court. This trust arises from the situation created by an injunction, which disables the corporation from exercising its franchises and taking care of its property.

"After the summary final hearing no process of subpoena is issued, or ought to be issued. The entire function of process has been performed by service of the statutory notice under the direction of the court. Whether the cor-

poration has submitted an answer upon the summary hearing, or only offered affidavits, or has, without answer or affidavits, appeared and contested the complainant's case, or has made default, no other subsequent final hearing can be had. Long before any subsequent final hearing could be brought on under the practice of the court, the entire assets of the insolvent corporation might be converted into cash and distributed, and under a comparatively recent statute the corporation itself might be dissolved by an order of the court made in the cause or proceeding. The opportunity for the defendant corporation to file an answer and to litigate the whole cause of action set forth in the bill or petition is on the return day of the order to show cause, at the time appointed for the summary final hearing. Both parties on this hearing under our settled practice are allowed an ample opportunity to present proofs."

The effect of such a decree clearly brings it within the rule laid down in the Michigan and Utah cases cited *supra*.

The question now resolves itself into a determination of whether such a decree comes within the rule laid down by the United States courts as to what constitutes a final decree. It would appear that the decree granting the injunction and appointing the receiver was a final determination of all the issues of law and fact involved in this proceeding. As a result of such decree the corporation is clearly out of the case. The assets of the corporation become a trust fund for its creditors. It is true that the court retains jurisdiction and control of the case and undoubtedly will be called upon to make further decrees and orders in the case, but, it cannot be contended that any of such subsequent orders or decrees will involve any of the issues settled by the original decree.

The corporation as a legal entity has no more interest in the proceedings, other than the general interest and right to see that its assets are disposed of to the best advantage, and if unable to raise additional funds and be rehabilitated, its rights are undoubtedly finally determined by the original decree granting the injunction and appoint-

ing the receiver. Nothing remains to be done by the court except certain ministerial acts looking to the disposition and distribution of the assets of the corporation. Such being the case we think that the decree granting the injunction and appointing the receiver is clearly within the rule laid down in the United States cases and as such subject to appeal or writ of error.

It appears from the record in this case that the original order was entered on September 17, 1908, and that the motion to set aside the said order and decree was decided by the court in an order entered the 27th day of November, 1908, which said order adjudged and decreed that the receivership and injunction should be continued and that the receiver should proceed to discharge his duties. On the same day a further order was entered directing the receiver to sell and dispose of all of the property of the plaintiff in error. For the purposes of this hearing and appeal the two orders were considered as one and it was from these orders that the appeal was taken. It is suggested that these orders were clearly interlocutory and not appealable. However, it is undoubtedly the rule that the pendency of a motion to set aside the decree when filed in due time clearly suspends the operation of the original decree so that it does not take final effect for purposes of writ of error until such motion is disposed of. Memphis v. Brown, 94 U. S. 717.

We must therefore hold that the order granting the
3 injunction and appointing the receiver herein is a final decree within the meaning of the Organic Act relating to appeal and writ of error.

This brings us to a consideration of the merits of the case. The plaintiff in error assigned seven grounds of error, all of which are to the same effect, namely that the complaint does not sufficiently state the facts and circumstances of insolvency to make a case within the purview of the statute. Objection to the sufficiency of the complaint was taken by motion to vacate and set aside the original decree. The complaint after setting out the purely formal matters, including the allegation of indebtedness to the plaintiff below, alleges, "that the said corporation is in-

solvent and has suspended its ordinary business for want of funds to carry on the same."

Section 72, Chapter 79, Laws of 1905, under which this proceeding is brought is in part as follows:

"Whenever any corporation shall become insolvent or shall suspend its ordinary business for want of funds to carry on the same, any creditor or stockholder may by complaint setting forth the facts and circumstances of the case, apply to the District Court for a writ of injunction and the appointment of a receiver or receivers or trustees, and the court being satisfied by affidavit or otherwise of the sufficiency of said application, and of the truth of the allegations contained in the complaint, and upon such notice, if any, as the court by order may direct, may proceed in a summary way to hear the affidavits, proofs and allegations which may be offered on behalf of the parties, and if upon such inquiry it shall appear to the court that the corporation has become insolvent and is not about to resume its business in a short time thereafter, with safety to the public and advantage to the stockholder, it may issue an injunction," etc.

As it has been heretofore said our corporation act has been taken almost word for word from the New Jersey corporation act with only such changes in phraseology as may be necessary from the difference in the system of courts. In the case of Armijo v. Armijo, 4 N. M. 57, this court has laid down the rule "to the effect that in adopting the statute of another state or territory there is also adopted the construction placed upon it by the courts of such state or territory, unless for some good reason the courts of the state or territory adopting the statute should see proper to refuse to follow such decisions as sound interpretations of the Statute." See also Bullard v. Lopez, 7 N. M. 563; Raymond v. Newcomb, 10 N. M. 151. Referring to the New Jersey decisions we find that the question raised by the assignment of error herein has been directly passed upon by the New Jersey courts.

In the case of Newfoundland Railroad Construction Co. v. Shack, 13 Stew. Eq. R. 226, the court had under consideration a bill in chancery in which the allegation upon

the issue of insolvency was almost word for word with that in the case at bar. The court passing upon this said:

"With respect to the insolvency of the corporation, the only allegations in the bill are, that the company is indebted to divers persons in a large sum of money for goods furnished and work and labor done and money advanced to and for the said company, at their request and upon their order, as the complainant has been informed and believes; that the company is insolvent, and that it has suspended its business for want of funds to carry on the same. These allegations are insufficient to make a case within the purview of the statute. The facts and the circumstances must be set out in the bill from which the insolvency of the company shall appear. Rawnsley v. Trenton Life Ins. Co., 1 Stock. 96, 347."

See also Atlantic Trust Co. v. Consolidated Electric Storage Co., 49 N. J. Eq. 405; Rawnsley et al, v. Trenton Mutual Life Ins. Co., 9 N. J. Eq. 95.

Following the decisions of the New Jersey courts we must therefore hold that the complaint in the case at bar *does not sufficiently state the facts and circumstances*
4 to make a case within the purview of the statute, and being wholly insufficient the court should not have granted the injunction or appointed the receiver. The decree of the court granting the injunction and appointing the receiver together with all subsequent decrees and orders made in such receivership are therefore reversed and the cause remanded with instructions to the court to grant leave to the plaintiff below to amend his complaint upon terms, within twenty days from the filing of the mandate from this court in the district court; otherwise to dismiss the same without prejudice.

[No. 1269, August 29, 1910.]

TERRITORY OF NEW MEXICO, Appellee, v. CARLOS CECIL AYER, Appellant.

SYLLABUS (BY THE COURT.)

1. In laying a foundation for the introduction of the record of former testimony given by a witness claimed to be absent from the Territory, declarations made by the witness as to his intention to leave the Territory permanently and the return of the sheriff of "not found" endorsed on the subpoena issued for the witness, are each of them competent to prove that the witness was not available.

2. The evidence in this case considered and held not to tender a plea of self defense held that an instruction as to self defense, though erroneous, was an error of which the appellant could not complain.

3. Where a trial court fails to instruct the jury as to all the essential ingredients of the crime charged, and the defendant neither calls "the court's attention to such omission nor takes exception thereto," he cannot avail himself of such error on appeal. Territory v. Watson, 12 N. M. 419.

4. An instruction defining a "reasonable doubt" to be "one for which a reason could be given, based on the evidence or want of it," though erroneous, does not in this particular case constitute reversible error where the jury might well have found the defendant guilty solely on his own testimony.

Appeal from the District Court for Bernalillo County before IRA A. ABBOTT, Associate Justice. Affirmed.

E. W. DOBSON and THOMAS K. D. MADDISON for Appellant.

The mere fact that the witness is sick or out of the jurisdiction, or that his whereabouts are unknown so that he can not be reached by subpoena is not enough. Underhill on Criminal Evidence, secs. 261, 262, 263; Cooley on

Constitutional Limitations, sec. 318, 5th ed.; 1 Bishop Crim. Proc., sec. 1195, 3d ed.; People v. Newman, 5 Hill, N. Y. 295; U. S. v. Angell, 11 Fed. 34, Syllabus; Thompson v. State, 17 So. 512, Ala., Syllabus; Southern Ry. Co. v. Bonner, 37 So., Ala. 704; State v. King, 86 N. C. 603; Sullivan v. State, 6 Tex. App. 319, 32 Am. Rep. 580; Menges v. State, 21 Tex. App. 413; Motes v. U. S., 178 U. S. 458; State v. Wing, 64 N. E. 514, Ohio; People v. Plyer, Cal., 58 Pac. Rep. 904; C. L. 1897, sec. 1047.

When a man is unlawfully assaulted and put in danger, real or apparent, he is not required to endeavor to escape, but may stand his ground and repel force with force, even to the extent of taking life if necessary or apparently necessary, to protect himself. Hammond v. People, Ill., 64 N. E. 982; citing 2 Whart. Crim. Law, sec. 1019; Beard v. United States, 158 U. S. 550; Withers v. Commonwealth, Ky., 36 S. W. 14; Williams v. State, Tex., 17 S. W. 1071.

It is the duty of the court in its instructions to tell the jury in clear and concise language, what the essential elements of the crime charged are. It is error to refer the jury to the indictment to ascertain them. Territory v. Baca, 11 N. M. 559, and cases cited.

Instruction that a reasonable doubt is one for which a reason could be given, based on the evidence or want of evidence in the case, is error. Siberry v. State, Ind., 33 N. E. 684; Cross v. State, Ind., 31 N. E. 473; Cowan v. State, 35 N. W. 405; Childs v. State, 51 N. W. 837; 1 McClain on Criminal Law, sec. 316; State v. Wingo, 66 Mo. 181; State v. McClure, 5 Nev. 132; Davis v. United States, 160 U. S. 487; State v. Harvey, 131 Mo. 329, 32 S. W. 1110; Frazier v. United States, Okla., 103 Pac. 373; Hensen v. State, Ala., 21 So. 79; State v. Donahoe, 78 Iowa 486, 43 N. W. 299; People v. Hill, 49 Hun. 432, 3 N. Y. Supp. 564; Hensen v. State, 21 Southern 79.

Instructions which correctly declare the law applicable to the case which they suppose, if the case can be rationally inferred from the testimony, should be given. Thorwegan v. Kind, 111 U. S. 554; People v. Taylor, 36 Cal. 267; Irvine v. State, 20 Tex. App. 13.

FRANK W. CLANCY, Attorney General. for Appellee.

Evidence of absent witness was properly admitted. Lowe v. State, 86 Ala. 47; Horton v. State, 53 Ala. 488; Davis v. State, 17 Ala. 354; Summons v. State, 5 Ohio St. 324; Marler v. State, 67 Ala. 55, s. c. 42 Amer. Rep. 95; 1 Greenleaf Ev., 14 ed., sec. 163; 1 Starkie Ev., Sharwood's ed.; State v. Wheat, 111 La. Ann. 862, 868 and cases cited; Sneed v. State, 47 Ark. 185-6 and cases cited; West v. Louisiana, 194 U. S. 263.

The instructions sufficiently state the material allegation of the indictment. Territory v. Baca, 11 N. M. 559.

The court's definition of a reasonable doubt was correct. U. S. v. Stevens, 27 Fed. Cas. 16, 392, pp. 1313, 1314; Territory v. Livingston, 13 N. M. 326, 327; U. S. v. Butler, 1 Hughes 491; U. S. v. Johnson, 26 Fed. 685; U. S. v. Jackson, 29 Fed. 503-504; U. S. v. Jones, 31 Fed. 724; U. S. v. Cassidy, 67 Fed. 782; Wallace v. State, 41 Fla. 580-1-2; Vann v. State, 83 Ga. 52; State v. Jefferson, 43 La. Ann. 995; People v. Guidici, 100 N. Y. 509-10; State v. Morey, 25 Oreg. 256-7-8; Emery v. State, 101 Wis. 655; Butler v. State, 102 Wis. 868-9; State v. Serenson, 7 S. Dak. 282-3.

Defendant was not prejudiced by the instructions on the subject of self-defense. Territory v. O'Donnell, 4 N. M. 210; U. S. v. De Amador, 6 N. M. 178; Territory v. Watson, 12 N. M. 421; Trujillo v. Territory, 7 N. M. 53; Pinkerton v. Ledoux, 3 N. M. 410; Territory v. Garcia, 12 N. M. 327; Territory v. Livingston, 13 N. M. 327; Territory v. Baker, 4 N. M. 257, 267; Foster v. Territory, 6 Ariz. 242-3; Hill v. People, 1 Colo. 440, 451-2; Cockrill v. Comm., 95 Ky. 25; State v. Alexander, 66 Mo. 158-9; State v. Hill, 69 Mo. 453; Brown v. State, 62 N. J. L. 701 to 709; State v. Don Carlos, 38 S. C. 225; Brickwood's Sackett, sec. 3102 et seq.

OPINION OF THE COURT.

MECHEM, J.—This is an appeal from a conviction of murder in the third degree. Five assignments of error are made and insisted upon in the argument and brief of appellant's counsel, the fifth assignment covers the same

objections that are raised in the second and third assignments.

1. It is first claimed that the record of the testimony given by one Dr. Cutter, at the preliminary hearing of the appellant was improperly admitted. This question is raised by exceptions of the action of the trial court; (1) In allowing the witness, Davern, to testify over appellant's objections, that Cutter was located in Los Angeles, California, that he left Albuquerque to go there about a year before the trial, that before leaving, he stated to Davern that he was going to Los Angeles to take a position as surgeon of a traction company there. On cross-examination Davern testified that all he knew about Cutter's leaving was what Cutter told him and that he had not seen Cutter since he left; (2) Because the court considered the return of the sheriff on the subpoena issued for Cutter which was in the following words: "I further certify that Dr. James B. Cutter could not be found in my territory and is now in California. P. Armijo, sheriff of Bernalillo County, by R. Lewis, deputy sheriff." The subpoena was written October 27, 1908; filed by the sheriff November 13, 1908, and the case was called for trial the 18th of the same month.

In the case of King v. McCarthy, et al., 54 Minn. 190, 55 N. W. 960, the Supreme Court of Minnesota in commenting on the competency of declarations of an absent witness said:

"Whether he intends to return is a fact only positively known to himself and upon that question his own declarations are admissible in connection with other evidence of the fact of his departure or absence from the state. We do not understand that the competency of evidence upon a preliminary question of this kind which is, to a certain extent addressed to the sound discretion of the court, is governed by the same strict rules which apply to the admission of evidence upon the issues of the case. Anything which will reasonably satisfy the court that the absent witness is not likely to return within the jurisdiction of the state may be admitted. See Wyatt v. Bateman,

7 Car. & P. 586; Austin v. Rumsey, 2 Car. & P. 736; also Prince v. Blackburn, 2 East. 250."

In the case of Hill v. Winston, et al., 75 N. W. 1030, the court not only allowed the admission of the declarations of the absent witness as to his residence but also received the sheriff's return of not found on the subpoena and as to the competency of the return said:

"Nor did the court rule incorrectly when it received in evidence as preliminary to the admission of the former testimony, the return of the sheriff, by his deputy, made upon the subpoena issued April 29, for this same witness, the return bearing date May 12. The return, that, after due and diligent search and inquiry for the witness, Johnson, throughout the county, he could not be found therein, made but two days before the trial, was competent as proof of the fact that the personal presence of the witness could not be obtained in connection with other proof of the same fact."

There was sufficient evidence of a competent character to satisfy the trial court that the witness Cutter, was beyond the reach of process of the court, and there was
1 no error in admitting the record of his testimony at the preliminary hearing, where the appellant had the opportunity and did cross-examine the witness.

2. The appellant complains of certain instructions given as to the right of self defense. We have read the evidence in the case with great care and are of the opinion that the appellant was not entitled to any instructions as to self defense.

There were no eye witnesses to the shooting. There was nothing in the dying declaration of the deceased that in any way tended to show that appellant acted in self defense and if the plea was tendered in any manner it was by the evidence of the appellant.

The appellant who was a night operator at Isleta, had been allowed by the conductor of a passenger train, to go upon a coach and get ice water. According to his testimony he had just filled a bucket and was descending the steps of the coach when he met deceased, a colored porter, on the train. Quoting from appellant's testimony:

"As I was going down the steps, I met this colored porter on the second step and I—he asked me—'what the hell I was doing on there getting ice water off the car.' I told him I had permission from the conductor to get the water off there and it was none of his damned business, and as I went to get off the car, I had the bucket in my left hand—I went to get off and he struck me aside of the head a terrible blow and I fell off, which naturally—which knocked the bucket—upside—I was terribly scared and for fear he would follow up his attack, I pulled my revolver and shot him at the moment.

Q. How much time elapsed between the time you struck the ground and the time you shot him?

A. Instantly. I shot him instantly.

Q. What was the result of the blow to you?

A. It frightened me terribly.

Q. Describe the position Harrison was in when you fired the shot?

A. He was on the second step. Looked as if he was fixing to—objection (no ruling).

A. He was on the second step.

Q. Which way was he facing?

A. He was facing me.

Q. How far was it from the lower step to the ground at the place he knocked you off the step?

A. I suppose it must have been three feet.

Q. What position were you in to the best of your recollection at the time you fired the shot?

A. I was on my back.

Q. The train had not started when you fired the shot?

A. Yes sir. It was moving along slowly as best I can remember.

There was no evidence that the deceased was armed with a deadly weapon or that at the time of the shooting the appellant was being attacked or that he had any reason to apprehend that he was in danger of even great bodily harm.

"It is clear that to establish a case of justifiable homicide it must appear that something more than an ordinary assault was made upon the prisoner; it must also appear

that the assault was such as would lead a reasonable person to believe that his life was in peril." Allen v. U. S., 164 U. S. 492.

"But the danger which will warrant an exercise of the right of self defense must have been one of great injury to the person, that would maim or be permanent in character, or might produce death." Wharton on Homicide 376; Acers v. U. S., 164 U. S. 388.

"The phrase 'great personal injury' as used in the statute, means something more than apprehension, however imminent of a mere battery not amounting to a felony." Territory v. Baker, 4 N. M. 236.

A person attacked with naked fists is not in danger of "great injury to the person that would maim or be permanent in character, or might produce death." But there was no evidence that at the time of the shooting that the appellant was being assaulted or that he, himself, thought he was going to be assaulted. True, he says that he shot for fear that the deceased might follow up his attack, but something farther was necessary than a mere fear that the deceased would do something, some attempt on the part of deceased was necessary.

Considering only testimony of the appellant, there
2 was an entire absence of any evidence justifying an instruction as to self defense.

"Nor should one (i. e. an instruction) be given in the absence of anything in the case to show self defense, though in such a case, the accused cannot complain of an error in an instruction or in instructing as to self defense." Wharton on Homicide 358. Territory v. Baker, *supra*. The same observations apply to the criticism as to the necessity for retreat.

3. The appellant insists that the court failed to instruct the jury as to what were the essential ingredients of the crime of murder in the third degree.

Instruction No. 1, as given by the court reads as follows:

"The defendant is on trial before you under an indictment which charges that on the 14th day of July, 1904, he did in this Bernalillo County, unlawfully, feloniously

and with malice aforethought inflict a wound upon Henry Harrison, by shooting him, of which wound the said Harrison died in this county on July 16th, 1904, and this is charged in the indictment as murder in the third degree."

The court then proceeded to define murder generally, malice expressed and implied, murder in the first and second degrees, and then as to murder in the third degree, said:

"Murder in the third degree is every killing of a human being which by the provisions of this act is not murder in the first and second degrees and not excusable or justifiable homicide," and further instructed the jury as to justifiable homicide.

It is not shown by the record that the appellant at the trial requested any further or fuller instruction as to the ingredients of the crime charged.

It was said by this court in the case of Territory v. Watson, 12 N. M. 419, that:

"The fact that the defendant neither called the court's
3 attention to such omission nor took exception thereto, was an error of which the defendant cannot now avail himself."

4. The appellant questions the correctness of the instruction given by the court defining the term "reasonable doubt." The instruction is as follows: "You are instructed that a reasonable doubt is one for which a reason could be given based on the evidence or want of it. It is not a possible doubt, not a conjectural doubt, not an imaginary doubt, not a doubt of the absolute certainty of the guilt of the accused, because everything relating to human affairs and depending upon moral evidence is open to conjectural or imaginary doubt, and because absolute certainty is not required by law. If after a careful and impartial examination of all the evidence in the case you can say that you feel an abiding conviction of the guilt of the defendant, then you are satisfied beyond a reasonable doubt."

The specific objection is, to that part of the charge which, it is said, calls upon the jury to give a reason for a doubt that might actuate them in finding the defendant

not guilty and requires them to do so before finding him not guilty.

While instructions in the same language as that objected to, have received the sanction of numerous courts, yet, the weight of authority and with the better reason we believe, is that such an instruction is erroneous. In some jurisdictions, the courts while criticising the instruction, have held it not to be reversible error. Griggs v. U. S., 158 Fed. 572; State v. Sauer, 38 Minn. 438, 38 N. W. 355; People v. Stubenvoll, 62 Mich. 329, 28 N. W. 883; State v. Morey, 25 Or. 241, 36 Pac. 573.

We are not willing to go to the length of holding that such an instruction would not in any case be reversible error, but we think as applied to this case when the
4 testimony of the appeallant himself excluded any possibility of a reasonable doubt as to his guilt, the instruction was not prejudicial and therefore not reversible error.

For the foregoing reason the judgment of the lower court in this case is affirmed; and it is so ordered.

Chief Justice Pope and Associate Justice Wright dissent.

POPE, C. J.—(Dissenting.)—I am of the opinion that the cause should be reversed because of the instruction as to reasonable doubt. The majority opinion recognizes that the instruction as given is contrary to the weight of authority and in this view I concur. The vice of the instruction complained of, declaring that "a reasonable doubt is one for which a reason could be given based on the evidence or want of evidence in the case," has been the subject of frequent judicial attention. Perhaps the clearest expression of the objection to such an instruction is found in Siberry v. State, 133 Ind. 667, 690, where it is said: "Such an instruction as the one we are considering can, we think, only lead to a confusion, and to the detriment of the defendant. A juror may say that he does not believe the defendant is guilty of the crime with which he is charged. Another juror answers that if you have a reasonable doubt of the defendant's guilt give a reason for your doubt. And, under the instruction given in this

cause, the defendant should be found guilty unless every juror is able to give an affirmative reason why he has a reasonable doubt of the defendant's guilt. It puts upon the defendant the burden of furnishing to every juror a reason why he is not satisfied of his guilt, with a certainty which the law requires, before there can be a conviction. There is no such burden resting on the defendant or a juror in a criminal case."

But the majority opinion, while recognizing the force of all this, holds the error to be harmless upon the ground that the defendant under his own statement is clearly guilty. To this declaration I cannot assent. By the plea of not guilty the defendant makes an issue for the jury, one which we have just held in Territory v. Kennedy (decided at the present term) must, no matter how strong the testimony for the Territory, be left for a verdict at the hands of the jury. Even if the defendant introduce not a word of testimony the presumption of innocence stands as sufficient evidence in his favor until overcome by evidence for the Territory excluding every reasonable doubt. Whether such presumption has been so overcome is a matter not for the court but for the jury to determine, and to be so determined under correct, not erroneous, instructions as to reasonable doubt. When, therefore, an instruction so obviously misleading upon a subject so vital has been given it is conclusively presumed to be prejudicial since it goes to the fairness of the trial upon an issue which is always present and upon which the defendant is always entitled to the judgment of a jury of his peers. Even the view of the majority opinion that defendant admitted by his testimony every material fact necessary to establish his guilt lacks support from the record. To illustrate: One of the material facts to be established by the Territory is that the wound inflicted was the proximate and efficient cause of the death alleged. The defendant's testimony did not touch upon this. It was for the jury to determine, therefore, solely upon the strength of the Territory's case. But how could it decide this without instructions upon reasonable doubt? And how could it decide it properly except upon correct instructions?

As was said by Circuit Judge Ross in his dissent in Griggs v. United States, 158 Fed. 572, 578: "That no one can be legally convicted of a crime but by the unanimous verdict of twelve jurors upon evidence which satisfies their minds of the guilt of the defendant beyond a reasonable doubt will not be disputed. It necessarily results that when the court undertakes to instruct the jury as to what a reasonable doubt is, it is essential that it do so correctly. In the present case the trial court instructed the jury that such a doubt is one 'for which some reason can be given.' * * * I think the judgment should be reversed and a new trial awarded."

This thought and this conclusion of the learned circuit judge appeals to me. The judgment should be reversed and the cause remanded. I am authorized to say that Associate Justice Wright concurs in this dissent.

[No. 1281, August 29, 1910.]

TERRITORY OF NEW MEXICO, Appellant, v. EASTERN RAILWAY OF NEW MEXICO, Appellee.

SYLLABUS (BY THE COURT.)

1. The defendant, the Eastern Railway Company of New Mexico, was the owner by purchase, from the Pecos Valley & Northeastern Railway Company, of a railroad about two hundred and twenty miles in length, extending from a point on the southern boundary line between New Mexico and Texas, northeasterly to a point in the town of Texico, at or near the easterly boundary line between New Mexico and Texas and, by construction, a railroad extending from Rio Puerco station on the Santa Fe Pacific railroad, in Valencia County, easterly to a connection in Texico with the purchased railroad at its terminus there. It built a branch road from Clovis, on the railroad it had constructed a few miles west from Texico, to a point near the station of Cameo, on the first named road which point is also a few miles west from Texico, began running all trains to and from

Texico which had theretofore been run over the Pecos Valley and Northeastern railroad, over said branch road and by way of Clovis, over the portion of said constructed railroad between Clovis and Texico, and abandoned the portion of the first named railroad between Texico and the point near Cameo where the branch road connected. The distance from Texico to the last named point is thirteen and two-tenths miles, and between the same points by way of Clovis is nineteen miles. Held, that the change was within the statutory authority of sub-sec. 17, sec. 3847, C. L. 1897.

2. The directors of the defendant company did not take action to authorize the change specified in the preceding paragraph until after the change had been made and after suit was brought to prevent its consummation but did take such action before trial. Held, that the state of facts at the time of judgment and not that at the institution of the suit furnished the proper basis for the action of the trial court.

Appeal from the District Court for Chaves County before WILLIAM H. POPE, Chief Juctice. Affirmed.

FRANK W. CLANCY, Attorney General, for Appellant.

Without statutory authority, a railroad company cannot lawfully change its line. Brown v. Railroad Co., 126 Ga. 251 and cases cited; Railway Co. v. Woodyard, 226 Ill. 335; Lusby v. Railroad Co., 73 Miss. 368; State v. Railroad Co., 86 Miss. 196; Railway Co. v. Kirkland, 129 Ga. 557; Leverett v. Railway Co., 96 Ga. 389; Railroad Co. v. Maylor, 2 Ohio St. 239; Moorhead v. R. R. Co., 17 Ohio, 351-2; Railroad Co. v. Railroad Co., 31 N. J. L. 208.

HENRY L. WALDO of Counsel, R. E. TWITCHELL and W. C. REID for Appellee.

Where a railroad company has built its road without resorting to the power of eminent domain and is able to acquire a new right of way by purchase or otherwise, without condemnation, it has authority to make any changes

in its route that do not interfere with the rights of the public. Elliott on Railroads, 2 ed., secs. 930, 931; C. L. 1897, sec. 3838, sub-section 17; Laws of 1907, chapter 27; Mine Hill Railroad Company v. Lippincott, 86 Pa. St. 468; Dewey v. Atlantic Coast Line, 142 N. C. 392, 56 S. E. 292; Chicago St. Ry. Co. v. People, 222 Ill. 396, 78 N. E. 784; M. J. & K. C. Ry. Co. v. State, Miss., 122 Am. St. R. 295, affirmed 210 U. S. 187; Chicago & N. W. Ry. Co. v. State, 103 N. W. 1087; State v. Republican Valley R. R. Co., 17 Neb. 647, 24 N. W. 329, 52 Am. Rep. 424; People v. C. & A. R. R. Co., 130 Ill. 175, 22 N. E. 857; State v. Des Moines and Kansas City Ry. Co., 87 Ia. 644, 54 N. W. 461; A., T. & S. F. Ry. Co. v. D. & N. O. Ry. Co., 110 U. S. 682; State v. Dodge City M. & K. T. R. Co., 36 St. Rep. Kan. 747; 36 Kan. St. Rep. 755, 24 I. R. A. 564; City of Potwin v. Topeka St. Ry. Co., 51 Kans. 609; Jones v. Newport News & M. V. Co., 65 Fed. Rep. 736; The People, Respondent v. The Rome, Watertown & Ogdensburgh R. R. Co., 103 N. Y. 96; Atlantic, etc., R. R. Co. v. St. Louis, 66 Mo. 228; Northern Pacific R. R. Co. v. Dustin, 142 U. S. 419; Chicago & E. R. R. Co. v. People, 78 N. E. 784; Fullen v. Dame, 8 Pickering 472; Texas & Pacific Ry. Co. v. Marshal, 136 U. S. 395; San Antonio St. Ry. Co. v. State, 90 Texas 520, 59 Am. St. Rep. 834.

Whilst serving the public, no corporation or private person is obliged to continue the service without a reasonable remuneration. Smyth v. Ames, 169 U. S. 467; Chicago M. & St. P. R. R. Co. v. Minn., 134 U. S. 418; R. R. Co v. Sanford, 164 U. S. 578; Railway Co. v. Smity, 173 U. S. 684; Royal Trust Co. v. Washburn, B. & I. Ry. Co., 113 Fed. 531; Mercantile Trust Co. v. Columbus, S. & H. R. R. Co., 90 Fed. 149; Railroad Co. v. Dustin, 142 U. S. 499; Railroad Co. v. Hall, 91 U. S. 343; Railway Co. v. The Queen, I. El. & Bl. 858, 874; Com. v. Fitchburg R. Co., 12 Gray 180; State v. Southern Minn. Ry. Co., 18 Minn. 40; Coe v. Columbus P. & I. R. R., 75 Am. Rep. St. 524; Honolulu Rapid Transit and Land Co. v. Ty. of Hawaii, 211 U. S. 282, 29 Sup. Ct. Rep. 55; Northern Pac. Ry. Co. v. Washington Ty., 142 U. S. 492.

The court below has made findings of facts and this court will not disturb such findings if there is any evidence to sustain the same. Romero v. Coleman, 11 N. M. 533; Gerrell v. Barnett, 9 N. M. 254; Waldo v. Beckwith, 1 N. M. 97; Badeau v. Baca, 2 N. M. 194; Territory v. Webb, 2 N. M. 147; Territory v. Maxwell, 2 N. M. 250; Lynch v. Grayson, 7 N. M. 26.

STATEMENT OF THE CASE.

In this cause we have to determine whether the plaintiff, the Territory of New Mexico, here the appellant, is entitled to appropriate action by the District Court in which the cause originated to prevent the disuse and abandonment by the defendant of the portion of its road between the town of Texico and a point at or near the station of Cameo. The portion of the road thus in question is a part of what was the railroad of the Pecos Valley and Northeastern Railway Company which constructed it and ran trains over it regularly for about ten years up to March, 1907, when the defendant became the owner by purchase under the statutory authority of sec. 3921, C. L. 1897.

The defendent at the time of this purchase was engaged in constructing, in accordance with the law of the Territory, a railroad of approximately the same length as the purchased road, from Rio Puerco station on the Santa Fe Pacific railroad in Valencia county, easterly to the station of Texico, at a point at or near the eastern boundary of New Mexico, the same point to which the railroad it had purchased extended. It completed said construction and later in 1908, after filing notice of its intention so to do as required by law, built a branch road from the town of Clovis, on the railroad it had constructed, to a point near the station of Cameo, above named, on the railroad it had purchased, began running the trains which had theretofore run wholly over the latter railroad, to and from Texico by way of Clovis using said branch road to make the connection between the two main railroads, and had begun to take up its tracks between Texico and Cameo when this suit was brought to prevent such action.

The distance from the end of the branch railroad near

Cameo to the terminal point of the Pecos Valley and Northeastern railroad at Texico is thirteen and two-tenths miles. The distance between the same points by way of Clovis is nineteen miles.

The railroad for the entire distance each way is the property of the defendant.

The defendant claims that it had the right alike by the common law and the statutes of New Mexico to make the change in question. The Territory takes issue with the defendant on both branches of this claim.

The District Court found against the Territory on grounds stated in an exhaustive opinion by Judge Pope who tried the case without a jury, which the attorney general declares in his brief for the Territory "disposes of the questions involved as to the injurious effect upon the interests of the people of Texico or of the public generally," and that "it is now intended to discuss only the lawful authority and power of the defendant to abandon a portion of its purchased road and incidentally to consider the mischievous consequences of declaring such a power to exist."

OPINION OF THE COURT.

ABBOTT, J.—It is suggested at the outset for the Territory that by abandoning the portion of road in question the defendant would in effect violate the provisions of Section 3921, which requires a railroad purchased under its authority "to form a connected line with the railroad of the purchasing company either by direct connection therewith or through an intermediate line or lines constructed or to be constructed" and owned or controlled by the purchasing company.

By means of the branch line which the defendant constructed the Pecos Valley and Northeastern railroad is still a "connected line" with the railroad constructed
1 by the defendant from Rio Puerco to Texico, the point of connection now being Clovis instead of Texico, as it was before the change.

The attorney general also calls attention to the fact, as he states it to be, that the directors of the defendant

company did not take the action by which they seek to bring the change within the authority of sub-div. 17, sec. 3847, C. L. 1897, until April 20, 1908, which was after the construction of the branch road by means of which the change was really effected.

The facts are, apparently, even more decidedly that way than he claims. While the record, page 240, gives the date of the meeting as Thursday, April 20, 1908, at which the resolution of the directors, referred to, was adopted, the resolution itself contains a statement of what had been done in the latter part of May, 1908, and besides, April 20, 1908, did not fall on Thursday.

Counsel for the defendant state in their brief that the action of the directors was taken not only after the construction of the branch road, but after the beginning of this suit, which was entered July 13, 1908, and as August 20, 1908, fell on Thursday while July 20, did not, we conclude that April 20, in the record was probably a misprint for August 20.

Still, the action of the directors although tardy, and very likely due to the institution of the suit, served the purpose which was probably contemplated by the statute, of making the change definitely and unquestionably the act of the corporation, and not that of unknown and perhaps unauthorized officials of the company. In such a case we must deal with the facts as they were at the
2 time of judgment and not as they were at the beginning of the suit. Northern Pacific Railroad Co. v. Dustin, 142 U. S. 419.

We come now to the direct question whether such a change as that under consideration is within the authority of sub-div. 17, of sec. 3847, C. L. 1897, which is as follows:

"To change the line of its road, in whole or in part, whenever a majority of its directors may so determine: *Provided,* No such change shall vary the general route of such road, as described in its articles of incorporation. The land required for such new line may be acquired by contract with the owners thereof, or by condemnation, as provided in this act, as in the case of the original line."

The language used could not well have been made broader than it is.

By the description in the articles of incorporation of the Pecos Valley and Northeastern Railway Company; its railroad runs from a point in Eddy County, on the south line of the Territory, northerly and northeasterly to a point on the boundary line between New Mexico and Texas near the southwest corner of Parmer County, Texas, a distance of about two hundred and twenty miles.

Certainly it cannot be considered that a change by which an addition to the length of this line of only five and eight-tenths miles, the termini remaining the same, is a "variation of the general route." A change as great as that or greater might have been found necessary to avoid heavy grades or danger from floods.

It is further suggested for the Territory that what it complains of is not a change but an abandonment of a portion of the defendant's road. But the word "change" certainly, as used in the statute, implies the substitution of one thing for another, the giving up of all or a part of a line of road and the provision of other railroad in lieu thereof. If no abandonment was contemplated the word used should have been "addition" instead of "change."

We have examined the decisions cited by the attorney general but find none which stand against express statute permission to railroad companies to make changes in the location of their lines.

We quite agree with the attorney general that the power given by the statute is broad to a degree which may prove harmful to the public, especially that feature of it by which the Territory abdicates, in favor of the existing railroad corporations, the high right of eminent domain over a large but indefinite portion of the land within the Territory; but the remedy is to be found in legislation and not in any stretching of the authority of the courts to make instead of declare the law.

But it is no doubt true that, in general, the interest of a railroad company co-incided with the public interest as to any change it may wish to make in the line of its road. It will, as a rule, go to the expense of changes only

for the purpose of increasing its traffic or improving its facilities for handling traffic.

The danger referred to is further diminished by the fact that in some cases of attempted change it might appear that the change proposed would be so clearly and strongly against the public interest or that the moving corporation would be so bound by contractual obligations, express or implied, to maintain and operate the road it proposed to abandon that the courts would be justified in giving any relief at their command against the railroad company purposing to make the change.

We are many years removed from the time when a celebrated railroad magnate of New York, not now living, made the defiant utterance toward the public which became more celebrated than himself, and we are all, including especially the managers of railroads, still further removed from that period in our way of looking at the subject.

The brief for the defendant well illustrates that change, alike in argument and citation.

In the first section of Elliott on Railroads, several times cited by the defendant with approval, at the threshold of their discussion of the subject, and as a necessary preliminary to it, the authors declare "they are given certain prerogative franchises and privileges for public purposes in return for which the state retains a right of supervision and control in excess of that exercised over purely private corporations. In the very grant of the franchise there is, in effect, an implied condition that it shall be held as a public or *quasi* public trust."

The same view is found in the decision cited for the defendant so far as they touch on that point and indeed it is no longer questioned.

But in the case at bar it seems very clear from the record that there was practically no traffic to or from the portion of road abandoned and that there will result from the change a very decided balance of gain over loss for the public interest.

Even the injury which Texico may have suffered is not, apparently the result of the disuse and abandonment of that particular portion of road in question since, as

appears, there is no complaint that the same trains as before are not run to and from it, but, intsead, from the establishment by the defendant of the facilities for carrying on its business at Clovis instead of at Texico.

Even if the court should grant the relief prayed for by the Territory in its entirety, namely, the restoration to its former use of the abandoned portion of road, that would not, necessarily or even probably, take away from Clovis or give to Texico any of those advantages which the former town seems to have gained from its location.

The language of the court in People v. Rome, K. & O. R. Co., 103 N. Y. 96, quoted by Judge Pope in his opinion above referred to well applies in this case.

"We do not determine that in all cases, where a railroad company which by consolidation has become the owner of two lines of road, between two termini, and running through different sections of country, and different cities or villages, like the two lines between Syracuse and Rochester, could abandon either of its lines, because in such cases it might well be that the public interest, and the accommodation of a large portion of the people of the state, required that both lines should be operated but that where a railroad company owns, by consolidation, two lines of road, and can substantially accommodate the people of the state by operating one line between the same points, and can abandon the other line without serious detriment to any considerable number of people, we do not believe that it should be compelled by mandamus to operate both lines at a great sacrifice of money, upon the fanciful idea that the sovereignty of the state is wounded by its omission to operate both lines."

With the view we take of the rights of the defendant under the statutes of New Mexico, it is unnecessary for us to determine what are its rights at common law.

The judgment of the District Court is affirmed.

[No. 1282, August 29, 1910.]

JAMES M. COWLES, Appellant, v. JAMES J. HAGERMAN, Appellee.

SYLLABUS.

1. The contract sued on is silent as to the time for complete performance and in such case the law requires the same to be performed within a reasonable time from the date of the contract.

2. Upon former trial of case upon the same evidence, the court held that it was for the jury whether the contract had been performed in reasonable time and upon this issue the former decision has become the law of the case.

3. Neither the payments made nor the failure of the appellee to stop the work sooner furnish any evidence of any intention by the appellee to accept the work or waive any defense he might have under the law, growing out of the failure of the appellant to perform the contract.

4. Instructions must be based upon the evidence and where there was no evidence to warrant a requested instruction it was not error for the court to refuse to give it.

5. The appellee in notifying appellant to stop work took the responsibility of liability to pay, in the event of the court's finding that the contract had been performed within a reasonable time.

6. Instructions given in court below concisely stated the law applicable to liability or non-liability of the appellee.

7. Judgment rendered upon verdict by jury supported by substantial evidence should not be disturbed by appellate court.

8. Evidence did not warrant recovery upon quantum meruit for the value of the labor performed.

Appeal from the District Court for Chaves County before WILLIAM H. POPE, Chief Justice. Affirmed.

EDEN & BOWERS for Appellant.

Where there is no dispute as to the facts, the question of what is a reasonable time for the performance of a contract is for the court. Nunez v. Dautel, 19 Wall. 560, 22 L. ed. 161; Herkinson v. Dry Placer Co., 6 Colo. 274; 9 Cyc. 615; Luckhart v. Ogden, 30 Cal. 547.

Where one party to a contract fails to perform in a reasonable time, if the other party makes partial payments after such default, or urges or permits him to continue in the performance, or by his conduct treats the contract as still existing, this constitutes a waiver of the right to insist on the breach for failure to perform in time. 3 Page on Contracts, arts. 1496, 1502; German Svgs. Inst. v. Machine Co., 70 Fed. 146; McArthur Bros. v. Whitney, 67 N. E. 163; Eyster v. Parrott, 83 Ill. 517; Brodeck v. Farnum, 40 Pac. 189; Wortman v. Mont. Cent. Ry., 56 Pac. 316; Jeffrey Mfg. Co. v. Cent. C. & I. Co., 93 Fed. 408; Hamilton v. Woodworth, 42 Pac. 849; So. Pac. v. Amer. Well Works, 49 N. E. 575; Howard v. Thompson Lbr. Co., 15 S. W. 1092; Linch v. Elevator Co., 15 S. W. 208; Prentiss v. Lyons, 29 So. 944.

It was not permissible for the court to pass on the weight of the evidence. Palmer v. Miller, 49 N. E. 975; Baxter v. Knox, 44 N. W. 972.

REID & HERVEY for Appellee.

The question as to whether a contract has been performed within a reasonable time is a mixed question of law and fact and the rule seems to be that if the reasonableness of time in any particular case can be decided according to settled legal principles without passing judgment on the facts, it is for the court to determine it; otherwise it must be left to the jury, with proper instructions. Jones on the Law of Evidence, sec. 172, Note to the case of Aymar v. Beers, 17 Am. Dec. 546; 9 Cyc. 613, 615; Hagerman v. Cowles, 94 Pac. 946 and cases cited.

STATEMENT OF THE CASE.

This case was before the Supreme Court at a former term and the facts as shown by the record are as follows: The citizens of the town of Hagerman desired an artesian

well drilled for the purpose of supplying the town with water. Mr. J. J. Hagerman agreed to have such a well drilled, he being a large lot owner at Hagerman, one of the conditions being that the citizens purchase a certain number of lots from him.

On September 5th, 1903, a contract was entered into between Mr. Hagerman and Mr. Cowles, the appellant, for the drilling of the well. Appellant worked at this well, but not continuously, for about eighteen months without obtaining a sufficient flow of water or going to the required depth under his contract. The well was to be cased throughout with casing not less than 5 5-8 inches in diameter. The drilling was impeded by the loss of drill bars so that it was difficult, if not impossible, to continue the 5 5-8 inch casing and for that reason Cowles requested Hagerman to agree that the hole made for the 5 5-8 casing be enlarged by rimming out, or reduced to 4 5-8 inch casing for the reason that he could not put in a 5 5-8 inch casing further down, but Hagerman declined to agree to either proposition and the well was never completed according to the contract; Hagerman ordering the work discontinued in April, 1905.

The plaintiff in the lower court sued to recover the sum of $1,562.50 an alleged balance due for labor claimed to have been performed by him under the above contract.

Upon the first trial, the plaintiff recovered a judgment for $1,000.00 but upon appeal by the defendant the cause was reversed and remanded by this court.

Upon the second trial, by stipulation upon the same evidence, the jury returned a verdict for the defendant upon which judgment was rendered by the court below and the plaintiff Cowles appealed to this court.

OPINION OF THE COURT.

McFIE, J.—The contract sued on in this case is silent as to the time of complete performance and in such case the law requires the same to be performed within a
1 reasonable time from the date of the contract. Cyc. Vol. 9, p. 614, and citations, Neher v. Viviani, et al., decided at this term.

Upon the trial, the court submitted the question of reasonable time to the jury as a question of fact, in paragraphs 12, 13, 14, and 15 of is instructions.

The first three assignments of error are based upon the giving of these instructions.

This question is not an open one on this appeal. The case was tried upon the same evidence as that upon which the case was decided on the former trial. When the case was before this court upon the former appeal the court held:

"It is sometimes a question of law for the court whether a contract has been performed in a reasonable time, as when it depends upon the construction of a written contract only, or upon undisputed extrinsic facts; but when it depends upon disputed facts extrinsic to the contract it is for the jury. 9 Cyc. 615; Cotton v. Cotton, 95 Ala. 345; Luckhard v. Ogden, 30 Cal. 547; Hill v. Hobart, 16 Me. 164. We think it was a material issue in this case whether the appellee, if he ever in fact completed the well, did so within a reasonable time under all the circumstances in the case. The record shows that a year after the well was commenced appellee hired another party to put down a well within a few feet of the one bored by appellant and that the second well was completed and a good flow of water secured therefrom within three or four months.

The contract between these parties, which is in writing, provided that the work was to commence at a given time and be carried forward to completion "faithfully and continuously," thus showing the intention of the contracting parties that no more than a reasonable length of time was contemplated for the completion of the well." Hagerman v. Cowles, 94 Pac. 946.

As will be observed, the court held that upon the evidence before the court the question should have been submitted to the jury. Upon this issue, therefore, the
2 former decision has become the law of the case and will not be reviewed in this case. Crary v. Field, 10 N. M. 257.

The refusal of the court to give to the jury plaintiff's

requested instruction Nos. 1, 2, 2a, and 3, are assigned as error.

These instructions raise the only remaining point relied upon in the oral argument by appellant's counsel, namely, that if appellee, Hagerman, by his conduct and partial payments, accepted the work he waived the time of performance and was bound to pay according to his contract.

By reference to the contract, which is in writing, it will be observed that it provides that appellee shall be required to pay at least fifty per cent of the contract price of the artesian well, monthly, as the work progressed, and the plaintiff admits in his pleadings that sixteen hundred dollars were actually paid pursuant to the contract.

Under the contract, also, the appellee was given the option of causing the work to cease before the well reached a depth of one thousand feet. The appellant contends that because the appellee, Hagerman, made these payments and permitted the appellant, Cowles, to continue the work so long, he should be held to have accepted the work and waived his right to take advantage of the default of the appellant in failing to complete the contract within a reasonable time.

We cannot agree to the correctness of this contention. When the contract was entered into, the appellant, Cowles, was presumed to know the law, that where the contract was silent as to the time of its performance, it must be performed within a reasonable time. He assumed responsibility for his failure to do so, unless relieved therefrom by some affirmative act of the appellee, indicating his intention to do so.

Neither of the acts complained of indicate any such intention on the part of the appellee, as the payments were made as required by the contract regardless of the completion of the well, and the law and the contract required appellant to exercise diligence in the prosecution of the work without regard to the permission of the appellee.. Neither the payments made nor the failure of the appellee
3 to stop the work sooner furnish any evidence of any intention by the appellee to accept the work or waive

any defense he might have under the law, growing out of the failure of the appellant to perform the contract.

Instructions must be based upon the evidence and we
4 hold that there was no evidence to warrant the requested instructions, nor was there error in the refusal of the court to give them.

The appellee after the expiration of about eighteen months, notified appellant to stop work upon the well. In so doing he took the responsibility of liability to pay,
5 in the event of the court's finding that the contract had been performed within a reasonable time. Upon the trial the court among other instructions gave the following:

12. "The evidence shows, and it is not denied, that the defendant stopped the plaintiff from working upon the completion of the Mull well, which was some time in April, 1905. If you believe that at said date a reasonable time for the completion of the well had elapsed from the date of the contract to drill it and that it had not been completed according to contract then and in such event the defendan Hagerman had a right to order the plaintiff off the work and would not be liable for the work previously done and in that event you must find for the defendant."

13. "If on the other hand you believe that at the date of the completion of the Mull well in April, 1905, a reasonable time to complete the Cowles well had not elapsed since it was contracted for, the order to stop work on the well will in law be construed as an exercise by the defendant, Hagerman, of the right given under the contract to stop the plaintiff's work in advance of a thousand feet, and such stopping of the work under such circumstances would not prevent the plaintiff from recovering for the work already done at the contracted rate, provided said work had up to that time been done in accordance with the contract. If you believe from the evidence, therefore, that the defendant so stopped the work before a reasonable time had elapsed for its completion and that up to that point where stopped the plaintiff had done the work in a reasonably skillful and workmanlike manner and otherwise in full accordance with the contract, then and in that event the

plaintiff would be entitled to recover the balance due on nine hundred and seventy-seven feet, to-wit, the sum of $1,562.50, the amount sued for."

In our opinion these instructions concisely stated the
6 law applicable to the liability or non-liability of the appellee, and the jury having returned a general verdict in favor of the appellee together with a special finding that the appellant had not performed the contract within a reasonable time, the judgment rendered upon
7 these verdicts, supported as they are by substantial evidence should not be disturbed.

There was a count in the complaint upon the *"quan-*
8 *tum meruit,"* for the value of the labor performed, but as the evidence does not warrant a recovery upon this count it will not be further considered.

The judgment of the court below is affirmed.

[No. 1285, August 29, 1910.]

WILLIAM G. ROBERTSON, et al., Appellants, v. THE MINE AND SMELTER SUPPLY COMPANY, et al., Appellees.

SYLLABUS (BY THE COURT.)

1. A judgment of foreclosure of a material man's lien obtained without service of process upon the owner of the property is as to him void for want of jurisdiction.

2. Injunction against proposed sale under such a decree is the proper remedy.

Appeal from the District Court for Lincoln County, before ALFORD W. COOLEY, Associate Justice. Reversed and remanded.

HEWITT & HUDSPETH for Appellants.

If the machinery in question was not purchased or furnished to be used in the construction, alteration or re-

pair of this particular mining claim no lien would lie against such claim. Sec. 2217, C. L. 1897; Hill v. Bishop, 25 Ill. 349, 79 Am. Dec. 333; Rogers v. Currier, 79 Mass. 129 and authorities cited; Stout v. Sawyer, 37 Mich. 313; Boisot on Liens, sec. 105; Ripley v. Mining Co., 12 N. M. 186; London v. Coleman, 59 Ga., 653; Stout v. Sawyer, 37 Mich. 313.

The claim or statement of lien itself must describe the property sought to be charged. Sec. 2221, C. L. 1897; Phillips on Liens, sec. 378; Jones on Liens, sec. 1426 and authorities cited.

No notice is required of the non-liability of the owner until after he has received knowledge of the labor or improvements. Sec. 2226, C. L. 1897; Post v. Fleming, 10 N. M. 476.

The bill should not have been dismissed but the injunction ought to have been perpetuated. Clark v. Brown, 25 Mo. 563.

The threatened sale was an attempt to subject the mining claim of appellants to the payment of the debt of another without due process of law. Jones on Liens, sec. 1571; McCoy v. Quick, 30 Wis. 521; Lampson v. Bowen, 41 Wis. 484; Mining and Smelting Co. v. Finch, 6 Colo. 214, and authorities cited; Clark v. Brown, 25 Mo. 563; Bolen v. Fleming Co., 55 Cal. 164.

The owner's interest in the land can only be reached and applied to the satisfaction of the lien debt by making him a party to the proceeding. Jones on Liens, sec. 1572 and authorities cited; Phillips on Liens, secs. 395, 397; Clark v. Brown, 25 Mo. 563; Bolen v. Fleming Co., 55 Cal. 164; Houser v. Hoffman, 32 Mo. 334.

A contract of sale does not authorize vendee to create liens. West Port Lumber Co. v. Harris, 110 S. W. Rep. 609, Mo.; National Bank of Metropolis v. Sprague, 20 N. J. Eq., 13; Hayes v. Fessenden, 106 Mass. 228; Wheaton v. Berg. 50 Minn. 525; Malmgren v. Phinney, 50 Minn. 457.

Mechanics liens against an equitable estate survive or perish with it. Steel v. Argentine M. Co., Idaho, 42 Pac. 585; Campbell's Appeal, 36 Pa. St. 247; McGuinness

v. Purington, 43 Conn. 143; Calloway v. Freeman, 29 Ga. 408; Walker v. Burt, 57 Ga. 20; Scales v. Griffin, Mich., 2 Doug. 54; Picken v. Investment Co., 31 Neb. 585; Galveston Ex. Ass'n. v. Perkins, 80 Texas 62; Mentzer v. Peters, Wash., 33 Pac. 1078; Boiset on Liens, sec. 309.

SHERRY & SHERRY for Appellee.

The sufficiency of the description is a question for the jury. Cleverly v. Mosely, 148 Mass. 280; Willamette Steam Mills Co. v. Kremer, 94 Cal. 206; Phillips on Mechanic Liens, 2 ed., p. 619, sec. 399; Hughes v. Togerson, 96 Ala. 346; Maynard v. East, 13 Ind. App., 432.

An imperfect description of the property in a mechanic's lien notice may be aided by extrinsic evidence. Coburn v. Stephens, 137 Ind. 683.

Notice. C. L. 1897, sec. 2226.

The mechanic's lien law is to be liberally construed. Ford v. Springer Land Association, 8 N. M. 37, overruling Finane v. Hotel Company, 3 N. M. 256.

Neither possession of, nor legal title to, land upon which a mechanic's lien is claimed, is necessarily conclusive of the right to a lien upon such land, or upon a structure which has been constructed thereon. Empire Land & Canal Co. v. Engley, 18 Colo. 388, 33 Pac. 153.

Liens for labor and material furnished in a building are superior to the mortgage. Jarvis-Conklin Mort. Trust Co. v. Sutton, 46 Kan. 166, 26 Pac. 406; Gen. St. Kan. 1889, par. 4733.

OPINION OF THE COURT.

PARKER, J.—It appears that a suit was brought to foreclose a material man's lien upon a mining claim and decree of foreclosure was awarded. The appellants, owners of the property, were not served with process of any kind. Upon a notice of a proposed sale under the decree of foreclosure appearing in the local newspaper, the appellants brought an action to enjoin the sale. The court be-

low refused the injunction and dismissed the complaint, from which judgment appellants appeal.

The foreclosure proceeding plainly violated the "due process of law" clause of the 14th amendment of the Constitution of the United States. The essential elements
1 of due process of law, as applied to matters of this kind, are notice and opportunity to be heard. Simons v. Craft, 182 U. S. 427, 436.

The judgment of foreclosure was, therefore, absolutely void as against the appellants, the owners of the property.

2. Injunction was the proper remedy of appellants
2 and should have been awarded against the sale. Mining and Smelting Co. v. Finch, 6 Colo. 214; 30 Cent. Dig., Judgment, sec. 793; 23 Cyc. 993; Remer v. McKay, 35 Fed. 86.

For the reasons stated the judgment of the court below will be reversed and the cause remanded with instructions to reinstate the complaint and award permanent injunction against the sale, and it is so ordered.

[No. 1290, August 29, 1910.]

TERRITORY OF NEW MEXICO, Appellee, v. DICK EAGLE, Appellant.

SYLLABUS (BY THE COURT.)

1. Where a dying person makes no declaration that he knows his danger or is conscious of his impending death and there is nothing in his conduct, or that of those present, understandingly acquiesced in by him, from which such consciousness of impending death may be ascertained; yet, where it is reasonably to be inferred from the terrible character of the wound and his state of illness that he was sensible of his danger and conscious of impending death, his statements, made under such circumstances, relative to the homicide are properly admitted as a dying declaration.

2. Under a statute providing "When the jury retires to consider its verdict it shall be allowed to take the pleadings

in the cause, the instructions of the court, and any instruments of writing admitted as evidence, except depositions," it is error to permit the dying declaration which has been reduced to writing, to be taken to the jury room for investigation and examination by the jurors.

Appeal from the District Court for Bernalillo County before IRA A. ABBOTT, Associate Justice. Reversed and remanded.

HERBERT F. RAYNOLDS and FRANK H. MOORE for Appellant.

Arraignment and reception of the plea in a criminal trial is absolutely of no legal validity when such action takes place elsewhere than at the county seat of the county in which the indictment was found. C. L. 1897, secs. 903, 904, 905, 1050, 3398, 3422; Laws of 1899, chap. 4, sec. 2; U. S. v. Crain, 162 U. S. 637, 645; Co. Litt. 263 a; 2 Hale's Pl. Cr. 219; 4 Bl. Com. 322, 341; 1 Chitty's Cr. Law 419; Commonwealth v. Hardy, 2 Mass. 303, 316; Hopt v. Utah, 110 U. S. 574, 579; Territory v. Gonzales, 13 N. M. 94, 79 Pac. 705; Decennial Digest, Title Crim. Law, sec. 261; 11 Cyc. 735, 737, 738, 726, 728 and cases cited; 2 Enc. of P. & P. 7-9; 8 A. & E. Enc. of Law, 2 ed., 34, note 1; Brumley v. State, 20 Ark. 77; Williams v. Reutzel, 60 Ark. 155; Galusha v. Butterfield, 3 Ill. 277; Jordan v. People, 36 Pac., Col. 218; White v. Riggs, 27 Me. 114; Herrshofer v. Beverly, 43 N. J. Law 139; ex parte Williams, 65 S. W., Ark. 711; Eaton, etc., Ry. Co. v. Varnum, 10 Ohio State 622; Bell v. Jarvis, 107 N. W. 547, 98 Minn. 109; American Insurance Co. v. Pappe, 43 Pac., Okla. 1085; U. S. v. Cornell, Fed. Cases No. 14868, 2 Mason 60; in re Millington, 24 Kas. 214; Cooper v. The American Central Ins. Co., 3 Colo. 318.

In order to render a dying declaration admissible in evidence, it must be shown that the declarant knew or believed that he was beyond hope of recovery. Wharton on Homicide, 3 ed., secs. 631, 632, 634, 637; State v. Meyer, 65 N. J. Law 237, 47 Atlantic 486, 86 A. S. R. 634, note

637; Wigmore on Evidence, vol. 2, secs. 1438 to 1442; Bishop's New Criminal Procedure, vol. 1, sec. 1212; Jones on Evidence, 2nd ed., sec. 332.

It was error to allow dying declaration to be taken out by jury into the jury room over objection of defendant. C. L. 1897, sec. 3002; State v. Moody, 18 Wash. 165, 51 Pac. 356, 359; Abbott's Trial Brief, Criminal Causes 704.

The court erred in instructing the jury that a reasonable doubt was a doubt for which a reason could be given. State v. Cohen, 108 Ia. 208, 78 N. W. 857, 75 A. S. R. 213, 217; Siberry v. State, 133 Ind. 677; Cowan v. State, 22 Neb. 519; Morgan v. State, 48 Ohio St. 371; Carr v. State, 23 Neb. 749; Thomas v. State, 28 Southern 591, 126 Ala. 4; Bodine v. State, 29 South. 926, 129 Ala. 106; Klyce v. State, 28 South. 827, 78 Miss. 450.

The court erred in instructing the jury that the defendant was bound to retreat if he could do so safely. Runyan v. State, 57 Ind. 80, 84; Beard v. U. S., 158 U. S. 561; Wharton on Homicide, 3 ed. 473, sec. 295 and cases cited; Bishop's New Criminal Law, vol. 1, par. 850; 2 Wharton Crim. Law, par. 1019; Gallagher v. State, 3 Minn. 270; Pond v. People, 8 Mich. 150, 177; State v. Dixon, 75 N. C. 275, 295.

The court erred in its failure to instruct as to the dying declaration introduced in evidence. Wharton on Homicide, 3 ed., par. 650; Brickwood Sackett's Instruction, par. 3100, vol. 2; C. L. 1897, sec. 2992; State v. Mayo, 42 Wash. 540, 85 Pac. 251, 255; State v. Eddon, 8 Wash. 292, 36 Pac. 139.

Where the evidence in a prosecution for homicide is such that the jury might find a verdict for one of the different degrees of homicide, the jury should not be left to draw the distinction between murder in the first and murder in the second degree merely from general definitions, and from a definition of murder in the second degree as including all other kinds of murder not included in the definition of murder in the first degree. Wharton on Homicide, par. 159, pp. 246, 247; C. L. 1897, sec. 2992; Crain v. U. S., 126 U. S. 625, 645.

FRANK W. CLANCY, Attorney General, for Appellee.

In the absence of constitutional provisions forbidding such legislation, the legislature has power to authorize or direct the holding of courts at places other than county seats. C. L. 1897, sec. 2875; U. S. v. Gwyn, 4 N. M. 635; Woods v. McCay, 144 Ind. 316; Cooper v. Mills Co., 69 Iowa 356; Whallon v. Circuit Judge, 51 Mich. 503; Mathias v. Cook, 57 Kan. 16.

To establish the pre-requisite facts, it is not necessary that the declarant shall express a conviction or belief that he must or will die. They may be reasonably inferred from attendant facts and circumstances, as any other fact of judicial ascertainment. Resort may be made to the nature and extent of his wounds, his physical state, his evident danger, his conduct, his contemporaneous expressions, the occurrence of death soon thereafter and all other circumstances at the time; and if from these the reasonable inference is, that the declarations were made under a conviction of impending death, it is sufficient. McLean v. State, 16 Ala. 672; Wills v. State, 74 Ala. 21; Kilpatrick v. Com., 31 Penn. St. 198; 1 Green on Ev., sec. 158; Whar. Crim. Ev. sec. 282; Ward v. State, 78 Ala. 446.

A dying declaration is not a deposition. Lutcher v. U. S., 72 Fed. 972; Crenshaw v. Miller, 111 Fed. 451; Water Co. v. American Co., 65 Fed. 535; 1 Bouv. Law Dic., title, Deposition; The Sallie P. Linderman, 22 Fed. 558; 21 Cyc. 979-80; Prince's General Laws 145.

The defendant was bound to retreat if he could do so safely. Beard v. U. S., 158 U. S. 561; Alberty v. U. S., 162 U. S. 499; Allen v. U. S., 164 U. S. 498; Erwin v. State, 29 Ohio St. 186.

It was not error to instruct that a reasonable doubt is one for which a reason could be given. Territory v. Livingston, 13 N. M. 326, 327; U. S. v. Stevens, 27 Fed. Cas. 16,392, pp. 1313, 4; U. S. v. Butler, 1 Hughes 491; U. S. v. Johnson, 26 Fed. 685; U. S. v. Jackson, 29 Fed. 503, 504; U. S. v. Jones, 31 Fed. 724; U. S. v. Cassidy, 67 Fed. 782; Wallace v. State, 41 Fla. 580, 582; Vann v. State, 83 Ga. 52; State v. Jefferson, 43 La. Ann. 995;

People v. Guidici, 100 N. Y. 509, 510; State v. Morey, 25 Oreg. 256, 258; Emery v. State, 101 Wis. 655; Butler v. State, 102 Wis. 868, 869; State v. Serenson, 7 S. Dak. 282, 283.

The court was not bound to comment on the weight of the dying declaration introduced in evidence. Territory v. O'Donnell, 4 N. M. 210; U. S. v. DeAmador, 6 N. M. 178; Territory v. Watson, 12 N. M. 421; Trujillo v. Territory, 7 N. M. 53.

STATEMENT OF THE CASE.

The defendant, Dick Eagle, was indicted at the September, 1908, term of Valencia County District Court, for murder in the first degree, for killing a Pueblo Indian, Santiago Eteewa, said killling having taken place in Valencia County. After the finding of the indictment and arrest of the defendant, but before arraignment, he was confined in the county jail of Bernalillo County, at Albuquerque, New Mexico.

That on the 27th day of November, 1908, in the District Court of Valencia County, then in session at the court house in the County of Bernalillo, in the Territory of New Mexico, this cause being then pending in the said District Court of the County of Valencia, and the District Court of Bernalillo County being also in open session on some part of said day, the district attorney being present in behalf of the Territory, the defendant was brought into court in custody of the sheriff and was arraigned upon the indictment and entered a plea of "not guilty." He was afterwards remanded to the custody of the sheriff of Bernalillo County to await trial. At the time of said arraignment defendant was not represented by counsel nor had he been prior thereto. No other arraignment was ever had in this matter other than above stated.

Afterwards, when counsel was appointed to defend him, at their request the venue of the case was changed from the County of Valencia to the County of Bernalillo, and without any further arraignment, the case proceeded to trial.

The Territory produced an alleged dying declaration

of the deceased, Santiago Eteewa. This was introduced in evidence over the objections of defendant. At the conclusion of the trial, and when the case was submitted to the jury, the dying declaration of Santiago Eteewa, which had been reduced to writing, was taken by the jury to the jury room, also over the objection of defendant.

The jury returned a verdict of murder in the second degree. After the verdict, motion for a new trial and motion in arrest of judgment were made by defendant's counsel and overruled by the court. The defendant was sentenced to twenty years in the penitentiary and from this verdict and sentence defendant appealed to this court.

OPINION OF THE COURT.

WRIGHT, J.—Considering the assignments of error in the order of importance rather than in the order discussed in the brief, we find that the second error complained of relates to the admission in evidence of the dying declaration of Santiago Eteewa. The general rules governing the admissibility of dying declarations are too well established to need any lengthy discussion.

In the case of Blackburn v. The State, 98 Ala. 63, the court in discussing this question uses the following language:

"Such declarations are not admissible unless they appear to have been made under a sense of certain and impending death. It is not what the court, which passes upon their admissibility, may believe the character of the deceased was; for, although it may appear to the court, or to any one capable of thinking rationally, that there was no possible hope of recovery, yet the question, aside from that is, what was the state of the declarant's mind, when the declarations were made; did he appreciate the fatal character of his injury, and were his declarations uttered under the sense and solemnities of impending dissolution. If so, then, when the death of the deceased is the subject of the charge, and the circumstances the subject of the dying declarations, they may be admitted in evidence, otherwise not." Walker v. The State, 52 Ala. 192; Kilgore v. The State, 4 Ala. 7; Ward v. The State, 78 Ala.

441; Hussey v. The State, 87 Ala. 121." See also Wharton on Homicide, 3rd ed., secs. 631, 632, 634 and 637; Underhill on Criminal Evidence, sections 102 to 104, inclusive; Encyclopedia of Evidence, vol. 4, pages 922 to 930.

An examination of the evidence in this case discloses the fact that the evidence upon which the admission of the dying is predicted is contained wholly in the testimony of Dr. Dillon, Mr. Allen and Mr. Bibo, the notary public, who took the statement.

Q. Describe what you found—what his condition was?

A. Well, I found a wound, a bullet wound, supposed to have entered—about—the point of entrance about half an inch to the left of the ensiform appendage, and it ranged downward; the bullet had left the body at about the mid scapular line, posteriorly just above the brim of the pelvis.

Q. Stand up and show where it went in and went out.

A. (Witness demonstrating). The bullet entered about here (indicating).

Q. Yes?

A. About half an inch to the left of the top of this little cartilage that comes down on the breast bone and it came out right about there (indicating) just above this pelvic bone—the wound where the bullet entered was a small puncture—aperture—from which there had been little blood, if any—external bleeding—but the wound here was a large gaping wound from which there was bleeding when I examined him—that day there was no intestinal discharge; but the second time I saw him there was a discharge of intestinal contents at the point of exit of the bullet. Further examination showed that there had been marked internal hemorrhage; the abdomen was markedly distended; his temperature was sub-normal, about 96 I think; his heart action—the heart was rather rapid, about 88 to 90, varying; the man was conscious, but in a rather—semi-conscious, or rather dazed condition; he was not fully normal; he vomited blood; vomited all the

nourishment we could give him, and even vomited water, and later he developed an almost incessant hiccough, or rather it would come on and last for probably thirty minutes or an hour, and then subside for a little while and then return again.

Q. Can you state from the course and direction, or from the point of entrance and point of exit of the bullet, what organs were traversed by the bullet?

A. Not absolutely.

* * *

Q. From that examination of him and your attendance upon him, state if you can, what was the cause of his death?

A. I think the chief lesion—or chief cause of death was peritonitis, due to the bullet wound.

Q. The primary cause of death, then, was the bullet wound?

A. The bullet wound, yes, sir.

Q. What was your professional opinion as to the character of the wound—that is, as to whether it was—it would be fatal or not, when you first saw him?

A. I told his friends that I thought he would die in a few days.

Nowhere in this testimony does it appear that Dr. Dillon told Eteewa of his condition, or in his presence, in any manner, indicated that Eteewa could not recover.

Mr. Allen testified as to the character of the wound to the same general effect as did Dr. Dillon, and in addition thereto testified with reference to what was said and done in the presence of Eteewa at the time of the taking of the deposition, as follows:

"A. It was only a few words—I was only there just a short time, and I told him that I was going back—I made up my mind to send for a notary or bring a notary at once and take his statement—I told him I would be back in an hour or so. I sent a messenger for Mr. Bibo and returned to McCarty's in an hour or so—two or three hours, and he made a second statement similar to the first one."

The Court: "That was to Mr. Bibo."

A. Yes, to Mr. Bibo, and I was present.

Q. You were present?

A. I was present—I told him that I was going to bring a justice of the peace, or Mr. Bibo.

Q. There was nothing said directly as to whether he would get well, or would not?

A. No, sir, I did not mention it to him.

Q. How was his condition the second time as compared with the first?

A. Well, about the same, as far as I could see—he had taken no nourishment or anything of the sort, they told me—about the same; and I did not see any material difference in the length of time.

Q. Was this statement supposed to be after the doctor had been there?

A. The doctor was there at the same time—at my first visit—the doctor lived in Laguna and went home—I returned with Mr. Hunt and Mr. Bibo. Mr. Bibo met me there. The doctor and I were there together on other matters.

Q. Mr. Allen, from your observation of his condition at the time that Mr. Bibo was there, what, if any, opinion did you form as to whether he would live or die."

* * *

A. I thought he would.

Q. Describe his appearance and what indications there were that led you to the opinion?

A. Well, his ghastly appearance—his face, and his pulse was very weak.

Q. Anything else about his appearance that you noted specially at that time?

The Court. What appearance of blood about him?

A. Very little of it on the outside, I think; he was bleeding internally—very little on the outside; he had the same shirt on when he was shot—supposed to be—the hole was in the shirt on both sides, he was in his shirt sleeves; it was warm weather.

Q. At any time when you were with him did you notice any vomiting?

A. Yes, sir; later in that day.

Q. Not either of those times.

A. No, sir; I did not notice him vomiting.

Mr. Bibo had no conversation with Eteewa other than the direct questions shown in the dying declaration and did not at any time ask Eteewa as to his condition or his hope or lack of hope of recovery. There was nothing in the dying declaration itself to indicate the state of mind of the deceased at the time the declaration was made. From an examination of the testimony it nowhere appears that Santiago Eteewa indicated at any time by word of mouth or otherwise that he realized his condition and had surrendered all hope of recovery. Under the foregoing evidence it then becomes necessary to determine whether the dying declaration of Santiago Eteewa was made under the sense of impending death and thereby became admissible under the rule hereinbefore stated. There being no expressions from Eteewa himself from which this can be determined and nothing in his conduct at the time the declaration was made from which it may be inferred that he was conscious of his condition, and no communications having been made to him by his medical adviser or friends which were assented to or understandingly acquiesced in by him, we must rely solely upon the terrible character and extent of the wound inflicted in determining whether Eteewa was under the sense of impending death at the time he made the declaration admitted in evidence as a dying declaration. In discussing this question, Wigmore in vol. 2, sec. 442, says:

"In ascertaining this consciousness of approaching death, recourse should naturally be had to the attending circumstances. It has been contended that only the statements of the declarant could be considered for this purpose, or, less broadly, that the nature of the injury alone, could not be sufficient; i. e., in effect, that the declarant must have shown in some way, by conduct or language, that he knew he was going to die. This, however, is without good reason. We may avail ourselves of any means of inferring the existence of such knowledge; and, if in a given case the nature of the wound is such that the declarant must have realized his situation, our object is sufficiently at-

tained. Such is the settled judicial attitude." See also Gipe v. State, 1 L. R. A. New Ser. 421.

This seems to have been the well settled rule in England also. In John's case as reported in 1 East P. C., 357, 358, it appears that it was the unanimous opinion of the judges that:

"If a dying person either declare that he knows his danger, or it is reasonably to be inferred from the wound or state of illness, that he was sensible of his danger, the declarations are good evidence." See also, King v. Woodcock, 1 Leach, C. L. 503; Anthony v. State, Meigs 265, 33 Am. Dec. 143; McLean v. State, 16 Ala. 672; Hill v. Com., 2 Gratt. 594, 608; 3 Russell Crimes, 9th American from 4th London ed., p. 250; and see Green v. State, 154 Ind. 655, 57 N. E. 637; 1 East P. C. 358; John's Case *supra;* Donnelly v. State, 26 N. J. L. 463; Starkey v. People, 17 Ill. 17; 1 Roscoe Crim. Ev. 37; 1 Bishop New Crim. Proc. 1212; 1 Elliott Ev. 355. In the case of Mattox v. The United States, 146 U. S. 140, 151, the court commented upon and approved this doctrine. (See also Wharton on Homicide, 3rd ed., sec. 634.)

In the case at bar it appears that on the day the declaration was made the doctor examined the wounds of Santiago Eteewa and pronounced the same fatal. From his testimony (quoted *supra*) it appears that the wound was of such a terrible nature and character that his symptoms as to vomiting, internal bleeding, sub-normal temperature, rapid pulse, distended abdomen and later the excretions from the wounds were of such a serious and dangerous nature that it must be inferred therefrom that Eteewa was conscious of his condition and under the sense of impending death at the time the statement was made.

In the case of Anthony v. State, Meig, 265, 33 Amer. Dec. 146, the court used the following language:

"If the dangerous nature and character of the wound, the state and illness of the party, her sinking condition, and her statement of extreme suffering, and of those symptoms which usually precede death, are circumstances from which in any case the consciousness of danger can be collected, they exist in the present case, and would justify

the inference of such consciousness." Anthony v. State, 33 Am. Dec. 146. The facts in this case therefore can lead to but one conclusion, viz., that the statement of Santiago Eteewa was made under the sense of impending death and properly admitted as a dying declaration.

The appellant also assigns as error the taking of the dying declaration to the jury room over the objection of appellant. This dying declaration had been reduced to writing and introduced in evidence. The Supreme Court of Washington in passing upon this point, under a statute similar to ours, in the case of State v. Moody, 51 Pac. 359, says:

"Again, it is claimed that the court erred in allowing the dying declaration to go to the jury room, for the investigation of the jury, over the objection of appellant. We think, without any question, that this was reversible error. The statute does not permit witnesses or depositions to go to the jury room, and for the very best of reasons. And certainly the dying declaration is, in substance, a deposition of a witness; the solemnity of the occasion simply taking the place of the oath which is ordinarily administered to a witness who subscribed to a deposition. No cases are cited on this proposition, but we think it so plainly falls within the ban of the statute and of the law that the citation of authorities is unnecessary."

The dying declaration in this case contains all of the evidence of the deceased, and it would appear to us that the reasoning of the court in the case cited *supra* is sound. Our statute provides as follows:

"When the jury retires to consider its verdict it shall be allowed to take the pleadings in the cause the instructions of the court, and any instruments of writing admitted as evidence, except depositions." Sec. 3002, C. L. of N. M. 1897.

It could not be contended for a moment that a *witness* could be introduced into the jury room after the case had been closed. The same argument would apply with equal force to the deposition of a witness, and under the rule laid down in the Washington case cited *supra,* a dying declara-

tion has all of the essential characteristics of a deposition. If permitted in the jury room for examination and investigation by the jurors, being all of the evidence of that particular witness, it gives undue prominence and weight to the evidence of the deceased and clearly comes within the ban of the statute cited *supra*.

The appellant also assigns as error the fact that appellee was arraigned at the court house in Bernalillo County outside of the County of Valencia, the county where appellant was indicted and where the homicide occurred. The circumstances surrounding this arraignment appear in the statement of facts. In view of the fact that the case must be reversed and remanded for a new trial below, and that the alleged irregularity will doubtless be obviated upon the further proceedings in the cause, we do not find it necessary to pass upon this assignment.

Two other assignments of error were made by the appellants, both of which, in the opinion of the court, were serious, but in as much as they will not in all probability arise upon a retrial of this case the court declines to discuss and pass upon the same.

For the reasons above stated, the cause is reversed and remanded for a new trial; and it is so ordered.

[No. 1294, August 29, 1910.]

ROBERT HAGIN, Appellee, v. JEFF COLLINS, Defendant and Appellant.

SYLLABUS (BY THE COURT.)

1. A motion to dismiss for failure seasonably to file assignments of error will be denied where such motion is not made until after such assignments have been filed.

2. Errors not jurisdictional will unless set up in motion for new trial, not be considered on an appeal resulting from a trial by jury.

3. A general exception to an instruction which though in part erroneous is in part correct cannot be sustained.

Appeal from the District Court for Quay County before ALFORD W. COOLEY, Associate Justice. Affirmed.

C. H. HITTSON for Appellant.

Court erred in sustaining objection to question asked for purpose of showing actual rental value of property involved. C. L. 1897, sec. 3360.

The court erred in instructing the jury that "the reasonable rental value of the property from the time it was taken up until the expiration of the lease, would be the measure of damages which you should find for the plaintiff, provided you do find for the plaintiff." Sec. 3360, Laws 1897; Albey v. Weingart, 58 A. 87; Andrews v. Minter, 88 S. W. 822; 107 N. W. 4; 108 N. W. 432.

The court erred in giving to the jury the instruction asked by the plaintiff: "You are further instructed that a verbal leasing of the premises for one year is as valid and legal as a written lease." Section 4, Statute of Frauds.

STATEMENT OF THE FACTS.

Hagin brought forcible entry and detainer against Collins for certain premises in the town of Tucumcari known as the Farmers Home Wagon Yard. Upon the trial in the District Court the jury found for the plaintiff Hagin and assessed his damages in the sum of $450.00. The defendant thereupon appealed.

OPINION OF THE COURT.

POPE, C. J.—The first matter for determination upon consideration of this appeal is a motion to dismiss the appeal upon the ground that the assignments of error were not filed seasonably. This motion, however, was
1 not made until after the assignments were filed and must therefore be overruled. While the law exacts diligence of the appellant in filing assignments of error it equally exacts diligence of the appellee in taking advantage of such omission. After the appellant has made amends for his shortcoming, it is too late for the appellee to move on that ground. This was distinctly held by this

court in Armijo v. Abeytia, 5 N. M. 533, where, in disposing of a motion based upon a failure of the appellant to file his transcript of the record, it was said by the court: "The object of the statute is, undoubtedly, to assure promptness in obtaining the decision of the appellate court, in order that the successful litigant in the *nisi prius* court, if rightfully entitled to his judgment or decree, may not, by negligence or willful dereliction on the part of the appellant, be deprived of his rights. However it is evident that the enforcement of the appellee's rights under this statute, in the first instance, depends upon his own action. The appellant is prima facie negligent, and loses his right to prosecute his appeal, when less than ten days remains before the first day of the term, and the transcript is not filed. Then is the time for the appellee to move; for immediately, in contemplation of law, his rights are infringed. He then has a duty to perform—a duty just as imperative as the previous duty of the appellant,—and that is to produce in court the transcript, and move to affirm the judgment. If he fails to do so, but allows the appellant to file the transcript, the presumption certainly arises that as he has not moved before, he does not consider his rights interfered with."

The motion to dismiss is accordingly overruled.

Coming to the case itself we find that while a number of grounds of error are assigned in this court, only one of them was presented to the trial court in the motion for a new trial. We have repeatedly held that errors not
2 jurisdictional will not be considered on an appeal following a jury trial, where such were not set up in the motion for a new trial. U. S. v. Cook, 103 Pac. 305, and cases cited. This of course follows from the elementary principle of procedure that the trial court should have the opportunity to correct its errors before the aid of the appellate court is sought to that end. Considering this appeal, therefore, as confined to the sole ground common to the motion for a new trial and the assignment of errors and proceeding to determine this ground we find that well settled rules of procedure likewise preclude consideration of this allegation of error. This ground of error is an

alleged improper instruction by the trial court upon the measure of damages. An inspection of the record shows that the charge of the court was in four paragraphs each of which is indorsed as given by the trial judge. At the foot of these instructions is the following: "To the above instructions defendant excepts."

Whether this exception was indorsed upon each of these four instructions or simply at the foot of the entire charge —a matter which the record does not clearly show—it is too general an exception to constitute notice to the trial court of the inaccuracy complained of and thus it is unavailing as a basis for alleging error. Assuming as the view most favorable to the appellant that it was indorsed upon each of the paragraphs, it is found that the charge upon the measure of damage was contained in the fourth paragraph of the charge. This paragraph, however, contains a statement of numerous other rules of law for the guidance of the jury, many of them clearly correct and indeed not questioned, so that the case comes within the rule announced by this court as early as Beall v. Territory, 1 N. M. 518, (a civil case), where it is said: "These instructions were excepted to as a whole in the court below and this court following the practice as ascertained by decisions of the Supreme Court of the United States will not review exceptions to instructions to a jury unless made specifically; and further if one of the instructions
3 excepted to as a whole was proper, they must all be affirmed." This rule has been consistently followed by this court and as recently as Territory v. Alarid, 106 Pac. 371, it was said: "The erroneous direction in question forms but a small part of the fifth instruction in which it is found and which contains other directions to the jury that are correct. A general exception to an instruction which though in part erroneous is in part correct cannot be sustained. Cooper v. Schlesinger, 111 U. S. 148."

It follows from the foregoing that none of the alleged errors are open to consideration by the court. While it is always to be regretted that the merits of an appeal are shut out from our consideration by rules of practice, an orderly procedure requires that these rules shall neverthe-

less be enforced in the expectation of their ultimate observance by members of the bar.

A motion is made by appellee for ten per cent damages as for a frivolous appeal. The view which we take of the record leads us to deny this motion.

For the reasons above stated, however, the judgment of the trial court is affirmed.

[No. 1318, August 29, 1910.]

TERRITORY OF NEW MEXICO, on the Relation of the City of Albuquerque, and of Simon Stern, Treasurer of Said City of Albuquerque, Relators, Appellee, v. E. PINNEY, as Treasurer and ex-Officio Collector of the County of Bernalillo, Territory of New Mexico, Appellant.

SYLLABUS (BY THE COURT.)

1. Chapter 57 of the Laws of 1909, which provides that, "all delinquent taxes," for certain years shall be distributed to the general county fund and general school fund of the respective counties in which they are collected, does not include taxes levied for city purposes.

Appeal from the District Court for Bernalillo County. Affirmed.

GEORGE S. KLOCK for Appellant.

The power of a state legislature over public municipal revenues. Laws of 1907, chapter 65, section 2; Laws of 1909, chapter 57; Dillon, vol. 2, secs. 766, 767; Gaslight Co. v. Clarke, 95 U. S. 654; Hunter et al, v. City of Pittsburg, 207 U. S. 177, 179; Worcester v. Worcester Consolidated St. Ry. Co., 196 U. S. 548; 28 Cyc. Law and Proc. 310; People v. Morris, 13 Wend., N. Y. 330, 331, 337; Blanding v. Burr, 13 Cal. 351; State ex rel. St. Louis County Court, 34 Mo. 570, 572; Miller on Constitution

524, 530; Mitchell v. Clarke, 110 U. S. 643; City of St. Louis v. Thomas W. Shields, 52 Mo. 351.

Error was committed by the court in entering judgment without notice to the attorney for the appellant. C. L. 1897, sec. 2685, sub-sec. 136; Beakes v. DaCumha, 126 N. Y. 297; Pearson v. Lovejoy, 53 Barbour, N. Y. 407.

H. J. Collins for Appellee.

The legislature is without power to divert money derived from taxes levied for city purposes to county purposes. 24 St. Laws 170, ch. 818, 7 Fed. St. Ann. 264; Cooley on Taxation 83, 183, 184, 230; in re Washington St., 69 Pa. St. 352, 363; McFadden v. Longham, 58 Tex. 79; Busch v. Board of Supervisors, 159 N. Y. 212; State v. Switzler, 143 Mo. 287; Loan Association v. Topeka, 20 Wall. 654, 663; Freeland v. Hastings, 10 Allen, 570, 575; Allen v. Jay, 60 Me. 124; Steiner v. Sullivan, 74 Minn. 498; Hammett v. Philadelphia, 65 Pa. St. 146; Hansen et al, v. Vernon et al, 27 Ia. 28; Hammett v. Philadelphia, 65 Pa. St. 151; Hutchinson v. Ozark Land Co., 57 Ark. 554; Callum v. City of Saginaw, 50 Mich. 7; Town of Milwaukee v. City of Milwaukee, 12 Wis. 103; State v. Haben, 22 Wis. 661; People v. Parks, 58 Cal. 622; Gas Co. v. Clark, 95 U. S. 654; Hunter et al, v. City of Pittsburg, 207 U. S. 177; Worcester v. Worcester Con. St. Ry. Co., 196 U. S. 548; 28 Cyc. Law and Proc. 311, 313; People v. Coler, 166 N. Y. 1, 82 Am. St. Rep. 605; People v. Morris, 13 Wend., N. Y. 330, 331, 337; State ex rel. St. Louis Co. Ct., 34 Mo. 570; Hooper v. Emery, 13 Me. 375.

All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression or an absurd consequence. U. S. v. Kirby, 7 Wallace 486, 487; Willis v. The Eastern Trust and Banking Co., 169 U. S. 295; Brown v. Walker, 161 U. S. 819; Riggs v. Ralmer, 12 Am. St. Rep. 819; U. S. v. Healey, 160 U. S. 145; Pennoyer v. McConnaughy, 140 U. S. 23; U. S. v. Moore, 95 U. S. 763; Stuart v. Laird, 1 Cranch 299, 309; Schools Executors v. Fauche, 138 U. S. 572; Wilkinson v. Leland, 2 Pet. 627; Sedgwick

Const. and Stat. Constr. 196; Oates v. National Bank, 100 U. S. 244; Bird v. United States, 187 U. S. 124; Hawaii v. Maukichi, 190 U. S. 212; Brown v. Duchesne, 19 Howard 194; Heydenfeldt v. Dauey Co., 93 U. S. 638.

The general language of the statute will always be restricted in its effect where necessary to meet the intention of the legislature. U. S. v. Fisk, 3 Wall. 445; 5 Digest U. S. Sup. Ct. Rep. 5386, 5387, 5404, 5405; Church of the Holy Trinity v. United States, 143 U. S. 457, 459, 12 Sup. Ct. Rep. 551; Durousseau v. United States, 6 Cranch 307; Washington & I. R. Co. v. Coeur D'Alene R. & Nav. Co., No. 1, 160 U. S. 77, 16 Sup. Ct. Rep. 231; Bloomer v. McQuewan, 14 How. 539, 553; Bate Refrigerating Co. v. Sulzberger, 157 U. S. 1, 15 Sup. Ct. Rep. 508: Knowlton v. Moore, 178 U. S. 77; McKee v. United States, 164 U. S. 291, 292.

Authority of cities to levy taxes is limited. C. L. 1897, secs. 2436, 2442, 2529, 4017, 4021, 4184.

The elementary rule that every reasonable construction must be resorted to to save a statute from unconstitutionality, or as applied in this case, in order to save the statute and hold it to a legitimate exercise of legislative power. Hooker v. California, 155 U. S. 64; Insurance Co. v. Jarman, 187 U. S. 197; People v. Daniel's, 6 Utah 288, 292, 296; Dillon on Mun. Corp., 4 ed., 328; Linford v. Ellison, 155 U. S. 506, 508.

Irregularity of judgment cured by *nunc pro tunc* order. Leonard v. Broughton, 16 Am. St. Rep. 347; Davidson v. Richardson, 126 Am. St. Rep. 738; Coe v. Erb, 69 Am. St. Rep. 764; Ninde v. Clark, 4 Am. St. Rep. 823; Black on Judgments, secs. 126, 132.

OPINION OF THE COURT.

PARKER, J.—This was a proceeding by mandamus by the treasurer of the city of Albuquerque against the treasurer of Bernalillo County to compel the latter to pay over to the city treasurer certain taxes claimed to be due it as the result of collections of delinquent taxes. The county treasurer had refused to pay over the money and

justified his refusal upon Chapter 57 of the Laws of 1909, which is as follows:

"Section 1. That Section 2 of Chapter 65 of the Laws of 1907, be amended by substituting therefor the following: 'That all delinquent taxes for the years 1901, 1902, 1903, 1904, 1905 and 1906, be distributed as follows: Two-thirds thereof to be paid into the general county fund and one-third thereof to be paid into the general school fund of the respective counties in which they are collected: *Provided, however,* That the two-thirds of such taxes as above mentioned to be paid to the general county fund shall be used for the purpose of paying the debts of such county for the years 1901, 1902, 1903, 1904, 1905 and 1906, and shall be applied pro rata upon the debts of said county incurred during such years and duly approved by the Board of County Commissioners; and if any surplus shall remain the said surplus shall go to the current expense fund of the said county.' "

"Sec. 2. This act shall be in full force and effect from and after its passage and all acts in conflict herewith are hereby repealed."

It appears that the taxes which are the subject of controversy are taxes levied for "city purposes." In the absence of allegation or evidence to the contrary we are compelled to assume that the taxes referred to are such as were levied and collected for the ordinary governmental purposes of the city. No distinctions between the power of the legislature over revenues raised for ordinary governmental purposes and those raised for strictly local or municipal purposes need be pointed out or defined. The specific question, therefore, is: First. Can the legislature divert from a city money raised by taxation for its ordinary governmental purposes and appropriate it to the general expense or general school fund of the county in which the city is located? Second. Has it done so?

We pass the general principle, as conceded, that a municipality has no property right in revenues raised for governmental purposes. It has acted merely as an agent of the state and the revenues belong alone to the state. They are the same as if they had been raised directly by

the state and were in its treasury. Can the Territory, then, levy a tax upon the property in a city, not levied on the rest of the county, and apply it to the general running expenses of the county in which the city is situated? In other words, can the legislature levy a tax upon a portion of the people within a given district and devote it to governmental purposes for the whole of the district?

In territories the only restrictions upon the taxing power are those contained in the constitution of the United States and congressional enactments. Talbot v. Silver Bow Co., 139 U. S. 438.

Counsel urges that the provision of the so-called Springer Act, 24 U. S. Stat. 170, 7 Fed. Stat. annotated, page 264, forbidding local or special laws for the assessment and collection of taxes has been violated. But this is not a local or special law. It applies to all cities in the Territory alike. It is the fourteenth amendment to the Constitution of the United States to which resort must be had to test the validity of this act and no other limitation upon the legislative power in this regard, of which we are aware, exists. The amendment, of course, provides, among other things, that no person shall be deprived of the equal protection of the laws. This provision was not designed to secure absolute uniformity and equality of taxation and thus supersede state constitutions and laws designed for that purpose. Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 232, 237. It permits reasonable and just classification of taxpayers and, so long as all within the class are treated alike, its provisions are not violated. Ty. v. D. & R. G. Co., 12 N. M. 425; Giozza v. Tiernan, 148 U. S. 657, 662.

At this point appears the real defect in the law, if it is to be literally construed. A portion of the people pay a tax for the support of the county government which is not levied upon the remainder of the people of the county. This is a clear violation of the constitution and is not permissible. By reason of this act the inhabitants of all cities, at least those delinquent as tax payers, are selected as those upon whom the burden of taxation for county government is doubly laid. If any reason could be assigned for so unequally taxing residents of cities, a different question

might arise. If by reason of residence within a city the tax payer received greater benefits from the county government than the tax payer in the county but without the city, some basis might be afforded to justify the discrimination. But it is apparent that no such difference can exist. See Santa Clara Co. v. So. Pac. R. Co., 18 Fed. 385; The Railroad Tax Cases, 13 Fed. 722; R. R. & Tel. Co's. v. Board of Equalization, 85 Fed. 312, 317; Ry. v. Taylor, 86 Fed. 168, 186; Railway v. Ellis, 165 U. S. 150; Railway v. Mathews, 165 U. S. 1; Fraser v. McConway & Torley Co., 82 Fed. 257; So. Railroad Co. v. Greene, 216 U. S. 400; Home Ins. Co. v. New York, 134 U. S. 594, 606; Barbier v. Connolly, 113 U. S. 27, 31; Bank v. Boston, 125 U. S. 68.

The only real difficulty in this case arises out of the fact that the mandamus was brought by the city, a mere agency of the Territory, and which had been divested of its right to the use of the funds by the act. Want of interest in the city at once suggests itself. The vice in the law consists not in taking the money from the city, for the Territory might expend it for the benefit of the city in its own way and according to its own wisdom. The vice consists in appropriating the money to other than city purposes thus effectuating discriminatory taxation. The difficulty, however, seems to be readily solved by a rule of construction which seems, under all the circumstances, applicable to the words used in the statute.

The position of appellant is that the terms of the act are comprehensive and therefore include all delinquent taxes of every kind and character whatsoever. Looking alone to the letter of the law his position is certainly correct. Appellee contends that the words, "all delinquent taxes", used in the act are used in a restricted sense and do not include city taxes. The argument is based upon the unreasonableness, hardship and injustice of a literal interpretation of the statute as well as the unconstitutionality of the act if construed literally. This argument is certainly very forceful and, we think, sound. To adopt the literal interpretation is fraught with serious consequences. In the first place the city tax payer pays his

ordinary county tax the same as other residents of the county and receives his proportionate share of the benefit derived from county government. In addition he pays his city tax, which, if the fund is to be diverted, bears no part of the city's burdens and for which he receives no benefit. The city also suffers. It is to be presumed that the city levies its taxes in view of its needs and necessarily in view of its prospective collection of revenue. If the fund is to be diverted much embarrassment may result to the city in meeting its current expenses, in maintaining its public schools, its internal improvements and meeting many of its various obligations. It may be urged that as the taxes proposed to be diverted are for years not later than 1906, antedating by three years the proposed diversion, no harm could result to the city or its institutions. But as before seen the levy of its taxes may well have been regulated by its prospective income from the very taxes sought to be diverted to the county by this act. Just why taxes in such large amounts were allowed to remain delinquent so long does not appear except by a reference in the briefs to the effect that they had been in litigation and were due from a few large tax payers and were paid after the litigation. It therefore appears that a literal interpretation results in injustice, hardship and unreasonableness, and, when properly questioned, the act so construed must be held to be beyond legislative power. Conceding, without deciding, that it is within the power of the legislature to effectuate these results as against the appellee in this case, it being a mere agency of the state, and admitting that ordinarily neither the citizen nor the municipality has any property right in a tax levied or paid, and that the Territory may appropriate the money raised by taxation to such use as it may see fit, still in view of all the circumstances in this case we are constrained to hold that it has not done so. In reaching this conclusion we are not unmindful of certain cardinal rules of interpretation. The first is, of course, that the intention of the legislature, when ascertained, must control; that the intent of the legislature is ordinarily to be ascertained solely from the language used; that no question of propriety of

the legislation is to control the plain terms of the statutes. Bu there are other rules of construction which we deem in this case to be controlling. Thus in Holy Trinity Church v. United States, 143 U. S. 457, an action was commenced to recover the penalty prescribed by the act of Congress for importing foreigners into the United States under contract, made previous to the importation, to perform labor or services in the United States. The corporation of the Trinity Church of New York had contracted with an Englishman to remove to the City of New York and enter into its service as rector and pastor of the church. In that case the court said:

"It is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers. This has been often asserted, and the reports are full of cases illustrating its application. This is not the substitution of the will of the judge for that of the legislator, for frequently words of general meaning are used in a statute, words broad enough to include an act in question, and yet a consideration of the whole legislation, or of the circumstances surrounding its enactment, or of the absurd results which follow from giving such broad meaning to the words, makes it unreasonable to believe that the legislature intended to include the particular act."

In U. S. v. Kirby, 7 Wall. 482, 486, it is said:

"All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always, therefore, be presumed, that the legislature intended exceptions to its language which would avoid results of this character. The reason of the law in such cases should prevail over its letter."

Also in Davis v. Bohle, 92 Fed. 325, 328, it is said:

"It is one of the fundamental rules of the construction of statutes that they should receive a sensible interpretation and that a construction should always be avoided which in its practical operation tends to defeat any of the purposes of the statute or which leads to an absurd conse-

quence. Exceptions may be presumed, or words omitted or supplied, when it is necessary to accomplish the obvious intent of the law maker and to prevent injustice or oppression."

In Riggs v. Palcer, 5 L. R. A. 340, 345, it is said:

"It is a familiar canon of construction that a thing that is within the intention of the makers of the statute is as much within the statute as if it were within the letter; and a thing which is within the letter of the statute is not within the statute unless it be within the intention of the maker."

See also Bird v. U. S., 187 U. S. 124; Hawaii v. Maukichi, 190 U. S. 212, where it is held that there is a presumption against a construction which would render a statute ineffective or inefficient or which would cause grave public injury or even inconvenience. In Hooper v. California, 155 U. S. 648, 657, it is said:

"The elementary rule is that every reasonable construction must be resorted to in order to save a statute from unconstitutionality."

In Knights Templar's Indemnity Co. v. Jarman, 187 U. S. 197, 205, it is said:

"Were the act of 1887 more ambiguous than it is as to its application to past transactions, we would still be disposed to apply the cardinal rule of construction, that where the language of an act would bear two interpretations equally obvious that the one which is clearly in accordance with the provisions of the constitution is to be preferred."

See also Lewis Suth. Stat. Con., secs. 347, 489, 376, 392, 367 and 374. See also 1 Words and Phrases, page 312, where the word "all" has been many times restrained so as not to include every kind and class coming within the subject with which the word is associated.

We conclude, therefore, that, taking into account the injustice, hardship, unreasonableness, absurdity and unconstitutionality of the act if literally interpreted, that

we are compelled to restrict the word "all' as used in the act so as to exclude therefrom taxes levied for city purposes, and to hold that the legislature used the word in this restricted sense.

We have examined all the cases cited by appellant and do not find any of them inconsistent with the conclusion reached.

Counsel for appellant complains that the judgment was entered without notice after the cause had been taken under advisement by the court, but he was afterwards allowed to open the judgment for the purpose of making such objections as he saw fit to make as to form and substance and therefore was in no way injured. We find no error in the judgment of the court below and for the reason stated, it will be affirmed, and it is so ordered.

[No. 1325, August 29, 1910.]

LAS VEGAS RAILWAY AND POWER COMPANY, a Corporation, and WILLIAM A. BUDDECKE, Appellants, v. THE TRUST COMPANY OF ST. LOUIS COUNTY, a Corporation, Appellee.

SYLLABUS.

1. Examination of the record fails to disclose any proof that the court did not take full and complete proofs.

2. A mere inference cannot be held to contradict a plain recital in the decree to the effect that certain things were duly and regularly done.

3. Under articles of deed of trust the defaulting corporation should have, first, a written demand made upon them to cure any default, and then, a period of sixty days thereafter in which to devise ways and means of overcoming such default.

4. In the deed of trust there were no restrictions upon the rights and powers of the trustee to institute proceedings to foreclose such deed of trust.

5. The complaint sufficiently states facts to constitute a cause of action as it properly and sufficiently alleges demand and requisition upon the trustee by a majority of the bond holders.

6. There was no such showing of fraud as would have warranted the court in vacating the decree of foreclosure.

7. Not only is the price for which the property was sold, inadequate, but there are also additional circumstances which render it inequitable to permit the sale to stand. The purchaser is conceded to be a disinterested party and purchased in good faith. The sale should be set aside and a new sale ordered therefore only upon terms.

Appeal from the District Court for San Miguel County before JOHN R. MCFIE, Associate Justice. Sale set aside and new sale ordered upon terms. Otherwise affirmed.

VEEDER & VEEDER, and W. B. and FORD W. THOMPSON for Appellants.

Default is tantamount to a complete denial of plaintiff's cause of action and requires of the court that it have full proof thereof, before it gives judgment therefor. Blair v. Bartlett, 75 N. Y. 150; Freeman on Judgments, sec. 330; White v. Merritt, 7 N. Y. 352.

The power of the trustee to take legal proceedings to enforce payment of the amount secured should be strictly construed. Guaranty Trust Co. v. Green Cove Railroad, 139 U. S. 137, 142; Chicago & Vincennes R. R. Co. v. Fosdick, 106 U. S. Rep. 47, 76; Farmers Loan & Trust Co. v. C. & N. P. R. R. Co., 61 Fed. 543, 546; Central Trust Co. v. Worcester Cycle Mfg. Co., 93 Fed. 712, 718; Potomac Manufg. Co. et al, v. Evans, 6 S. E. Rep. 2.

Fraud or misconduct in the purchaser, or fraudulent negligence in any other person connected with the sale as the agent of the mortgagor, or of persons interested as judgment creditors, and also surprise created by the conduct of the purchaser, will induce the court to re-open the biddings. Collier v. Whipple, 13 Wendell N. Y. 224,

227; Fix v. Loranger et al, 15 N. W. Rep. 81; Pacific R. R. v. Ketchum, 101 U. S. Rep. 289; King v. Platt, 37 N. Y. 160; Kellogg v. Howell, 62 Barb. 280, 291; Am. Ins. Co. v. Oakley et al, 9 Paige Chancery 259, 261; Brown et al, v. Frost, 10 Paige Chancery 243, 245; McCotter v. Jay, 30 N. Y. Repts., 80, 81; Robinson v. Iron Railway Co., 135 U. S. Repts., 522, 531; Kent v. Lake Superior Canal Co., 144 U. S. Repts., 75, 88, 91; Goodell v. Harrington, 76 N. Y. 547; 2 Daniel's Chancery Practice 1291; 27 Cyc. 1701, 1715, 1717; 9 Enc. of P. & P. 535; Innes v. Stuart, 36 Mich 285; Morris v. Woodward, et al, 25 N. J. Eq. 32; Atkins v. Judson, 53 N. Y. Sup. 504; Herndon v. Gibson, 17 S. E. Rep. 145; Hamilton v. Hamilton, 46 Am. Dec. 58; Requa. v. Rea & Wife, 2 Paiges Chancery 339, 341; Colier v. Whipple, 13 Wendell, N. Y. 224, 232; Blossom v. The Milwaukee Sts. R. R. Co., 1 Wallace U. S. 655.

Inadequacy of price, accompanied by additional circumstances of unfairness, growing out of fraud, accident or some trust relation, are good grounds against confirmation. Fidelity Trust & Safety Vault Co. v. Mobile St. Ry. Co., 54 Federal Reporter 26; Graffan v. Burgess, 117 U. S. 180; Pewabic Mining Co. v. Mason, 145 U. S. 349.

CHARLES A. SPIESS and WM. G. HAYDON for Appellee.

Statutes of New Mexico authorize judgment by default. C. L. 1897, sec. 2685, sub-secs. 106, 134; Laws 1905, ch. 26.

Power of court to set aside judgment ceased upon expiration of statutory time for filing motion to set aside. 23 Cyc. 907, 999; Canadian Co. v. Clarita, etc., Co., 74 Pac. 301, 302; in re Eichoff, 36 Pac. 11; Eichoff v. Eichoff, 40 Pac. 24; Long v. Fink, Cal. 50 Pac. 1060; Moore v. Superior Court, 25 Pac. 22, 31 Pac. 899; Blondo v. Snyder, 31 Pac. 591; Butler v. Soule, 56 Pac. 601; People v. Green, 16 Pac. 197; People v. Harrison, 24 Pac. 311; Jacks v. Valdez, 31 Pac. 899; Thornton v. Harlan, 9 Pac. 727; People v. Temple, 37 Pac. 414; People v. Davis, 77 Pac. 651; Bronston v. Schulton, 104 U. S. 410; 26 L. ed. 799; Barnett v. Barnett, 9 N. M. 205; Phillips v. Negley, 117 U. S. 665; Maynard v. Perault, 30 Mich. 161; Allen

v. Wilson, 21 Federal 882; Terry v. Commercial Bank of Alabama, 92 U. S. 454; Sloan v. Sloan, 102 Ill. 581.

If the court had jurisdiction of the parties and subject matter, the title of a bona fide purchaser is good, notwithstanding there may have been errors or irregularities in the proceedings which rendered the decree invalid. 24 Cyc. 41, 65, pars. 5, 6; Branley v. Damley, Minn., 71 N. W. 1026; Freeman on Executions 343; Brignardelo v. Gray, U. S., 17 L. ed., 697; Voorhees v. Jackson, 10 Peters 339, L. ed., 491; Grignon v. Astor, 2 Howard, U. S., 319; 12 Enc. P. & P. 91, par. 10 and cases cited; Freeman, Void Judicial Sales, par. 41; Quigley v. Breckenridge, Ill., 54 N. E. 580; Wilson v. Kellogg, 77 Ill. 47; McLean, etc., Co. v. Swofford Bros. Dry Goods Co., 68 Pac. 502, Okla.; Mercantile Trust Co. v. M., K. & T. Ry. Co., 36 Fed 223; Morgan's L. T., etc., Co. v. Texas Central, 137 U. S 171; Guaranty Trust & Safe Deposit Co v. Green Cove, etc., 139 U. S. 137, 35 Law 116; Dow v. Memphis, etc., R. R. Co., 20, Fed. 265; Credit Co. v. Arkansas Cent. R. Co, 15 Fed. 46; Farmers' Loan & Trust Co. v. Winona, etc., Co., 59 Fed. 957; Farmers' Loan & Trust Co. v. Chicago, etc., 61 Federal, 543; Mer. Trust Co. v. Chicago, etc., 61 Federal 374.

Limitations contained in a mortgage, restricting the right of foreclosure, must be strictly construed. Toler v. East Tennessee V. & G. Ry. Co., 67 Fed. 179; Guaranty Trust & Safe Dep. Co. v. Green Cove Springs & M. R. Co., 139 U. S. 137; Railroad Co. v. Fosdick, 106 U. S. 47; Morgan's L. & T. R. & S. Co. v. Texas, etc., Co., 137 U. S. 171; Farmers L. & T. Co. v Winona & S. W. R. Co., 59 Fed. 957; Mercantile Trust Co. v. M. K. & T. Ry. Co., 36 Fed. 221.

Suit was not prematurely brought and demand for performance was not required for the purposes of this suit. Mercantile Trust Co. v. Chicago P. & S. L. Ry. Co. 61 Fed. 372; Mercantile Trust Co. v. M. K. & T. Ry. Co., 36 Fed. 223; Louisville & N. R. Co. v. Schmidt, 52 S. W. 840 Ky.; State Trust Co. v. Kansas City P. &. G. R. Co., 120 Fed. 406; Central Trust Co. v. Texas & St. L. Ry. Co., 23 Fed. 846; 33 Cyc. 562 b.

STATEMENT OF FACTS.

This is a proceeding in equity brought by appellee against the Las Vegas Railway and Power Company (a corporation) and William A. Buddecke, to foreclose certain deeds of trust made in favor of said appellee to secure the payment of bonds of the Las Vegas Railway and Power Company to the amount of $300,000.00; the said deeds of trust conveying the franchise and all property, real and personal of the appellants situated at Las Vegas, in the County of San Miguel and Territory of New Mexico. The bill of complaint in said cause was filed on the 28th day of September, A. D., 1908, and service was made upon the said defendants, who appeared, but filed no answer, and afterwards a decree pro-confesso was obtained and a final decree entered in said cause against them on the 5th day of December, A. D., 1908, providing for the sale, at public auction of all of the property mentioned and described in the several trust deeds, to pay said bonds amounting to $300,000.00 and the interest thereon.

Thereupon a special master was appointed to make the sale of said property who thereafter gave public notice thereof and fixed the date of sale on Monday the fifteenth day of March, 1909, at the east front door of the court house in Las Vegas, San Miguel County, Territory of New Mexico, and on said last mentioned date all of said real estate and premises, personal property and franchises were sold to Joseph M. Cunningham for the sum of $65,000.00. At the time of the sale, notice of protest against it was given by William A. Buddecke, and afterwards on the tenth day of April, A. D., 1909, and before the confirmation of the sale, he filed said protest in writing. On the same day there were various other protests in writing filed by various owners and holders of bonds of the said Las Vegas Railway and Power Company. Together with these protests was filed a motion to set aside and annul the sale of said property. The grounds upon which these protests were made were, in brief, that one G. W. Garrels, both before the time of the sale, and at the time of the sale, prevented competitive bidding at the said sale, and also that the price for which the said property was sold

was inadequate and did not represent its fair market value. Many affidavits, both in support of the protests and in opposition thereto, were filed and the same were taken up for hearing by the court, and on the 15th day of April, 1909, an order was entered confirming the sale. Afterwards, on May 13, 1909, appellants filed a demurrer and motion in said cause to set aside the default and decree pro-confesso, also the order of sale and all of the proceedings had thereunder, for the reason that the same was null and void, the bill of complaint not stating facts sufficient to constitute a cause of action, and that the court was thereby without jurisdiction to enter the decree herein, also alleging that the said suit was instituted in fraud of the company and its stockholders, and in fraud of the minority bondholders, and that the decree was caused to be entered in fraud of said parties. The demurrer and motion were also overruled by the court. From which ruling on said motion and demurrer, an appeal was taken to this court.

Such further statement of facts as is necessary for the determination of the issues, is contained in the opinion.

OPINION OF THE COURT.

WRIGHT, J.—The appellants assigned only two grounds of error and in their brief discuss them in the reverse order from that in which they are assigned. An examination of the second assignment of error, and the discussion in the brief thereon, discloses the fact that the appellants rely upon the question of irregularity in the entering of the decree, and the question as to whether or not the complaint states facts sufficient to constitute a cause of action.

Under this assignment of error, appellants contended that upon default being made in any case in equity, as the case at bar, that such default was tantamount to a complete denial of the plaintiff's cause of action, which required that the court take full proof of all the material allegations of the complaint before judgment could be

entered thereon. An examination of the record, how-
1 ever, fails to disclose any proof whatever that the court did not take full and complete proofs. The appellants attempt to sustain their contention by certain inferences drawn from the trust deeds and complaint.

The final decree entered herein contains the following recital:

"On this day the above entitled cause coming on before the court for trial and judgment, plaintiff being represented by William G. Haydon, its attorney, the defendants not appearing, but having made default as hereinafter shown, and the court having heard the evidence in said cause, finds:"

It therefore appears from the record in the case *affirmatively* that evidence of all of the material allegations in the complaint was heard by the court. A mere
2 inference cannot be held to contradict a plain recital in the decree to the effect that certain things were duly and regularly done. We think, therefore, that no further discussion of this question is necessary.

A consideration of the other branch of the second assignment of error involves the direct determination of whether or not under the terms of the deed of trust, sought to be foreclosed, the complaint states a cause of action. The appellants contended that an examination of the deed of trust and the allegations of the complaint would disclose that the action to foreclose was prematurely brought, contending that articles 3 and 4 of the deed of trust, in order to justify the trustee in initiating proceedings to foreclose said deed of trust, required that there must have been, first, a default on the part of the railway and power company in some one of the covenants contained in said trust deed; second, a demand upon the railway and power company to cure such default, either by payment or performance; third, a continuous default for sixty days after such demand; fourth, a requisition in writing signed by the holders of a majority in value of the outstanding bonds asking for a foreclosure after such sixty days have elapsed. The appellant's contention was based upon the wording of articles 3 and 4 of the deed of trust, which reads as follows:

ARTICLE III.

"If the Railway and Power Company, its successors or assigns, shall at any time hereafter make default, or refuse or neglect or omit for sixty days after the same shall fall due, and be demanded to pay any half yearly installment of the interest payable upon the bond or any of them intended to be hereby secured, or shall make default, or refuse or neglect, or omit for sixty days after they shall fall due, and be demanded to pay the principal sum of each and all of said bonds, or shall fail for sixty days after, faithfully to keep the covenants in this deed contained, to be kept and performed by the said Railway and Power Company, then, and in either such case the trustee or its successors in trust created or declared in and by this deed, personally, or by its attorney or agents may forthwith enter into and upon, and take possession and control of all and singular the real estate, etc. * * And have, hold, and use the same, operating by its superintendents, * * *

ARTICLE IV.

"In case any continuous default shall be made as provided in article three hereof, or in case the Railway and Power Company shall make default in the performance of any of the other provisions of these presents, then and in such case, if a majority in value of the outstanding bonds hereby secured, shall so elect, the whole principal of the bonds hereby secured shall thereupon be declared by the trustee to be, and shall immediately become due and payable; and it shall be lawful for the trustee, upon request in writing, signed by the holders of a majority in value of said bonds then outstanding, and upon being indemnified to its satisfaction to institute proper proceedings at law or in equity to enforce the lien hereby created, or cause the said property to be taken in execution and sold under such process for the payment of the debts, principal and interest hereby secured; or, the trustee may upon like request and indemnity enter upon and take possession of all of said real estate, * * * * AND PROCEED TO SELL the same." * * * (after due advertisement has been made.)

The contention of the appellants is based solely upon

these two articles. Article six of the said deed of trust provides as follows:

"It is hereby declared and decreed by and between the parties hereto, that it shall be the duty of and it is hereby made obligatory upon the trustee, upon being requested so to do, in manner as hereinafter provided, by the holder or holders of a majority in value of the bonds at the time outstanding, and on being indemnified to its satisfaction, to take needful steps which may be requisite to protect the rights of the holders of the bonds secured hereby." (Then follows a provision as to the form of a requisition.) * * * The trustee shall proceed forthwith to enforce the rights of the trustee and of the bond holders under these presents, by sale or entry, or by judicial proceedings according to such requisition, provided that in the meantime and until such requisition by a majority of the bond holders shall have been as above provided, the trustee shall have full power and authority to commence and prosecute such proceedings at law or in equity from time to time as it may deem necessary, or proper for the due perfection (protection) and enforcement of the rights of the bond holders or any of them under these presents."

The two sections of the complaint of which the appellants complained are sections 12 and 13.

Section 12 reads as follows:

"That continuous default has been made in the terms and conditions of said deed of trust in this, that the said mortgagor, the Las Vegas Railway and Power Company, the defendant herein, has failed and neglected to pay the interest coupons of said bonds, that it has failed to pay the taxes assessed against its property that it has failed to pay the sum of fifteen hundred ($1500.00) dollars, to create a sinking fund as provided by the terms of said deeds of trust."

Section 13 reads as follows:

"That on account of such defaults and under and by virtue of the terms of said deeds of trust and the request made in said written requisition, plaintiff herein, the trustee in said deed of trust, hereby declares all of said indebtedness, principal and interest now due and payable, and

has so declared, and notified said company as by Exhibit "F" heretofore attached is shown."

An examination of articles 3 and 4 of the deed of trust discloses the fact that these two articles, taken as a whole, refer to the extraordinary remedies and powers which are given to the trustee to enforce the covenants of the deed of trust. These are extraordinary and arbitrary powers given to the trustee, whereby he can take immediate possession and control of all of the corporeal properties and franchises of the company, and either operate them for the benefit of the creditors of the company or dispose of them under the usual power of sale contained in deeds of trust and mortgages. Under the provisions of these two articles it is no more than right and just to the de-
3 faulting corporation that it should have, first: A written demand made upon them to cure any default, and then a period of sixty days thereafter in which to devise ways and means of overcoming such default. The appellants contend that the requirements set out in article 3 and article 4 would also apply to any proceedings in law or equity that might be brought by the trustee to enforce the covenants of such deed of trust. A careful reading of article 6, however, fails to disclose that any such re-
4 strictions are contained in that article upon the rights and powers of the trustee to institute proceedings to foreclose such deed of trust. The appellants further contend that these limitations upon the power of the trustee to take legal proceedings to enforce the deed of trust should be strictly construed against the right of the trustee to bring such proceedings, and that such limitations went, not only to the extraordinary remedies provided in articles 3 and 4, but to all his powers under such deed of trust, and in support thereof they cite Guaranty Trust Company v. Green Cove Railroad, 139 U. S. 127.

An examination of the opinion in this case, however, discloses no such rule, in fact, it is rather to the contrary.

In the opinion in this case upon this very point, the court uses the following language:

"A case nearer in point is that of Morgan's Steamship Co. v. Texas Central Railway, 137 U. S. 171, decided

at the present term, in which the condition was that on default continuing for sixty days in the payment of interest or any part of principal, the principal of the bonds shall become immediately due, and that upon request of seventy-five per cent of the holders of bonds, and written notice of the same, the trustee should take possession of the property, and operate it for the benefit of the bond holders, and that upon like request he should proceed to foreclose the mortgage and sell the property to the highest bidder for cash. It was also provided that nothing contained in the instrument should be construed to prevent or interfere with the foreclosure by any court of competent jurisdiction. It was held that the trustee could maintain a bill to foreclose the mortgage upon occurrence of a default, without averring or proving a request of seventy-five per cent. of the bond holders, as such request was necessary only in case the trustee wished to proceed to foreclose or take possession *ex mero motu* without the intervention of the court.

"We think that such limitations upon the power of the trustee to take legal proceedings to enforce payment of the amount secured, should be strictly construed. In this case, the condition only relates to the taking possession of the property under the deed of trust, or to a sale in the city of Philadelphia, under the power of sale contained therein, and we think it should not be held applicable to foreclosure proceedings begun in a court of competent jurisdiction to obtain a judicial sale of the property. This was the ruling in the eighth circuit, by Judge Dillon in Alexander v. Central Railroad of Iowa, 3 Dillon 487; and by Judge Caldwell in Credit Co. v. Arkansas Central Railroad Company, 15 Fed. Rep. 46; and we think it is sound."

In the deed of trust involved herein there is no restriction placed upon the powers of the trustee in Article 6.

The next question involves the determination of whether sections 12 and 13 of the complaint, under article 6 of the deed of trust, sufficiently state the fact of default on the part of the appellants herein. While it is true that neither one of said articles contains any statement that demand was made upon the company and sixty days had

elapsed since said demand, still, under the provisions of article 6 of the said deed of trust no such statement was necessary and they undoubtedly correctly and sufficiently state the fact of default. Section 10 properly and sufficiently alleges demand and requisition upon the trustee by a majority of the bond holders. We therefore hold
5 that the complaint sufficiently states facts to constitute a cause of action.

Under the remaining assignments of error the appellants contend that the court should have vacated and set aside the sale and dismissed the entire proceedings.

They set out three reasons why the decree, as distinct from the sale, should be set aside, as follows:

First. Because the record shows that at the time the complaint herein was filed none of the defaults complained of existed or could exist, for the reason that the complaining parties had waived the same. This contention is based upon the terms of a certain contract entered into on January 20, 1908, whereby the owners of the majority of the bonds, who afterwards, instigated the suit to foreclose, agreed to clip the interest coupons from their bonds for a period of five years and accept notes of the appellant company payable February 15, 1913, in payment thereof, thereby waiving their rights to claim a default in payment of interest.

Second. Because the requisitions made upon the trustee to proceed to foreclose were direct violations of such contract.

Third. Because such contract of January 20, 1908, superseded during its life, the said deeds of trust as to all parties thereto and they were thereby estopped; that each and all of the defaults and grounds for instituting proceedings to foreclose, set out in such pretended requisitions were such as the parties had waived by their said agreement.

An examination of such agreement and requisitions discloses that the requisitions set out three alleged defaults, namely, in payment of interest, in payment of taxes and in providing for a sinking fund, while the agreement refers only to the default in payment of interest.

That default was made in payment of taxes and in providing for a sinking fund, and is nowhere denied. Such being the case, the foregoing objections of the appellants are not well founded.

The appellants further contend that there was fraud in the inception of the suit. This contention is not borne out by the record. While it is true that there may have been some sharp practice indulged in by one G. W. Garrels in getting possession of the bonds from the then owner, August Barthels, one of the protestants against the confirmation of the sale, yet, the fraud, misrepresentation and breach of trust, set out by the affidavits and exhibits filed by the protestants, go to the sale rather than to the proceedings prior to the entry of the decree of foreclosure.

The record shows that there was no question of fraud until long after the decree was signed. All parties were unanimous that a foreclosure was necessary.

There was, therefore, no such showing of fraud as
6 would have warranted the court in vacating the decree of foreclosure, even admitting that the motions were timely.

This brings us to the remaining phase of the assignment of error, namely, the motion to vacate and set aside the judicial sale.

The properties and franchises of the appellant company sold for $65,000.00. To be deducted from this are the cash assets, including cash on hand, and lighting bills for the current month, amounting in all to about $8,000.00. leaving the net amount derived from said sale, about $57,000.00.

The undisputed evidence is that the properties and franchises of the appellant company were worth from $100,000.00 to $120,000.00. That a guaranteed bid of $100,000.00 was submitted by the protestants when the sale was before the court for confirmation.

All of the evidence offered in support of the motion to vacate and set aside the sale, as well as that in opposition thereto, are by way of affidavits and documentary evidence. It appears therefrom that one August Barthels, the owner of just one-half of the bonds, had an agreement with one

G. W. Garrels and others, prior to the commencement of this suit, to the effect that they were to put up money and bid in this property at an amount approximating $100,000.00, with the intention of reorganizing the appellant company upon a paying basis and thereby saving something out of the wreck for the said August Barthels. That it was due to this agreement that Barthels consented to and did sign the requisition upon the trustee, as a result of which the foreclosure suit was commenced. It also appears in the evidence that this agreement had been declared off by Garrels and some of the other parties thereto, yet that no notice thereof was given to Barthels prior to the sale. Relying upon this agreement, Barthels made no effort to be present at the sale and protect his interests. It further appears that the said G. W. Garrels was president of the Franklin Bank of St. Louis, Missouri, and as trustee held $150,000.00 worth of bonds of the appellant company, as collateral security for certain notes endorsed by said August Barthels, which notes were held by the Franklin Bank. It also appears that the said G. W. Garrels was a director and large stockholder in the Trust Company of St. Louis County, the trustee named in the original deeds of trust. He was also the prime mover in obtaining a foreclosure of the trust deeds so that his bank could realize upon its collateral security. It further appears that Garrels had agreed with the officers of the First National Bank of Las Vegas, New Mexico, not to dispose of these bonds which he held as trustee for Barthels, except upon notice to the First National Bank of Las Vegas so that it could protect its interests under a note for $9,000.00 held by it, endorsed by Barthels. Notwithstanding this agreement, Garrels, on the day of sale, in the presence of J. M. Cunningham, the purchaser of the properties of the appellant company, disposed of these same bonds to one James M. Thorpe at twenty-five cents on the dollar, at private sale, an hour before the time of the judicial sale of the properties of the appellant company, without notice to any of the other interested parties.

It also appears from the affidavits filed in support of the protest, and undenied by the said Garrels, that on the

way over to the court house at Las Vegas, Garrels came to the conclusion that he had made a mistake in selling the aforesaid bonds at twenty-five cents on the dollar; that he endeavored, in the presence of J. M. Cunningham, to get back the bonds which he had sold; stating that if the property brought $100,000.00 he would have to account to Barthels and others for any excess over twenty-five cents on the dollar that might be realized to the bond holders by the judicial sale.

Later on, at the sale, when he discovered that the First National Bank of Las Vegas was bidding, he rushed up to Mr. Raynolds, the representative of the bank, and said: "For God's sake, don't bid, I have sold my bonds." Mr. Raynolds swears that because of this action by Mr. Garrels he made no further bids, thinking that an arrangement had been made to protect the bank, when, in fact, he would have been ready to bid $120,000.00 for the property if any notice had been given by Mr. Garrels in accordance with his agreement. The First National Bank of Las Vegas was one of the protestants against the confirmation of such sale.

To briefly sum up the foregoing it appears:

1. The property was worth from $100,000.00 to $120,000.00 at the lowest estimate.

2. It was sold for a sum approximating $57,000.00, after deducting the cash assets.

3. At least two parties vitally interested in the sale were prevented from bidding at the sale by the action of G. W. Garrels.

4. A guaranteed bid of $100,00.00 was submitted along with the protest by appellants.

Under the practice of the English Court of Chancery, prior to the change of the rule by statute at a later date, as a general rule, biddings at judicial sales could be reopened and a re-sale ordered where, before confirmation of the sale, an offer was made for a 10 per cent advance on the bid and an indemnity to the purchaser. After confirmation, however, there must be other additional circumstances besides the offer of an increased price before the sale could be set aside.

The English practice, however, has not been generally adopted in the United States.

The general rule in the United States is as follows:

In Blanks et al., v. Farmers' Loan and Trust Co. et al., 122 Fed. 849, the court states the rule as follows:

"It is perfectly well settled that a judicial sale will not be set aside for inadequacy of price unless it be so gross as to shock the conscience, or unless there be additional circumstances which would make it inequitable to allow the sale to stand. Graafan et al. v. Burgess, 117 U. S. 180, 6 Sup. Ct. 686, 29 L. ed. 839; Powabic Mining Co. v. Mason, 145 U. S. 349, 12 Sup. Ct. 887, 36 L. ed., 732; C. S A Sixth Circuit Court in Meagan v Segal, et al., 34 C. C. A. 323, 92 Fed. 252; Fidelity Insurance, etc., Co. v. Roanoke, Iron Co., C. C., 84 Fed. 752; Fidelity Insurance Co., etc., v. Roanoke St. Ry. Co., C. C., 98 Fed. 475; Beach Mod. Eq. Prac., sec. 824; Am. & Eng. Enc. of Law, 2nd ed., vol. 17, p. 1,000, verbis "Judicial Sales" and numerous cases there collated."

The rule as stated in Cyc., is as follows:

"But when in connection with the inadequacy of price there are other circumstances having a tendency to cause such inadequacy, or any apparent unfairness or impropriety, the sale may be set aside, although such additional circumstances are slight and if, unaccompanied by inadequacy of price, would not furnish sufficient ground for vacating the sale." 24 Cyc. 39-40 and cases cited.

Upon this question the United States Supreme Court, in Schroeder v. Young, 161 U. S. 337, says:

"While mere inadequacy of price has rarely been held sufficient in itself to justify setting aside a judicial sale of property, courts are not slow to seize upon other circumstances impeaching the fairness of the transaction, as a cause for vacating it, especially if the inadequacy be so gross as to shock the conscience. If the sale has been attended by any irregularity, as if several lots have been sold in bulk where they should have been sold separately, or sold in such manner that their full value could not be realized; if bidders have been kept away; if any undue advantage has been taken to the prejudice of the owner of the

property, or he has been lulled into a false security; or, if the sale has been collusively, or in any other manner, conducted for the benefit of the purchaser, and the property has been sold at a greatly inadequate price, the sale may be set aside, and the owner permitted to redeem." See also Morton v. Morton, 7 Ky. Law Rep. 752; State v. Brooks, 2 Bland 42; Johnson v. Rowe, 1 Ky. Law Rep. 274.

It has also been held that where a stranger or third person becomes a purchaser in good faith that the mere offer of a higher price will not be sufficient to warrant the setting aside of the sale, unless there has been fraud and misconduct of the master or other person having control of the sale, or surprise upon the party interested, which proceeded from or were caused by the purchaser or some person connected with or having the management of the sale. Mahoney v. Macukbin, Trustee, et al., 52 Maryland 357; Collier v. Whipple, 13 Wendell, 224, 227; Lefevre v. Laraway, 22 Barbour, 173.

It cannot be contended for a moment, in the case at bar, that the price realized at the sale, under all of the proofs submitted in support of and in opposition to the protest against such sale, was other than grossly inadequate.

It then remains to be determined whether there are any other and additional circumstances which would impeach the fairness of the sale and make it inequitable to allow the same to stand. In deciding this point it is also necessary to determine whether August Barthels and the First National Bank of Las Vegas, New Mexico, were prevented from bidding at the sale by any accident, mistake, fraud or misrepresentation which proceeded from or was caused by the purchaser, some person interested in, connected with or having the management of such sale.

G. W. Garrels, up to a few moments prior to the actual sale, had occupied the position of a creditor of the appellant company and as such was vitally interested in such sale. So far as the officers of the First National Bank of Las Vegas knew, he still occupied that position at the time of the sale. All of his acts which resulted in the bringing of the suit to foreclose, and the negotiations with Barthels were carried on while he, Garrels, occupied the

position of a creditor. During all of this time he was also a director and stockholder in the Trust Company of St. Louis County, the trustee bringing the foreclosure suit. Later, by reason of his sale of the bonds, whereby he placed himself in the position of being compelled to account to Barthels, the owner of the equity in such bonds, in event of the sale of the properties and franchises of the appellant company at a price which would net more than the amount due on the notes endorsed by Barthels, he suddenly becomes very active in his endeavors to keep down the bidding at such judicial sale.

It is true that there is no fraud or misrepresentation directly traceable to J. M. Cunningham, the purchaser at such judicial sale, and it cannot be said that there was any collusion between G. W. Garrels and J. M. Cunningham, the purchaser, but the activities of G. W. Garrels are so interwoven with the entire transaction, and he appears in so many different capacities that his interest in and connection with the sale, are such as to bring his misconduct within the rule laid down in the case of Collier v. Whipple and Lefevre v. Laraway, cited *supra*.

It therefore follows: Not only is the price grossly
7 inadequate but there are also additional circumstances which render it inequitable to permit the sale to stand.

However, as the purchaser, J. M. Cunningham, is conceded to be a disinterested party, and undoubtedly purchased in good faith, it is only just and proper that the sale should be set aside and a new sale ordered only *upon terms*.

It is therefore ordered that if, within thirty days from date hereof, the appellants, or some one in their behalf, shall deposit with the District Court of San Miguel County the sum of one hundred thousand ($100,000.00) dollars, the amount of their guaranteed bid, such sum to be taken and considered as a bona fide bid for the properties and franchises of the appellant company upon a resale thereof, then and in that event the decree confirming the sale herein shall stand reversed and the sale set aside, and a new sale be made in accordance with the original decree and mandate without further action of this court to issue

accordingly. Upon a resale being so ordered the court below shall make such adjustment of the rights of the original purchaser, J. M. Cunningham, as to interest, costs, expenses and liabilities incurred because of such original sale so vacated and set aside as to the court may seem just.

Upon failure, however, of the appellants to so deposit the sum of $100,000.00 the judgment of the lower court will stand affirmed with costs, and mandate without further action of the court to issue accordingly, and it is so ordered.

[No. 1270, August 30, 1910.]

OTTO MANN, Appellee, v. JOHN A GORDON, Appellant.

SYLLABUS (BY THE COURT.)

1. In a suit brought to recover money lost at gambling within one year prior to the bringing of such action, moneys won at gambling by the plaintiff from the defendant more than one year prior to the commencement of action by the plaintiff to recover his losses, are not within the terms of section 2927 of the Compiled Laws of 1897 and cannot be pleaded as a set-off or counterclaim to the original cause of action.

2. A demurrer to a counterclaim which pleaded a cause of action under the gaming statutes barred by the statutes of limitation was properly sustained.

3. In an action under Sec. 3199, C. L. 1897, to recover money lost at a gambling device, it was in evidence that the plaintiff did not settle the loss at the time of the play but about six weeks later he gave a check which defendant subsequently cashed. Held that an instruction to the effect that the loss occurred at the time the game was played and not when the check was given or the money paid, was proper.

Appeal from the District Court for the County of

Bernalillo, before IRA A. ABBOTT, Associate Justice. Affirmed.

E. W. DOBSON for Appellant.

Suit should have been brought within one year from the time such action accrued. C. L. 1897, sec. 3211; Ware v. Howley, 27 N. W. 789, 68 Iowa 633.

Counterclaims. Code, sub-secs. 40, 41; C. L. 1897, secs. 2980, 2982, 2927; Folsom v. Winch, 19 N. W. 305, 63 Iowa 479; Allen v. Maddox, 40 Iowa 124; Feld v. Coleman, 72 Miss. 545; Waring v. Hill, 89 Ind. 497; 20 Cyc. 946; Elias v. Gill, 18 S. W. 454, 92 Ky. 569; Dunn v. Bell, 4 S. W. 41; Zielly v. Warren, 17 Johnson, N. Y., 335; Johnson v. McGregor, 41 N. E. 550.

Money voluntarily paid, with knowledge of the facts, can not be recovered, even though the asserted claim was invalid and unenforceable. 22 A. & E. Enc. Law 609, and authorities cited; 14 A. & E. Enc. Law 626; Whelloch v. Babo, Harp. L., S. Car., 421; Herd v. Vincent, 1 Overt., Tenn. 369.

MEDLER & WILKERSON for Appellee.

Defendant to maintain his counterclaim must bring himself within terms of C L. 1897, sec. 3211. C. L. 1897, secs. 2914, 2917, 2927; Laws 1880, ch. 5, sec. 14.

Recovery of money lost at gambling. C. L. 1897, secs. 3199, 3211.

STATEMENT OF FACTS.

This is a suit brought by appellee to recover $960.00 alleged to have been lost at gambling. The complaint was filed April 24, 1907, and alleges that the money was lost on April 28, 1906.

The answer denies that plaintiff lost the money and denies that the cause of action accrued within one year; and further alleges as a counterclaim and set-off that on August 17, 1905, the appellee won from the appellant $975.00.

A reply was filed which was afterwards withdrawn and a demurrer filed to the answer, on the grounds that the counterclaim failed to state facts constituting a cause of action in that the alleged cause of action set up in the counterclaim had not accrued within one year from the bringing of the suit. There were other grounds of demurrer but the same are not material to the issues herein. This demurrer was sustained and thereafter trial was had to the court and jury upon the issues made by the complaint and denial of liability contained in the answer, which resulted in a verdict for the plaintiff of "$560 and 6 per cent."

From the judgment entered thereon defendant below appealed to this court.

OPINION OF THE COURT.

MECHEM, J.—The appellant assigns eleven grounds of error, but in his brief and upon the oral argument abandoned all but three. Of these, only two are necessary to a determination of the case.

1. It is insisted that the court erred in sustaining appellee's demurrer to the counterclaim set up in the answer.

Section 3211 of the Compiled Laws of 1897 provides that any suit brought under the act to restrain gaming shall be commenced within one year from the time such action accrued and not afterwards.

Section 2927 of the Compiled Laws, which was section 14 of the Act of 1880, reads as follows:

"A set-off or counterclaim may be pleaded as a defense to any cause of action, notwithstanding such set-off or counterclaim may be barred by the provisions of this act, if such set-off or counter claim so pleaded was the property or right of the party pleading the same at the time it became barred and at the time of the commencement of the action, and the same was not barred at the time the cause of action sued for accrued or originated; but no judgment for any excess of such set-off or counter claim over the demand of the plaintiff as proved shall be rendered in favor of the defendant." U. S. v. Howland,

vol. 1, page 556, N. M. Rep.; Staab et al., v. Ortiz, vol. 1, page 516, W. C. Rep.

The cause of action set up as a counterclaim by appellant was barred as an independent action at the time the complaint herein was filed in the district court. Counsel for appellant contends, however, that the counter claim pleaded in the answer comes within section 2927 cited *supra*. Evidently he overlooked the limitation therein expressed limiting the provisions of the act permitting
1 a barred action to be pleaded as a counter claim or set-off, to the actions specifically mentioned in such act.

Section 2929, which was section 16 of the same act, as 2927 cited *supra*, provides as follows:

"None of the provisions of this act shall apply to any action or suit, which, by any particular statute of this Territory, is limited to be commenced within a different time, nor shall this act be construed to repeal any existing statute of the Territory which provides a limitation of any action; but in such cases the limitation shall be as provided by existing statutes."

The gaming law being an earlier statute, and not one of the causes of action mentioned in the earlier sections of the Act of 1880, and containing specific restrictions as to the right to bring an action to recover moneys
2 lost at gambling is clearly not within the provisions of section 2927, cited *supra*, and the demurrer was properly sustained.

II. The remaining assignment of error relates to the refusal of the court to give the following instruction to the jury:

"The jury are instructed that if you believe from the evidence that the check for $460 was given by the plaintiff to the defendant a month or so after the playing of the game at which it is alleged that the same was lost, then the money represented by said check cannot be recovered by the plaintiff in this action."

The court refused this instruction and instructed the jury upon this point as follows:

"Now, whatever loss occurred, and that you are to determine from the evidence, you are instructed, occurred

at the time the game was played, and not in any particular at any later time; that is, the two checks for two hundred dollars each, if they were such checks, were lost when they were given, and not when they were paid, and the check for four hundred and sixty dollars, if that amount was lost at all, and that you are to determine from the evidence, was lost at the time of the game, and not at the time the check was given, so you are to determine from the evidence whether the plaintiff did lose to the defendant nine hundred and sixty dollars, or any part of it, within the year prior to the 24th day of April, 1907."

The testimony of the plaintiff was to the effect that he lost $960 on or about April 28, 1906. That of this amount he paid $100 in cash at the time of the game and gave two $200 checks which he took up two or three days later, paying the money and destroying the checks; that the balance of $460 was not paid at the time of the game; that on the first of June following, more than a month after the alleged loss of the money, he gave the defendant a check for the $460, which defendant afterwards cashed. It appeared from the evidence, as an undisputed fact, that the $460 was paid as aforesaid and that it represented the credit extended by the gamekeeper to the appellee herein; that the appellee more than a month later, although under no legal obligation so to do, voluntarily paid this amount to the appellant.

Appellant's argument on this point is that this $460 was not money lost at gambling within the meaning of the statute; that it was voluntary payment not made at the time of the gambling by any check or note given therefor, but the check was voluntarily given some thirty-three or thirty-four days after the alleged transaction and he cites in support of his contention the following quotation from 14 Am. & Eng. Enc. of Law, 626:

"When the winner extends credit to the loser, whether or not he takes from the loser a promissory note, and the loser subsequently voluntarily pays the gambling debt to the winner, it has been held that the transaction is not within the meaning of the statute, and the loser cannot recover the payment so made."

The context is supported by Whelloch v. Bobo, 1 Harp. L. (So. Car.) 421, decided in the year 1824 on a statute of 9th Anno., c. 14, then in force in South Carolina, which allowed the recovery of treble the amount of a sum of money won on a horse race. The second case is Herd v. Vincent, 1 Overton (Tenn.) 369, decided in 1808, the application of the latter case being very doubtful indeed. The foot note also cites an Irish case to the contrary, Lynn v. Bell, 10th Ir. C. L. 487, which we have not an opportunity to examine. We are not inclined to follow these cases because in our opinion to do so would be to give too narrow a scope to our statutes. Such statutes are remedial in their nature and designed to discourage gambling by making the game keepers winning insecure. We do not think we are justified in any refinement in its construction.

The statute reads as follows:

Sec. 3199. "Any person who shall lose any money or property at any game of cards, or at any gambling devise, may recover the same by action of debt, if money; if property by action of trover, replevin or detinue."

Sec. 3202. "All judgments, securities, bonds, bills, notes or conveyances when the consideration is money or property, won at gambling, or at any game or gambling device, shall be void."

By Sec. 3203, no assignment of any such bond, etc., shall affect the defense of the person executing the same. And the right to recover money lost or to avoid any bond, etc., given in consideration of money lost at gambling is given not only to the person but to his wife, children, heirs, executors, administrators and creditors.

So it will be seen that the statute is very broad and comprehensive. It seems intended that the loser at gambling may recover for any loss and for the loss of anything of value whatsoever.

The argumen of the appellant reduced down to its lowest terms is that where a person pays a gambling debt at any other time than at the time of the loss, it is a voluntary payment and being voluntary no recovery can be had.

We fail to observe by the terms of the statute any-

thing to base this argument upon. Whether the payment be made voluntarily or under duress it seems no distinction is made by the statute.

But is it argued "that money voluntarily paid with knowledge of the facts, cannot be recovered, even though the asserted claim was invalid and unenforceable." 22 A. & Eng. Ency. of Law 609.

Why should this rule apply any more when the loser pays before leaving the gaming table than a month afterwards? The loser is entitled to recover money or property lost by him "at any game of cards or at any gambling device." Is not the money lost as in this case, at roulette, paid to the winner six weeks after the game, just as much lost as if paid at the moment the game was finished? Surely the loser lost and just as surely the loss was at the game or gambling device.

Does not a man pay as much voluntarily when he pays before he leaves the table as after it? The argument of appellant loses force when it is considered that the asserted claim is no more invalid six weeks after the game than it was at the moment the game was played, or in other words the payment would have been as voluntarily made if at the time of the game as six weeks afterwards.

The instruction given by the court correctly stated
3 the law.

There appearing no error in the record the judgment of the lower court is affirmed.

William H. Pope, Chief Justice, and John R. McFie, Associate Justice, concur.

DISSENTING OPINION.

WRIGHT, J.—I am unable to concur in the reasoning of the majority of the court upon the question raised by the assignment of error upon the instructions given to the jury relating to the item of $460 admitted by the evidence to have been paid some six weeks after the gambling game, at which the same is supposed to have been lost, was played. The appellant requested the court to give the instruction which is set out in the majority opinion, to the jury. This instruction was refused by the court and

the court upon his own motion instructed the jury upon this point as is set out in the majority opinion.

In an early case in South Carolina under a statute permitting the recovery of money and goods lost in gambling, which statute was taken from 9th Ann. (an old English statute) the courts of that state held that when the winner exends credit to the loser and the loser subsequently voluntarily pays the gambling debt to the winner, that the transaction is not within the meaning of the statute and the loser cannot recover the payment so made. Whelloch v. Bobo, Harp. 1, (S. Car. 421); See also: Herd v. Vincent, 1 Overt. (Tenn.) 369.

In the South Carolina case cited *supra* the court said in passing upon this point, that the thing bet upon the game, which in this instance was a horse race, was a note, and that this being void under the statute there was no legal liability to pay the same. In other words, there was in fact nothing bet on the race which could be construed as being within the statute, the statute providing, as does our statute, that money and goods, (in our statute property) lost at gambling can be recovered by suit brought as provided in such statute.

In the case at bar there was nothing lost at gambling. There was no legal liability upon the part of the appellee herein to pay and the payment made afterwards with full knowledge of the fact, voluntarily, cannot be held as coming within the meaning of the statute.

This court in the case of Territory v. Newhall, 103 Pac. 982, held:

"A voluntary payment, made with a full knowledge of all the facts and circumstances of the case, though made under a mistaken view of the law, cannot be revoked, and the money so paid cannot be recovered back."

There was no money or anything else lost at the time of the game, the money itself was not lost until payment was made and that occurred six weeks after the game. If it had been the intention of the legislature to include voluntary payments made after the game they would un-

doubtedly have covered such point by the terms of the statute.

Mr. Justice Parker concurs in the above.

[No. 1316, August 30, 1910.]

C. E. THOMAS, Appellant, v. G. E. GAVIN, Appellee.

SYLLABUS (BY THE COURT.)

1. An agreement not to engage in the business of buying and selling lumber in a certain town or its vicinity for two years in consideration of the purchase at stipulated prices of the entire stock of lumber of the seller then on hand in the business in which the seller is then engaged in the lumber business, is not void as being in restraint of trade.

2. While a single sale of lumber would not in itself amount to engaging in the lumber business, it would be evidence on the question whether the seller was engaging in that business and in connection with other circumstances might furnish sufficient proof that he was so engaged.

3. In an agreement for the sale of a stock in trade and that the seller for a time abstain from engaging in the business in which it was employed, there was a provision that a sum named should be considered liquidated damages in case of a breach of the agreement by either party to it. Held, that it was for the court to determine from the circumstances of the case whether the sum named should be considered a penalty or liquidated damages. And the trial court having found actual damages only instead of the stipulated sum, for a breach of such a contract, it was at liberty, in addition to its judgment for damages, to enjoin the defendant from further violating the agreement in question.

Appeal from the District Court for Chaves County before W. H. Pope, Chief Justice. Affirmed.

R. D. Bowers for Appellant.

Contract was void because it was in restraint of trade. 2 Beach Cont., art. 175; Moore v. Bennett, 140 Ill. 69, 15 L. R. A. 364, 29 N. E. 891.

The proper measure of damages is the loss to plaintiff. Gregory v. Speiker, 110 Cal. 150, 42 Pac. 576; Peltz v. Eichele, 62 Mo. 171, 180; Lashus v. Chamberlain, 5 Utah 140, 13 Pac. 361; Howard v. Taylor, 90 Ala. 241, 8 So. 36; Warfield v. Booth, 33 Md. 63; 2 Sedgw. Dam. 632.

REID & HERVEY and J. M. O'BRIEN for Appellee.

The finding of fact is binding being based upon substantial evidence. Hancock v. Beasley, 14 N. M. 239, 91 Pac. 735.

The good will of a business is not the business but is one result springing out of it. McGowan v. Griffin, et al., Vt., 37 Atl. 298.

Measure of damages. Peltz, et al, v. Eichele, 62 Mo. 170, 180; Gregory v. Speiker, 110 Cal. 150, 42 Pac. 576, 52 Am. St. Rep. 70, 74; Larkins v. Chamberlain, 5 Utah 140, 13 Pac. 361; Graham v. Plate, 40 Cal. 493; El Modello Cigar Co. v. Gato, 25 Fla. 886, 23 Am. St. Rep. 537; Avery v. Meikle, 85 Ky. 435, 7 Am. St. Rep. 604.

So long as the purchaser of good will continues in that business and the stipulation of the vendor not to engage in such business remains in force, the vendor cannot enter into competition with him either in his own account or as the agent or business manager of another. 20 Cyc. 1280; Meyers v. Laban, 51 La. Ann. 1726, 26 So. 463; Garvin v. Hawkins, 42 N. Y. Suppl. 603; Jefferson v. Market, 112 Ga. 498, 37 S. E. 758; Ewing v. Johnson, 34 Howard Pr., N. Y., 202, 205; Kramer v. Old, 119 N. Carolina 1, 25 S. E. 815, 56 Am. St. Rep. 650; 34 L. R. A. 389; Vonderbank v. Schmidt, 44 La. Ann. 264, 32 Am. St. Rep. 336.

STATEMENT OF THE CASE.

This is a suit in which the plaintiff, here the appellee, seeks to recover damages from the defendant, here the appellant, for the alleged breach of a written contract which

was entered into between them on May 5, 1909, which contract contained the words:

"That, whereas the party of the first part (appellant) is the owner of a certain lot of lumber and building material and is engaged in the business of buying and selling such merchandise, but for reasons sufficient to himself, is desirous of closing out all of the said material and discontinuing the business, and the party of the second part is willing to purchase the same provided the first party will not again engage in such business in the city of Roswell, or vicinity for a period of two years from this date. * * * * * *

"Now, therefore, in consideration of the above and foregoing the party of the first part agrees to sell and the party of the second part agrees to buy," etc.

At the trial, which was by the district judge without a jury, it appeared that the defendant had sold to one Brooks a carload of lumber which, however, was ordered by him before May 5, 1909, but arrived and was delivered after that date, and had taken an order for a carload for one Levers after that date which for some reason he did not accept and for which the defendant found another customer. That the lumber was ordered from a mill located at St. Augustine, Florida, in which his brother was part owner and there was evidence to the effect that he derived profit from each transaction; that he claimed the right to take and fill similar orders in the future provided that he did not have a lumber yard and buy and sell lumber at it, as he had done before the agreement with Gavin, and that he meant to take and fill such orders as he had opportunity.

It also appeared that the stock purchased by the plaintiff, amounted to $1,103.77 at the agreed price and that the plaintiff removed the same from the place where the defendant had been doing business and did not continue the business there. That the defendant expected to derive a profit from said transaction and to continue making like transactions, claiming that he had the right to take and forward orders for lumber to be delivered on the

cars if he did not have an established place of business and buy and sell lumber at it.

OPINION OF THE COURT.

ABBOTT, J.—The attorneys for the appellant claim that the provision of the contract in question that he should not engage in the business of buying and selling lumber in Roswell or the vicinity for a period of two years is void for being in restraint of trade. They attach significance to the fact that by the terms of the contract neither the business itself nor the good will of it was sold, but a quantity of lumber only. It is well settled both at the common law and under the anti-trust act that an agreement to refrain from engaging in a certain business within reasonable limits of time and place is valid if it is made as subsidiary to the main purpose of disposing of property employed in that business on better terms than could be obtained without such an agreement. To bring the transaction within that rule it is not necessary that the "good will" of the business should be in terms included in the sale. The seller might have obtained a stock of goods for the purpose of going into business, and have no business or "good will" to sell and through some change of circumstances be desirous of selling his stock of goods. It would be unreasonable to hold that he is forbidden in the public interest to better his chance of making a sale by including in it and disposing of his right to engage in the proposed business in that place for a reasonable length of time. Wood v. Whitehead Bros. Co., 165 N. Y. 545, 551; United States v. Freight Assn., 166 U. S. 293, 329; Hopkins v. United States, 171 U. S. 578, 600; Field v. Barber Asphalt Paving Co., 194 U. S. 618, 23.

The appellant denies, further, that he did engage in the business of buying and selling lumber in Roswell or the vicinity after the execution of the contract in question, contrary to its terms.

There was evidence that ordering lumber by the carload for customers to be delivered without the expense of passing it through the lumber yard was an important feature of the lumber business in Roswell and that the

appellant was to some extent doing business in that way at the time of his sale to the plaintiff since at least one car load of lumber he had so ordered arrived and was delivered after May 5, 1909, the date of his agreement with the plaintiff. The clear purpose of the agreement was to prevent the defendant from competing with the plaintiff in the lumber business in Roswell and vicinity, in any manner, and to that he should be held. Meyers v. Laban, 51 La. Ann. 1726; 26 So. Rep. 463; Jefferson v. Markert, 112 Ga. 498.

It is true, as the defendant contends, that a single transaction does not generally speaking constitute "engaging in business." Nelson v. Johnson, 38 Minn. 255. But while the trial judge in his opinion filed in the cause refers to the order of the carload of lumber for Levers as being the breach of the defendant's contract on which the judgment was based, yet there were other circumstances which in his view must have given character to the transaction. To order a carload of lumber would not be a matter of daily or even frequent occurrence in a small business such as that of the defendant's obviously was. There would not, therefore, be many transactions of the kind in a limited length of time. There was evidence of only two from about the middle of April to some time in July. That evidence, coupled with the evidence that the defendant said he had the right notwithstanding his contract, to take orders for car load lots and meant to do
2 it as often as he had the chance, warranted the trial court in finding that he was engaged in the lumber business. Abel v. State, 90 Ala. 631-3.

It is true the defendant denied that he made the statement referred to, but the trial judge must have believed that he did since he made the injunction which had been prayed for against his engaging in business, permanent. The findings of the trial judge without a jury on questions of fact will ordinarily not be set aside by this court when there is substantial evidence to sustain them. Candelaria v. Miera, 13 N. M. 360 and cases cited.

The agreement between the plaintiff and defendant provided explicitly for the sum of $1,000 as liquidated

damages in case either party should violate its terms. But "when the stated sum obviously and grossly exceeds any just measure of compensation" it is generally recognized that the court which has to pass on the question can treat it as a penalty and award actual damages. Sutherland on Damages, Sec. 295, quoting at length from Perkins v. Lyman, 9 Mass. 522. See also 13 Cyc. 99, and cases cited, especially Smith v. Brown, 164 Mass. 584, and cases cited.

In this case the lumber which the plaintiff agreed to buy of the defendant amounted, at the stipulated prices per thousand, to only $1,134.77. On a strict construction of their agreement for liquidated damages, the plaintiff would have had to pay the defendant $1,000 if he had refused to take the lumber, that is he would have had to pay practically its full value, and the defendant would still have had the lumber, which would have been little less than a *reductio ad absurdum*. And when, as it happened, the District Court found that the defendant had violated the agreement to the extent, so far as the evidence went, of the sale of a single car load of lumber only, it would have been manifestly against justice to fix the damages at $1,000, and we think, on the ground stated, the court was justified in awarding only what it found to be actual damages. Besides, the award of the full sum of $1,000 would, by the weight of authority, have left the defendant free from his obligation not to engage in business and Sutherland, sec. 298, declares that plaintiff in such a case may have his choice between the liquidated damages agreed upon and an injunction against engaging in business, but cannot have both.

As the contract between the parties is entire, no action for damages would lie for any further breach of it. Some of the authorities go so far as to hold that even in such a case there can not be an injunction as well as a recovery of damages. We see no good reason, however, so to hold. In case of payment of the full amount of stipulated damages or judgment therefor, it may well be considered that the party liable for a breach of the agreement has suffered what was provided in case of such a breach as an alternative to keeping his agreement and is thus left free. But if instead,

as in this case, judgment is rendered for only actual damages, before the expiration of the time of abstention
3 from engaging in business agreed upon, the courts, we think, are warranted in protecting the injured party for the remainder of that time by injunction.

The defendant avers that the District Court made the defendant's supposed profit instead of the plaintiff's loss by the sale of the car load of lumber in question, the measure of damages. It is true that in his opinion filed in the cause the trial judge may seem to intimate that such was the case, but a decision which is well founded in fact will not be disturbed because some of the actual grounds, and perhaps the strongest grounds for it, are not stated. Lockhart v. Wills, 9 N. M. 344, 359, citing Wisne v. Brown, 122 U. S. 214.

Evidence of the profit made by the defendant was admissible as bearing on the question of the plaintiff's loss. But to that point there was also the evidence that the man for whom the car load of lumber was ordered was a customer of the plaintiff to whom he might naturally have sold any lumber he required and that the defendant claimed and was exercising the right to take orders for car load lots of lumber and so was in competition with the plaintiff, thereby, of necessity in a comparatively small town, affecting his business injuriously.

The amount of damages awarded was justified by the evidence. The judgment of the District Court is affirmed.

[No. 1328, August 30, 1910.]

YOUNG & NORTON, et al., Appellants, v. M. C. HINDERLIDER, Appellee.

SYLLABUS.

1. The power of the territorial engineer to reject an application "if in his opinion the approval thereof would be contrary to the public interest," is not limited to cases in which the project would be a menace to the public health or safety.

2. The mere fact that irrigation under the former project would cost more per acre than under the latter is not conclusive that the former project should be rejected.

3. Cause remanded to obtain facts through the water commissioners and territorial engineer, or by agreement of counsel, or otherwise, essential to a satisfactory decision of the cause.

Appeal from the District Court for San Juan County before JOHN R. MCFIE, Associate Justice. Remanded to obtain further facts essential to satisfactory decision.

MARTIN & EDWARDS for Appellants.

The territorial engineer is the only proper authority to pass upon the practicability, public utility and general effectiveness of any proposed system of irrigation in this territory. Pueblo of Nambe v. Romero, 10 N. M. 58, 61; Newcombe v. White, 5 N. M. 435; Bull v. Southwick, 2 N. M. 321; McCarville v. Boyle, 89 Wis. 651; Howell v. Mills, 53 N. Y. 322; Mills v. Davis, 53 N. Y. 349; Appeal of Vaux, 109 Pa. St. 497.

The two elements of a valid appropriation of water are (a) diversion and (b) beneficial application to some useful purpose. There can be no private ownership of water of the public streams of this Territory. Land & Irr. Co. v. Gutierrez, 10 N. M. 177-240; New Mercer Ditch Co. v. Armstrong, 21 Colo. 357, 366; Combs v. Agricultural Ditch Co., 17 Colo. 146, 150.

E. C. ABBOTT and H. C. ALLEN for Appellee.

Priority in time shall give the better right. Laws 1907, p. 73, sec. 2.

Manner of determining reasonableness of rate for water delivered for irrigation. Wilterding v. Green, 4 Ida. 773, 45 Pac. 134; Boise City Irr. & L. Co. v. Clark et al, Co. Com., Ida., 121 Fed. 415; Slosser v. Salt River C. Co., 7 Ariz. 376, 65 Pac. 332; Gould v. Maricopa C. Co., Ariz., 376, 65 Pac. 598; Salt River Val. C. Co. v. Nelssen, Ariz., 85 Pac. 117.

STATEMENT OF THE CASE.

On the first day of October, 1907, M. C. Hinderlider filed with the territorial engineer an application for a permit to appropriate 200 second feet of the flow of the La Plata river in San Juan County, New Mexico, and for the construction of a storage reservoir with a storage capacity of 12,406 acre feet for the purpose of reclaiming an irrigating about 14,000 acres of land in said county.

On December 20, 1907, Messrs. Young & Norton for themselves and others filed with the territorial engineer an application for a permit to appropriate the waters of the same stream in the same county and Territory, for the purpose of reclaiming and irrigating about 5,000 acres of land, being a part of the same land covered by the Hinderlider project. This last application included the construction of a storage reservoir with a storage capacity of 10,149 acre feet for the purpose of storing the flood waters of said river and applying the same to the reclamation of the said 5,000 acres of land.

After the publication of the notice required by law and on the 19th day of March, 1908, the said Young, Norton and others filed with the territorial engineer a protest against the approval of the said Hinderlider application.

That after a hearing before the territorial engineer and on July 20, 1908, he rendered an opinion sustaining said protest rejecting the Hinderlider application and approving the application of the protestants, the said findings and order of the said territorial engineer, omitting the caption, being in words and figures as follows:

The territorial engineer finds, from the evidence presented by oral testimony, at the hearing in the above matter, at Aztec, on the 10th day of April, 1908, from affidavits presented before and after said hearing, and from the official records:

First. That M. C. Hinderlider on the first day of October, 1907, filed with the territorial engineer an application for a permit to appropriate an amount equal to two hundred second feet of continuous flow during irrigation season, of public water from the La Plata river, for the purpose of irrigating 14,000 acres.

Second. That the survey necessary before making said application was made prior to the opening of the land for settlement, and that the application was asked for the purpose of appropriating said water by the forming of a company, the building of necessary construction works and the sale of water rights at a cost of $40 per acre on land under said project and that a large portion of said land is under the control of protestants who have entered or settled on the land.

Third. That on March 19, 1908, Young, Norton and twenty-two others filed protests against the granting of said application of M. C. Hinderlider and also against the granting of an application by Jay Turley and others.

Fourth. That the protestants Young and Norton and others, filed application for a permit to appropriate public waters from the same stream on the 20th day of December, 1907, with the intention of irrigating 5,000 acres.

Fifth. That Young and Norton et al., are actual settlers or entrymen on about 5,500 acres under the project, and that the above parties immediately after October 3, 1907, when the said lands were opened to entry by the U. S. government, employed surveyors to make surveys preparatory to making an application for a permit to appropriate, and that they used reasonable diligence in collecting data in the shape of maps and surveys, for the filing of said application at an early date.

Sixth. That the application of Young and Norton was not asked for speculative purposes, but with the intent of irrigating and developing the lands now settled or entered upon by said settlers.

Seventh. That the cost of their works can be built by Young and Norton, et al., for less than $20 an acre.

Eighth. That on the 25th day of October, 1907, Jay Turley and H. L. Hollister filed an application for a permit to appropriate water from said La Plata river to irrigate the lands owned by Young and Norton et al., and the engineer ordered of them a statement of their intended prices per water right for land under control by protestants, but statement of said prices was not filed in the office of the territorial engineer, but that he was informed verbally

that they would ask $35 an acre for water right upon said land, and

Ninth. That the extent of the unappropriated flood waters available is not sufficient to irrigate more than five or six thousand acres.

Therefore, the engineer is of the opinion:

First. That there is unappropriated water available for approximately five or six thousand acres.

Second. That either the applicant or protestants, if their applications were approved, could and would complete their appropriation satisfactory to the Territory.

Third. That the Young and Norton et al., project is more within the available water supply, making same more feasible.

Fourth. That it would not be to the best interests of the public to approve the application of M. C. Hinderlider, thereby forcing the protestants to pay more than double price for their water rights. The same conditions as to the public interest would also apply to the application of Jay Turley et al., in so far as the amount of water allowed in the approval of Young and Norton et al., application might be affected.

It is therefore ordered, that the application of Young and Norton be approved, as follows:

APPROVAL OF TERRITORIAL ENGINEER.

The number of this permit is 107.

Date of receipt of first application, December 20, 1907.

Publication of notice completed and proof filed March 23, 1908.

Application recorded in Book A, page 107.

Approved this twentieth day of July, 1908.

This is to certify that I have examined the within application for a permit to appropriate the public waters of the Territory of New Mexico, and hereby approve the same.

The amount of water appropriated:

(a) By diversion.....cubic feet per second.

(b) By storage, 20,290 acre feet.

(c) Remarks: This application is limited to an annual appropriation of 20,290 acre feet and shall not be

exercised at such times that the same would be of detriment of prior valid rights to the use of water from said stream.

The construction of the within described works to be commenced not later than Jan. 1, 1909.

One-fifth of the work above specified to be completed on or before July 20, 1909.

The whole of said work to be completed on or before July 20, 1910.

The time for application to beneficial use shall not be later than October 1, 1911.

Witness my hand this 20th day of July, 1908.

(Signed) VERNON L. SULLIVAN,
Territorial Engineer.

In the event of the failure of Young & Norton et al, to complete their appropriation according to the above approval, the applications of M. C. Hinderlider and Turley and others will be considered in routine of their priority of filing.

. . . . . .

Santa Fe, New Mexico, July 20, 1908.

Thereupon the said Hinderlider appealed from the decision of the said territorial engineer to the Board of Water Commissioners of this Territory, which board after hearing all of the evidence offered by the parties and the argument of counsel, reversed the decision of the said engineer and directed him to approve the application of the said Hinderlider, the findings and order of said board being in words and figures as follows, to-wit:

STATEMENT.

It appears from the records in the office of the territorial engineer and from the applications, maps, plats, field notes and affidavits and other papers filed in the office of the territorial engineer and with the board, and from the testimony presented to the board at the several hearings: That on the first day of October, 1907, M. C. Hinderlider, filed with the territorial engineer an application for a permit to appropriate water from the La Plata river in San Juan County, New Mexico, to an amount equal to

two hundred second feet continuous flow during the irrigation season, for the purpose of irrigating 14,000 acres of land and for the construction of a storage reservoir with a capacity of 12,406 acre feet at one filing and the ditches and reservoirs necessary to carry out said project. That after publication of notice, a protest was filed by appellees Young and Norton et al, on March 19, 1908; and after a hearing on April 10, 1908, the territorial engineer sustained the protest and rejected the application of M. C. Hinderlider, at the same time approving the application for practically the same water, filed by John D. Young and Geo. N. Norton, two of the protestants, which application was filed in the office of the territorial engineer on December 20, 1907, and contemplated irrigating about 5,000 acres of land.

From this decision M. C. Hinderlider appealed to the board. The reasons alleged by the protestants for the rejection of Mr. Hinderlider's application were, that the protestants were actual settlers or entrymen on some of the land proposed to be watered; that the application of Mr. Hinderlider was not based upon actual surveys, measurements and field notes made by him, but upon surveys made by the United States Reclamation Service at the expense of the United States, and which he was not entitled to use for his personal benefit; and that the project contemplated by the application of Hinderlider was considerably more expensive than that contemplated by the application of Messrs. Young and Norton, and the rejection of the Hinderlider application and the approval of that of Young and Norton might enable the owners of the land in that neighorhood to obtain water rights at less cost.

In rejecting the application of Hinderlider and approving that of Young and Norton, the territorial engineer gives as his chief reason for his decision that the project of Young and Norton is more within the available water supply and therefore a more feasible project, and that it would not be to the best interests of the public to approve the application of Hinderlider, thereby forcing the protestants to pay a larger price for their water rights than they might have to pay under the project of Young and Norton.

At the hearing before the board, at Farmington, in San Juan County, and the subsequent hearing in Santa Fe, it was shown to the satisfaction of the board that the survey from which the maps, plats and field notes filed by Hinderlider were made, was an actual survey made under his direction, and at his expense by an engineer and assistants employed by him. It appears that the engineer, employed by Hinderlider, did retrace a ditch line previously surveyed by the United States Reclamation Service, using the government stakes whenever convenient, or wherever they were in place, but the testimony of the engineer and his assistant and the original field book kept by him in which the notes of his survey were recorded, showed conclusively that he did make an actual survey and that the plats, maps, and field notes filed by Hinderlider were taken from these notes. It was shown by the evidence, that Hinderlider and also the engineer employed by him to make this survey, had been in the employ of the U. S. Reclamation Service in making surveys in that neighborhood for an irrigation project which had been abandoned by the government, and the knowledge so obtained and the stakes of the abandoned government ditch line were undoubtedly of great assistance to them in making the subsequent survey; but it appears that they did not use the field notes of the government survey in any manner in preparing the application, maps, plats and field notes filed with the territorial engineer.

The engineer in his decision, based his action on the ground that the project of Young and Norton would be for the best interest of the public because it would enable people living in that vicinity and under the proposed ditch to purchase water at a less price than they might have to pay were the application of Hinderlider approved.

DECISION.

The board is of the opinion that the statute, section 28, chapter 49, laws of 1907, contemplates that the territorial engineer may reject an application if he finds that the project would be contrary to the public interest, in that it would be a menace to the public health or safety,

and not for the reason that a project described in an application subsequently filed might be more advantageous to the owners of private property in the neighborhood; and that it was not the intention of the legislature to vest in the territorial engineer or the board such discretionary powers as to authorize him or them to discriminate against a prior application in favor of one filed later, because one project would be less expensive than another to water users. The same principle should govern with respect to applications to appropriate water under the New Mexico statute as in the applications for entries of lands under the public land laws of the United States; the first application making a filing in compliance with the law should be recognized, and if he shall subsequently comply with the regulations and statutes, his application should be approved, unless the project is, in the opinion of the engineer, a menace to the public health or safety, or unless there is no water available under the application.

In the present case the testimony shows that there is unappropriated flood water available and that while it is claimed that the project of Young & Norton might be more advantageous to the protestants, nevertheless, the project described in the prior application is feasible and its approval would not be contrary to the public interest. The board believes that the interest of the owners of the land under the proposed ditches and reservoir who may desire to become water users under the project are amply protected by the provisions of law which require owners of such works to supply water at reasonable rates.

The board could take into consideration the question of benefits to the public from the construction of the respective projects, it would be manifestly more to the benefit of the public, being the people of the Territory of New Mexico, or the people of San Juan County, New Mexico, to have the larger project constructed which would furnish water to irrigate 14,000 acres, than a smaller one to cover only about 5,000 acres; and it would be exceedingly detrimental to the interests of all the people of the Territory if a bona fide application by one who had complied with all the requirements of the statute and the rules and regu-

lations established by the territorial engineer, were to be rejected upon such grounds in favor of an application subsequently filed. It is certainly to the interests of the Territory that outside capital be invited and encouraged to construct irrigation works in the Territory and that the law relating to water rights be consistently enforced so as to protect those who in good faith initiate such enterprises.

For the foregoing reasons the decision of the territorial engineer in rejecting the application of M. C. Hinderlider, and in approving the subsequent application of Young & Norton in so far as the same includes any rights covered by the prior application, is hereby reversed, and the territorial engineer is directed to approve the said application of M. C. Hinderlider.

(Signed) CHARLES SPRINGER,
President, Board of Water Commissioners.

The protestants, Young, Norton and others appealed from the decision of the water commissioners to the District Court of San Juan County in which the cause was heard Nov. 17, 1909, on an agreed statement of facts, which is in words and figures as follows:

"1. On the 1st day of October, 1907, M. C. Hinderlider filed with the territorial engineer an application for a permit to appropriate 200 second feet of the flow of the La Plata river, in San Juan County, New Mexico, and for the construction of a storage reservoir with a storage capacity of 12,406 acre feet, all for the purpose of reclaiming and irrigating about 14,000 acres of land in said county and Territory.

"2. On December 20, 1907, these protestants filed with the territorial engineer an application for a permit to appropriate the waters of the same stream in the same county and Territory for the purpose of reclaiming and irrigating about 5,000 acres of land, being a part of the same lands covered by the Hinderlider project. The said application included the construction of a storage reservoir with a storage capacity of 10,149.3 acre feet, for the purpose of holding and storing the flood waters of said La Plata river and applying same to the reclamation of said 5,000 acres of land.

"3. That on March 19, 1908, these protestants filed with the territorial engineer a protest against the approval of the said Hinderlider application, alleging among other things that the protestants are all actual settlers or entrymen upon the land proposed to be watered, aggregating 5,000 acres; that protestants believe that they can conduct water to their land at an approximate expense of $11 an acre, and that protestants are financially able to immediately proceed with the construction of the proposed ditch and reservoir; that if their application be allowed they will at once proceed with the construction of the said ditch and reservoir and will have their lands under water for the season of 1909; that they could not positively state what the water would cost per acre for their use on their lands, if they must purchase it from Mr. Hinderlider, but that they were credibly informed and believed that the cost of the same would be from $30 to $40 per acre; that the application of the said Hinderlider was made for speculative purposes and for the personal benefit of the applicant, while the application of protestants was made for the benefit of actual settlers upon the land.

"4. That after a hearing, the territorial engineer, on July 20, 1908, rendered an opinion sustaining said project rejecting the Hinderlider application, and approving the application of protestants, findings as per copy of said decision herein filed.

"5. That thereupon the said M. C. Hinderlider, appealed from the decision of said territorial engineer to the board of water commissioners of this Territory, which board, after hearing the evidence, and argument of counsel, reversed the decision of the said engineer, findings as per copy of their decision herein filed.

"6. That the said M. C. Hinderlider is financially able to immediately proceed with the construction of the said ditch and reservoir.

"7. From said decision of said board these protestants have taken this appeal to this court.

That court sustained and affirmed the decision of the board of water commissioners, to which action Young,

Norton and others excepted and brought the matter to this court on appeal.

OPINION OF THE COURT.

ABBOTT, A. J.—We think the decision of the District Court was justified and probably required by the statement of facts on which it was heard, but we find that statement very incomplete and unsatisfactory as the basis of a decision in such a cause. If it were a matter of private interest alone, a question simply between two rival applicants for the right to use the waters in question, we should content ourselves with affirming the decision of the District Court. But the question is much broader than that, and includes the public interest as well, by the terms of the statute under which the territorial engineer, the water commissioners and the courts have jurisdiction of the subject matter.

The view apparently adopted by the water commissioners in their decision that the power of the territorial engineer to reject an application, "if in his opinion the approval thereof would be contrary to the public in-
1 terest," sec. 29, is limited to cases in which the project would be a menace to the public health or safety is, we think, not broad enough.

There is no such limitation expressed in terms in the statute and we think not by implication. The declaration in the first section of the statute that the waters therein described are "public waters" and the fact that the entire statute is designed to secure the greatest possible benefit from them for the public, should be borne in mind.

It is, for instance, obviously for the public interest that investors should be protected against making worthless investments in New Mexico, and especially that they should not be led to make them through official approval of unsound enterprises. If there is available, unappropriated water of the La Plata river for only five or six thousand acres of land, it would be contrary to the public interest that a project for irrigating fourteen thousand acres with that water should receive an official approval which would, perhaps, enable the promoters of it to market their scheme.

to sell stock reasonably sure to become worthless, and land which could not be irrigated, at the price of irrigated land. Such a proceeding would in the end result only in warning capital away from the Territory. The failure of any irrigation project carries with it not only disastrous consequences to its owners and to the farmers who are depending on it, but besides tends to destroy faith in irrigation enterprises generally.

It may be said that the territorial engineer could have approved the Hinderlider project for the number of acres which could be irrigated from it. He makes it clear, however, from his report, that the cost of the works for that project would be much greater than for works fit to irrigate the land which could really be irrigated from the available water there.

While that element is not conclusive on the question of public interest, we think it should be taken into account. It may be that, of the five or six thousand acres there which it is claimed can be irrigated at an expense of ten or twelve dollars per acre under the Young-Norton project, a thousand acres could be irrigated at five dollars per acre because of its being at a lower level or nearer the water than the other land. But that would not justify refusing to the owners of the other four or five thousand acres the privilege of irrigating their lands, under a plan which would increase the cost of irrigation to the owners of the thousand acres. And the same may be said of the Hinderlider project as compared with the Young-Norton project. The mere fact that irrigation under the former
2 project would cost more per acre than under the latter is not conclusive that the former project should be rejected.

But the attempt to cover too much land may have gone so far that the cost of irrigation under that project would be so excessive that the owners of land under the project could not pay the water rates and farm their lands at a profit. The statute provides that the charges for irrigation shall be "reasonable" but what is reasonable in any case must depend largely on the cost of constructing and operating the irrigating works.

The agreed statement of facts on which the judgment of the District Court is based may be held to include by reference the findings of the territorial engineer and those of the board of water commissioners although it is not made clear that they are to be a part of the stipulated facts, as it should be if that was the intention of the parties. Even if they are to be considered we are still without proper material for a conclusion. The territorial engineer finds that the Young, Norton project is "better within the available water supply," but that furnished no reason why he should not have approved the earlier project for the amount of land there is water for. He does not find that the cost of water under the Hinderlider project would be prohibitory or excessive but only that it would be considerable greater per acre than under the Young-Norton project. The price which the owners of land can afford to pay for irrigation must depend in part on the use to which it can be put.

For ordinary farm crops forty dollars per acre for water might be prohibitory, while for fruit or garden truck in certain localities it might not be excessive. But neither the territorial engineer nor the water commissioners have touched on that point in their reports. The territorial engineer apparently bases his approval of the latter project as against the former on the fact that Young and Norton and their associates are actual settlers on the land while Hinderlider is not a resident of the territory. We do not say this circumstance should have no weight in determining the question of the public interest, but we think it should not outweigh the other considerations to which we have referred.

On the other hand, the water commissioners find that there is available unappropriated flood water of the La Plata river but do not find whether there is enough for fourteen thousand or any other number of acres, nor whether the cost of the Hinderlider project would be such as necessarily to make the irrigation charges under it prohibitory or excessive.

We find in Armijo v. County Commissioners, 11 N. M.

294, a precedent for the course which we think it advisable to pursue in this matter.

The cause is therefore remanded to the District Court to obtain facts through the water commissioners and territorial engineer, or by agreement of counsel or otherwise essential to a satisfactory decision of the cause.

3

It is not meant to limit the District Court to the precise points we have named, but to leave the matter open for the introduction of any facts bearing on the question of public interest. And the judgment of the District Court is set aside in order that it may on further consideration render such decision as it shall deem proper.

[No. 1332, August 30, 1910.]

GEORGE A. DAVISSON, Plaintiff, Appellant, v. CITIZENS' NATIONAL BANK OF ROSWELL, N. M., Defendant, Appellee, and ETTA OWENS, Defendant, Appellant.

(SYLLABUS BY THE COURT.)

1. Under the circumstances set out in the statement of facts, the appellee as holder of an escrow was not justified in delivering it to either party.

Appeal from the District Court for Chaves County before W. H. POPE, Chief Justice. Reversed and remanded.

ED. S. GIBBANY and W. A. DUNN for Appellants.

Where a person responsible either by operation of law or express contract, to another has notice of a suit against the latter, and an opportunity to appear and defend, the judgment rendered in the action will be conclusive on him whether he appeared or not. 23 Cyc. 1270; Nathan v. Rehkopf, 57 Ill. App. 212; Robbins v. City of Chicago, 4 Wall. 657; American Bell Telephone Co. v. National Imp. Telephone Co., 27 Fed. 663; Doty v. Hawkins, 25 Amer.

Dec. 459; Wells v. American Express Co., Wis., 42 Am. Rep. 695; McAnally v. Chapman, 18 Tex. 198; Dushy v. Rudder, 80 Mo. 400; Bushnell v. Chautauqua Co., Nat. Bk. 74 N. Y. 290.

It is gross negligence of the bank, which is bailee of bonds by special deposit for which a receipt or certificate has been given, to deliver or dispose of them without direct authority from the depositor. Manhattan Bank v. Walker, 32 U. S. 959, 130 U. S. 267; Nathan v. Rehkopf, 57 Ill. App. 212; Preston v. Prather, 137 U. S. 604; Briggs v. Spaulding, 141 U. S. 150, 35 L. ed. 670; First National Bank v. First National Bank, 116 Ala. 532; Merchants National Bank v. Guilmarten, 17 L. R. A. 324; Merchants National Bank v. Carhart, 52 L. R. A. 776; Gray v. Merriam, 32 L. R. A. 772.

Fraud and misrepresentation. 9 Pl. & Pr. 681, 703; Geer v. Boston Little Circle Zinc Co., 103 S. W. 157; Roth Tool Co. v. Champ Spring Co., 67 S. W. 967; 9 Enc. P. & P. 681, 703; 14 A. & E. Enc. Law, 2 ed., 156; Crane v. Reeder, 25 Mich. 303; Comstock v. Ames, 3 Keys, N. Y., 357; Marvin v. Schilling, 12 Mich. 356; Depuy v. Williams, 26 Cal. 309; Warburton v. Aken, 1 McLean, U. S., 460; St. Louis, etc., R. Co. v. Clark, 121 Mo. 169; Book v. Justice Min. Co., 58 Fed. Rep. 106; League v. Davis, 53 Tex. 9; International, etc., R. Co. v. Searight, 8 Tex. Civ. App. 593; Chicago Dock Co. v. Kinzie, 49 Ill. 289; Best v. Davis, 44 Ill. App. 624; Morrison v. Collier, 79 Ind. 417; Dixon v. Duke, 85 Ind. 434; Townsend v. Vanderverter, 40 U. S. 383; Union Pacific R. R. Co. v. McAlin, 32 U. S. 637, vol. 3 L. R. A. N. S. 790 and annotations.

If the purchaser fails to comply with the terms of sale, or if the sale is not completed through his fault, then the deposit becomes forfeited to the vendor and cannot be recovered back. Nathan v. Rehkopf, 52 Ill. App. 212; Warvelle Vendors, secs. 926, 927; Hansborough v. Peck, 5 Wall. 497; Galway v. Shields, 66 Mo. 313; Bradford v. Parkhurst, 96 Calif. 102; Day v. Wilson, 83 Ind. 463; Downey v. Briggs, 102 Iowa 88; Cobb v. Hale, 29 Va. 510.

Agents' commission. Hildebrand v. Lillis, 51 Pac. 1008; Gilder v. Davis, 20 L. R. A., N. S. 398.

Where the language of a written escrow agreement is uncertain and ambiguous, it is the duty of the court, in construing it, to take into consideration the circumstances and conditions existing when it was made, in order to ascertain the intention of the parties. Clarke v. Eureka County Bank, 123 Fed. 922, and authorities cited; case affirmed, 130 Fed. 325.

Even where time is declared to be of the essence of the contract, it may be waived by the conduct of the party for whose benefit the stipulation is made. 9 Cyc. 608; 16 Cyc. 578; Brown v. Guarantee Trust, etc., Co., 128 U. S. 453; Phillips, etc., Const. Co. v. Seymour, 91 U. S. 646; Amoskeag Mfg. Co. v. U. S., 17 Wall. 592; McAlpine v. Reicheneker, Kans., 42 Pac. 339; Kent v. Church of St. Michael, N. Y., 18 L. R. A. 331; Welch v. Dutton, 79 Ill. 465.

One who pays earnest money on a contract for the sale of lands, cannot recover the same until he shows that he is willing to consummate the bargain made. Brockhausen v. Bowes, 50 Ill. App. 98; Hansborough v. Peck, 5 Wall. 497; Glock v. H. & W. Colony Co., Cal., 43 L. R. A. 199, 55 Pac. 713; Johnson v. Puget Mill Co., Wash., 68 Pac. 867; 23 Am. Dig., Century Ed., Col. 2350 and cases cited.

The fact that parties have made a written agreement, by no means precludes them from contracting anew with regard to the same subject matter. Goss v. Lord Nugent, 27 E. C. L. 37; Kirchner v. Laughlin, 4 N. M. 394, 17 Pac. 132, 23 Am. Dig., Col. 2350.

If a depository, bailee or holder of an escrow negligently pays over or delivers a fund in its possession to the wrong person, it is guilty of conversion and answerable therefor. 3 A. & E. Enc. of Law, 2nd ed., 762; 9 A. & E. Enc. of Law, 2nd ed., 291, 292; Southern Railway Co. v. Atlanta Nat. Bank, 112 Fed. 861; Clark v. Eureka County Bank, 123 Fed. 922; Kahaley v. Haley, Wash., 47 Pac. 23.

Assignment of check in escrow. 8 Wait's Act and Def. 116, 118; Christmas v. Russell, 14 Wall. 84; Central Nat. Bank v. Spratlin, Colo., 43 Pac. 1048.

Parties to suit. 15 Enc. P. & P. 731, 738; 2 A. & E. Enc. of Law, 2d. ed., 1092; 4 Cyc. 83, 84.

Commissions. Lunney v. Healey, 44 L. R. A. 593, 616; Gilder v. Davis, 20 L. R. A. 398; Brackenridge v. Claridge, 43 L. R. A. 600, 601.

REID & HERVEY for Appellee.

Findings of fact supported by any substantial evidence will not be disturbed on appeal. Richardson v. Pierce, 14 N. M. 334, 93 Pac. 715; Eagle Mining Company v. Hamilton, 14 N. M. 271, 94 Pac. 949; Hancock v. Beasley, 14 N. M. 239, 91 Pac. 735; Candelaria v. Miera, 13 N. M. 360, 84 Pac. 1020; Ortiz v. Bank, 12 N. M. 519, 78 Pac. 527; Marquez v. Land Grant Co., 12 N. M. 445, 78 Pac. 40; Carpenter v. Lindauer, 12 N. M. 388, 78 Pac. 57; Rush v. Fletcher, 11 N. M. 555, 70 Pac. 559; Romero v. Coleman, 11 N. M. 553, 70 Pac. 559; Gale & Farr v. Salis, 9 N. M. 211, 66 Pac. 520.

Definition of escrow. 16 Cyc. 561.

Depositor must have power to judge whether conditions have been performed. 16 Cyc. 576, 584; Humphrey v. Richmond, etc., Ry. Co., 13 S. E. 985; Henderson v. Johnson, Colo., 22 Pac. 463; Burlington R. R. Co. v. Palmer, 42 Ia. 222; Bodwell v. Webster, 113 Pick, 411; Hayden v. Meeks, Ark., 14 S. W. 864; Equity Gaslight Co. v. McKeige, 34 N. E. 898, N. Y.; Humphrey v. Richmond & M. R. Co., 13 S. E. 985; Riggs v. Trees, Ind., 5 L. R. A. 696.

Notice and judgment. Black on Judgments, 2 ed., sec. 574.

STATEMENTS OF FACTS.

The appellant Owens and one Berryman entered into a contract for the sale of lands, the appellant Davisson acting as agent for Owens. The conditions of the contract are not material here. After signing up the contract, Berryman drew his check upon an Arkansas bank in favor of Davisson, as agent, for $9,173.32, the check was placed in an envelope with the contract of sale and the parties in company went to the appellee bank and delivered the envelope containing the check and contract to the cashier of

the bank, who, as the court found, in the presence and with the concurrence of all the parties, made the following written endorsement on the envelope:

"Check enclosed to be held in escrow until September 10th, when final settlement is to be made, deed and abstract to be placed in escrow with this. Abstract to be forwarded to the Citizens Bank and Trust Company, Arkadelphia, Ark., for examination. No money to be paid over until abstract is approved. (Signed) J. J. Jaffa, Cashier."

Berryman thereafter made demand upon the bank for the return of the money, the check in the meantime having been cashed and the money in the hands of the bank. The bank called upon the appellants for their consent, which, for various reasons, they refused to give, but the bank delivered the money to Berryman. Suit was brought by Davisson against the bank to recover his commission on the sale. Mrs. Owens and her co-executors of the estate of Solon M. Owens, deceased, were made parties defendants. They answered and filed a cross-complaint against the bank and asked judgment for the money. The case was tried by the court without a jury. Judgment for the appellee and appellants bring this appeal.

OPINION OF THE COURT.

MECHEM, J.—The court below held that the bank's liability was fixed and limited by the memorandum above mentioned, and that as no abstract "approved by purchaser's attorney" was presented to the bank on or prior to September 10th, that after said date "it became the duty of the bank to deliver the said check or its proceeds to C. C. Berryman, one of the parties to the escrow agreement upon demand."

Now, it is admitted that the bank was acting as agent for both parties as far as the escrow itself was concerned, and the question is, did the bank act as it should have acted, or did it fail in its duty to either party?

Admitting the correctness of this holding for the sake of argument, the question then is, did the bank fulfill its duty to the appellants as fixed by the memorandum? To

this question we think the reply should be in the nega-
1 tive, for the reason that nowhere in the memorandum was the bank authorized to make any delivery of any paper, money or anything.

Had the appellants both agreed that Mr. Berryman should have his money or check back, then the bank would have been relieved from any liability, but it owed just as much duty to the appellants as it did to Berryman, and should not have taken sides, and when it failed to secure appellant's consent, it should have held the escrow and let the parties either come to some agreement among themselves or appeal to the courts, when the appellee could have interpleaded the money into court and secured its acquittance.

However, it took sides in this matter and will be held as it should be, to have acted at its peril and to be responsible to appellants for the fund if they can show a right to the same under the contract made with Berryman, either in its original form or as amended by the parties to it.

The law governing the duties of the bank in this case is well stated by Page in his work on contracts.

"'The depository of an escrow is regarded as an agent of both obligor and obligee, and he can neither return the deed or other instrument to the former without the latter's consent, nor save upon the fulfilment of the agreed conditions deliver it to the latter without the former's consent." 2 Page Contracts 585.

There happened no condition, as set forth in the memorandum, upon the fulfillment of which, or failure to fulfill, the bank was directed to return the papers to either party.

We do not deem it necessary upon this appeal to decide any of the other questions raised by the brief of appellants, except that the appellees will be held to be responsible to the appellant if they, upon a re-trial of this cause, shall sustain a right to the money the bank had belonging to Berryman and paid over to him in violation of its duty to appellants.

The judgment of the lower court is reversed and remanded with instructions to reinstate the cause and proceed in accordance with the views expressed in this opinion.

[No. 1245, August 31, 1910.]

DELOS A. CHAPPELL, Appellant, v. DANIEL H. McMILLAN, et al, Appellees.

SYLLABUS (BY THE COURT.)

1. A promise to do or forbear from doing an act may be just as valuable consideration for a promise as the act or forbearance would be, and that the promise given for a promise is dependent on a condition does not affect its validity as consideration.

2. If promises are made in the alternative and one alternative promise becomes impossible of performance, that does not impair the obligation of the other promise.

3. The holding of the trial court that the contract between the Carthage Coal Company, one of the appellees, and Delos A. Chappell, the appellant, had become null and void from failure of consideration, that both parties were wholly released therefrom, and its action in decreeing the cancellation of said contract, were not warranted as a matter of law under the circumstances appearing in the case.

Appeal from the District Court for Socorro County before FRANK W. PARKER, Associate Justice. Remanded for further proceedings.

YEAMAN & GOVE and H. M. DOUGHERTY for Appellant.

Until delivery of the escrow holder or the happening of the event upon which delivery is conditioned, the instrument is ineffectual for any purpose. 16 Cyc. and cases cited; Stiles v. Brown, 16 Vt. 563; Stanley v. Valentine, 79 Ill. 544; Parrott v. Parrott, 1 Heisk 681; Henry v. Carlson, 90 Ind. 412; Skinner v. Baker, 79 Ill. 496; Morgan v. Carter, 48 Minn. 501.

The court will not set aside an instrument originally valid but which has since become ineffectual by reason of subsequent events, destroying its future operations upon the ground that it creates a cloud upon the title to real

estate. Hotchkiss v. Elling, 36 Barbour 36; Warvelle on Abstracts 550; Fonda v. Sage, 48 N. Y. 173; Lehman et al. v. Roberts, 86 N. Y. 232.

A counter claim is a demand existing in favor of the defendants against the plaintiff and which might have been prosecuted if plaintiff had never sued at all. Pomeroy Code Pl., sec. 614; Anderson, etc., v. Thompson, 88 Ind. 405; Graham v. Dunnegan, 6 Duer. 629; 6 Cyc. 292; Grand Chute v. Winega, 15 Wal. 373.

If the promise is in the alternative to do one of two things, and one becomes impossible, this does not excuse the doing of the other. 7 A. & E. Enc. 2 ed., 149; Jacquinet v. Boutron, 19 La. Ann. 30; Barkworth v. Young, 4 Drew 1; DeCosta v. Davis, 1 B. & P. 242; Mill Dam Foundry v. Hovey, 21 Pick., Mass. 417, 443; Pindor v. Upsters, 44 N. H. 358; 11 Century Digest, sec. 346; Rose v. San Antonio Ry., 31 Tex. 49; 9 Cyc. 327; Gray v. Bowen, 23 N. Y. Sup. 67; Patton v. Mills, 21 Kans. 163; Mueller v. Spring, 88 Mich. 390; Nolen v. Pine, 40 Iowa 166; Collins v. Gibbs, 2 Burrow 899; Locks v. Wright, 1 Strange 569; Clark v. Great Northern Ry. Co., 81 Fed. 282.

JAMES G. FITCH for Appellee.

Causes of action which are inconsistent with each other, cannot as a general rule be joined. 23 Cyc. 404, 405 B, 406 and cases cited; Bliss on Code Pleading, sec. 122; Phillips on Code Pleading, sec. 199; Polock v. Shafer, 46 Cal. 270; Golucke v. Lowndes Co., 123 Ga. 412, 51 S. E. 406; Vaule v. Steenerson, 63 Minn. 110, 66 N. W. 257; Boyd v. St. Louis Transit Co., 108 Mo. App. 303, 83 S. W. 287; Scherer v. Tyrrell, 40 Hun. 637; Budd v. Bingham, 18 Barb. 494; McLennan v. Prentice, 85 Wis. 427, 55 N. W. 764; Bowen v. Mandeville, 95 N. Y. 237; Gardner v. Ogden, 22 N. Y. 327; Taylor Co. v. Pumphrey, 32 S. W. 225, Tex. Civ. App.

After the time within which an amendment is permitted as a matter of course, plaintiff cannot either before or after the evidence has been taken, substitute a new cause of action under the cause of an amendment. Simpson v.

Miller, 94 Pac. 252, Cal. Civ. App.; Cassidy v. Saline Bank, 104 S. W. 829, Ind. Ter.; Foste v. Life Insurance Co., 26 Or. 449, 38 Pac. 617; Gleason v. Gleason, 54 Cal. 135; Buchanan v. Comstock, 57 Barb. 582; Prouty v. Lake Shore R. R., 85 N. Y. 272; Jacob v. Lorenz, 98 Cal. 332, 33 Pac. 119; Riley v. St. Louis R. Co., 124 Mo. App. 278, 101 S. W. 156; Woodward v. N. P. Ry., 16 N. D. 38, 111 N. W. 627; Red Diamond Cloth. Co. v. Steidemann, 120 Mo. App. 519, 97 S. W. 220; Herman v. Glann, 129 Mo. 325, 31 S. W. 589; Purdy v. Pfaff, 104 Mo. App. 331, 78 S. W. 824; Ross v. Cleveland Land Co., 162 Mo. 317, 62 S. W. 984; Swedish-Am. Nat. Bank v. Dickinson, 6 N. D. 222, 69 N. W. 455; Allen v. City of Davenport, 115 Iowa 20, 87 N. W. 743; Meyer v. Berlandi, 39 Minn. 438, 40 N. W. 513; Bliss on Code Pleading, sec. 396; Phillips on Code Pleading, sec. 273.

Plaintiff did not stand on his demurrer to the counter claim, but after it was overruled filed a reply. He thereby abandoned it. Beall v. Territory, 1 N. M. 507; Overland Dispatch Co. v. Wedeles, 1 N. M. 528; Bremen Min. Co. v. Bremen, 13 N. M. 111; 7 Cyc. 256; Phillips on Code Pleading, secs. 306, 307; Bliss on Code Pleading, sec. 417.

In suits for rescission or cancellation all persons whose rights, interests, or relations with or through the subject matter of the suit would be affected by the cancellation or rescission should be brought before the court, so that they can be heard in their own behalf. 6 Cyc. 319; 16 Cyc. 106; Bowman v. Germy, 23 Kan. 306; Valentine v. Fish, 45 Ill. 462; Troxel v. Thomas, 155 Ind. 519, 58 N. E. 725; Pomeroy Code Remedies, secs. 90, 97; Bliss on Code Pleading, secs. 348, 351a, 411; DePuy v. Strong, 37 N. Y. 372; Grain v. Aldrich, 38 Cal. 514.

The facts warranted the finding of the court, that the lease was void, and the decree of cancellation. 9 Cyc. 320, 326, 369, 615; Philpot v. Gruninger, 14 Wall. 520, 20 L. 743; Dermott v. Jones, 23 How. 220, 16 L. 442; Cadwell v. Blake, 6 Gray, Mass., 403; Beacher v. Conradt, 13 N. Y. 108; Smith v. Wilson, 8 East 437; Boone v. Eyre, 1 Henry Blackstone 273; 9 Cyc. 615; Locke v. Wright, 1 Strange 569; Collins v. Gibbs, 2 Burrows 899; Clark v. Great

Northern Ry., 81 Fed. 282; Harvester King Co. v. Mitchell, 89 Fed. 173; 1 Parsons on Contracts, 3 ed., 386; Allen v. Hammond, 11 Pet. 63, 9 L. 633; Stewart v. Louring, 87 Mass. 306; Hoffman v. Duryea, 77 N. Y. Sup. 1086; Savage v. Whitaker, 15 Me. 14; Dickinson v. Hall, 31 Mass. 217; 6 A. & E. Enc. 787, Note 2.

STATEMENT OF THE CASE.

On February 2, 1904, the Carthage Coal Company gave to Daniel H. McMillan an option to purchase certain land and personal property at any time prior to May 15, 1904. This option was thereafter extended, in accordance with its terms, to August 15, 1904. The purchase price, seventy-five thousand dollars, was to be paid in installments. Upon the payment of the first installment, title was to pass to McMillan, but possession was to be retained by the coal company until the payment of the second installment at or before the specified time, when McMillan was to be given possession. On July 1, 1904, the Carthage Coal Company entered into an agreement with the plaintiff, the appellant, Chappell, which was expressly made subordinate to the rights of McMillan under his option. The instrument evidencing this agreement provides that Chappell should have the right to purchase the property if McMillan should not, and a deed was placed in escrow for delivery to Chappell in the event of the exercise of his option; that Chappell should have a lease on the premises from August 16, 1904, until all coal should be extracted therefrom, or McMillan should be entitled to the premises under his option, Chappell obligating himself to work the property and pay a specified royalty for all coal extracted; and that in the event McMillan should take up his option and pay the full purchase price for the premises, thus depriving Chappell of all right to obtain the property as lessee or purchaser, the coal company should pay to him, from the funds realized from the last installment of the McMillan option, the sum of ten thousand dollars. On July 23, 1904, and within the time limited for his second payment, McMillan elected to exercise his option to purchase, and on that date made both the first and the

second payments required to the coal company and received a deed conveying title to the property, and through his grantees took immediate possession. On the 25th day of July, 1904, the plaintiff filed a bill, which was afterwards amended, in which he attacked the validity of the McMillan option and all conveyances thereunder, for want of consideration and for fraud, and asked for their cancellation, and an injunction to prevent the defendants from mining coal under them, and to restrain them from preventing the plaintiff from mining coal, under his said agreement, and thereafter the defendants, the Carthage Coal Co., August H. Hilton and Henry R. Buel filed an answer and counter claim to the amended complaint, and in the counter claim asked for the cancellation of the deed in escrow under Chappell's option, and the entire contract of July 1, 1904, in effect alleging the same to be a cloud on their title and claiming failure, or want of consideration for the contract of July 1, 1904. To this counter claim the plaintiff filed a general demurrer, which was overruled by the court. Thereafter, on the 25th day of September, 1904, plaintiff filed an answer to the counter claim, specifically pleading the lease and option of July 1, 1904, and, in substance, claiming to be entitled to the payment therein provided for in case McMillan should purchase under his option, of ten thousand dollars. To this answer three of the defendants, on November 13, 1907, filed a demurrer and the court sustained the demurrer on December 30, 1907. On the 2nd day of June, 1908, the court entered an order in said cause affirming the validity of the McMillan option and the conveyances made under it, and decreeing the cancellation of the agreement with the plaintiff of July 1, 1904, and the escrow deed connected therewith.

OPINION OF THE COURT.

ABBOTT, J.—The appellant does not here call in question that part of the order of the District Court of June 2, 1908, which decrees the validity of the McMillan option and the related conveyances. The essential injury of which he complains to this court, through his assignments of error, is that by the order referred to, his agree-

ment with the Carthage Coal Company, of July 1, 1904, was declared void and its cancellation decreed. Of the appellees only the Carthage Coal Company, August H. Hilton, and Henry R. Buel are parties to the pleadings on which that portion of the order is founded. In their briefs, both parties claim that the question of the validity of the Chappell agreement with the Carthage Coal Company was not before the trial court on the pleadings. That position, we think, is untenable for the appellant since he chose not to stand on his demurrer to the counter claim of the appellees above named, whereby they alleged the invalidity of the agreement in question, and prayed for its cancellation, but instead replied to the counter claim, alleging the validity of his agreement and his right to the payment of ten thousand dollars from the Carthage Coal Company, in accordance with its terms. Overland Dis. Co. v. Wedeles and cases cited, 1 N. M., 528, 531; Bremen Mining Co. v. Bremen, 13 N. M. 111. On the other hand, the three appellees named aver that the appellant, having in his original complaint alleged the invalidity of the McMillan option, is precluded from afterwards, in the same cause, making any claim based on its validity. Whether the appellant is chargeable with fatal inconsistency in his pleadings we need not determine, since the appellees did not make that one of the grounds of their demurrer to his reply to their counter claim, but alleged and relied on the invalidity of the Chappell agreement, for failure of consideration moving from the appellant to the Carthage Coal Company.

The trial court sustained the demurrer, and must therefore have passed on the validity of the Chappell agreement, arriving apparently at the conclusion embodied in Finding of Law 3, which is as follows: "The contract and lease between the Carthage Coal Company was made subject to the rights of the said McMillan under his said option with the Carthage Coal Company and by the election to purchase and the making of the first and second payments of the purchase price, the conveyance of the Carthage Coal Company to the said McMillan and by him to the said Stackhouse and the taking of possession by the

latter, before any payment had been made or any act had been done, or was required to be made or done under or by virtue of the terms of the contract and lease between the Carthage Coal Company and the plaintiff, discharged and released both said plaintiff and said company from all their promises and undertakings therein contained, and the said contract and lease became null and void and there resulted an entire failure of consideration therefor."

Fortunately, the attorneys in the cause did not, on either side, stand on the position that the validity of the Chappell agreement was not involved, but, instead, have aided the court with able and exhaustive arguments on the question, in their briefs. Adopting the facts as stated in the finding of the trial court quoted, it is obvious that we must first determine what was the consideration on Chappell's part for what the Carthage Coal Company in its contract with him of July 1, 1904, agreed to do. Was it that he actually should mine certain quantities of coal and pay to the Carthage Coal Company certain royalties thereon, etc., or that he should promise and agree to do those things in certain contingencies, binding himself to the defendant coal company, to that effect by a valid agreement? On this the whole matter turns. It is familiar law (Cyc. 9, 323) that a promise to do or forbear
1 from doing an act may be "just as valuable considera-
tion for a promise as the act or forbearance would be," and "that the promise given for a promise, is dependent on a condition does not affect its validity as consideration." Cyc. 9, 327.

It was plainly in the minds of the parties, as the contract shows, that Chappell might never make a payment, never mine any coal, never pay any royalties; yet he might have had to do all those things under his contract in the event that McMillan did not buy under his option. The unavoidable inference from the terms of the Chappell agreement and the other facts of record is that, for some reason, the coal company thought or feared that McMillan would not buy under his option, or that the outcome would somehow be unsatisfactory to it. It clearly preferred disposing of the property in question, at a less price and on

more favorable terms to the purchaser than it had made to McMillan, to holding and operating it. It gave Chappell an option to buy it for $65,000, whereas the price to McMillan was $75,000. The difference of $10,000 between the two prices is significant as being the very amount which it agreed to pay Chappell in case McMillan should take the property under his option. In effect, it agreed to give the benefit of the McMillan option to Chappell, as to the first payment to be made under it, which, if made, was to relieve Chappell to that extent, and in the difference of $10,000, between the two prices, in consideration of his agreeing to take the mine off its hands, operate it and pay a royalty in the event of the expected failure of McMillan to buy under his option. Up to the time when McMillan met the terms of his agreement, it was protected against such a failure by the Chappell agreement for a consideration which was clearly expressed, and on terms which must have been in the minds of the parties since they were explicitly embodied in the contract.

The appellees contend that the "object" or "motive" of the coal company in making the Chappell agreement is to be distinguished from the "consideration" on Chappell's part, which is true, but the obvious motive or object throws light on what was the real consideration. The appellees claim also that the appellant attempts to read into the Chappell agreement conditions which it does not contain when he asserts "that his promise to mine coal and pay a royalty was in the alternative, or that it was dependent upon the validity and exercise of McMillan's option." Yet such, we think, is the plain import of the language of the agreement. After the provisions in it which are appropriate to and constitute a lease of the property, it provides thus: "It is further provided that this lease and option is subject to the rights, if any he has, of Daniel H. McMillan growing out of an option given by the said party of the first part to the said McMillan on the 2nd day of February, A. D., 1904, and the said party of the second part agrees to protect and save harmless the said party of the first part from any litigation which might be brought by the said McMillan against the said party of the first

part by reason of his having executed this contract." And: "It is further agreed that if it should be determined that the said Daniel H. McMillan has the right to carry out the said option that all payments, except the first, which has hereinbefore been provided for, shall be paid to said party of the first part herein, except ten thousand dollars of the last payment specified in the said option, which shall be made to the party of the second part herein, and in case of the refusal or neglect of the said Daniel H. McMillan to pay the same to the party of the second part, that the party of the first part shall make such payment to party of the second part." The "rights" referred to, included the right as "determined" by the district court to do the very thing which McMillan did, namely, to make the two first payments provided for by his option and take possession of the property in question before August 16th, 1904, at which date the appellant would have been entitled to take possession but for that action of McMillan. Even if McMillan had made the first payment under his option, but not the second, before August 16, 1904, the appellant, Chappell, would have been bound to take possession of the mine and operate it, since the agreement provided that in such case "the lease and contract shall be in full force and effect." That is, if it should be determined that McMillan had the right to do a certain thing and he did it before a certain time, the appellant was not bound to take possession, mine coal, etc., otherwise he was so bound. Suppose McMillan had made the first payment required of him but not the second before August 16, 1904, that the appellant had taken possession, mined coal, etc., as his contract required, and that McMillan had in a few weeks or days thereafter, by making the second payment provided for in his option, become entitled to possession and ousted the appellant. As we understand the position of the appellees they would concede that in such a case the appellant would have been entitled to the ten thousand dollars he claims. We certainly see no reason to the contrary. But he was bound by his contract to do that, if McMillan should take that course, and necessarily to hold himself in readiness to do it, until it should become known whether McMillan

would or would not take that course. That was an onerous obligation, one which would prevent a man unless he was possessed of much more than ordinary means, from engaging in other business enterprises while it continued in force. Unless he gets the ten thousand dollars he claims under his contract he has no compensation for the burden he thus assumed, by which he became practically the insurer of the coal company against the failure of McMillan to buy under his option. Suppose one should obtain a policy of insurance against accident for a term of a year and agree to pay the premium at the end of the year. The year expires and he has met with no accident. When asked to pay for the policy of insurance, he says: "The policy was for my benefit in case of accident to me, and it is now impossible that any accident should occur to me in that year. The consideration for my agreement to pay has failed; become impossible of performance on the part of the maker of the policy, since it was to pay me nothing unless in case of accident in that year." The reply would be, that the company which issued the policy had done all it agreed to do, obligated itself to pay the policy holder a certain amount in case he should meet with an accident, and that it incurred the risk of having to make such a payment.

When the appellant assumed the obligations expressed in his agreement with the Carthage Coal Company he furnished a valuable consideration for the concurrent promises of the coal company to him. That those
2 promises were in the alternative, and one alternative became impossible of performance does not impair the obligation of the alternative promise. Vol. 7, Am. & Eng. Enc. (2nd. ed.) p. 149; Mill Dam Foundry v. Hovey, 21 Pick., Mass., 417-443; See also Pinder v. Upster, 44 N. H. 358.

Other points are discussed by counsel in their respective briefs, but we do not find that they were before the trial court; at least, in a way to affect its action.

We are, therefore, of the opinion that the demurrer of the three appellees named to the appellant's reply to their

counter claim should have been overruled. It may be, of course, that these appellees have a good defense against the claim which the appellant makes for the payment of $10,000 to him, under the agreement in question, and they should not be deprived of the opportunity to make such a defense, if they have one.

The case is remanded to the District Court for further proceedings in accordance with this opinion, between the appellant and the three appellees, the Carthage Coal Company, August H. Hilton and Henry R. Buel.

William H. Pope, C. J., John R. McFie, A. J., and Edward R. Wright, A. J., concur.

M. C. Mechem, A. J., dissents.

F. W. Parker, A. J., heard case below.

[No. 1250, August 31, 1910.]

EAGLE MINING & IMPROVEMENT COMPANY, Plaintiff in Error, v. ROBERT E. LUND, Defendant in Error.

SYLLABUS (BY THE COURT.)

1. Where the plaintiff in error files a transcript of the record, but not, as required by Sec. 20, Chapter 57 of the Laws of 1907, ten days before the return day of the writ, and also files assignments of error, but not before the return day of such writ, a motion to dismiss the writ of error, on those grounds, not made until after such filing, will be denied. Armijo v. Abeytia, 5 N. M. 533.

2. A decree granting an injunction and appointing a receiver for an insolvent corporation under the provisions of Sections 72 and 73 of Chapter 79, of the Laws of 1907, is a final decree within the terms of the Organic Act relating to appeals and writs of error.

3. A decree appointing a receiver to take possession of all and every the estate, real, personal and mixed of an insolvent corporation with power to collect and take possession of all the properties and assets of the corporation

and to make an inventory of the same and to abide the further orders of the court with relation thereto considered by itself, there having been no injunction previously granted by the court as provided in Section 72 of Chapter 79 of the Laws of 1905, is properly classified as an interlocutory order or decree and not subject to appeal or writ of error.

Error to District Court for Chaves County before WILLIAM H. POPE, Chief Justice. Writ dismissed.

G. W. PRICHARD for Plaintiff in Error.

The suit should have been brought in the judicial district in which the property lies. C. L. 1897, secs. 882, 2950, par. 4; Laws 1905, chap. 79, sec. 75; A. & E. Enc. of Law, 2 ed., 65; Booth v. Clark, 17 How. U. S. 335; Holmes v. Sherwood, 16 Fed. 727, and cases cited; Smith on Receiverships 56, 122 and cases cited.

The facts and circumstances must be set out in the complaint from which the insolvency of the company shall appear. Newfoundland R. R. Construction Co. v. Shack, 40 N. J. Eq. 222, 226; Rawnsley v. Trenton Life Ins. Co., 1 Stock. 95; Cook v. East Trenton Pottery Co., 54 New Jersey Equity 29; Pierce v. Old Dominion Copper Co., 65; Atlantic Rep. 1005.

Insolvency is an absolutely essential ingredient of fact in every case in which the court is asked to enjoin a corporation and to appoint a receiver to take charge of the assets. Atlantic Trust Co. v. Consolidated Storage Co., Dick. Ch. Rep. 402; Edison et al, v. Edison United States Phonograph Co., 7 Dick Ch. Rep. 620; Newfoundland R. R. Con. Co. v. Shack, 40 N. J. Eq. 222; Ft. Wayne Eln. Com. v. Franklin Eln. L. Co., 57 N. J. Eq. 7.

The order appointing a receiver should describe the property which the receiver is to take. Smith on Receivers 63 and cases cited; Hellebush v. Blake, 119 Ind. 350; O. Mahoney v. Belmont, 62 N. Y. 133; Crow v. Wood, B. Beaver 273.

R. E. LUND for Defendant in Error.

The court having undisputed jurisdiction of the defendant, it may not only proceed as to the person, making such orders and decrees as it deems equitable as to him or it, but it may also deal with, and exercise jurisdiction over and concerning the acts, the res or rem of such defendant, even though these be wholly beyond the court's jurisdiction, in another state. Lyon v. Crosby, 27 Pac. 786; 14 Pac. 775; "Equity," 16 Cyc. 118, 119; 5 N. M. 297; Phelps v. McDonald et al, 99 U. S., 25 L. ed., 473, syl. 3; Laws 1905, chap. 79; 22 Cyc. 785, 906, note and citations.

When a person is unable to pay his debts, he is an insolvent. Cunningham v. Norton, 125 U. S. 77, 31 L. ed., 624; Toof et als, v. Martin, 80 U. S. 40, 51, 20 L. ed., 481; 2 Burrill's Law Dic., 2 Enc. P. & P. 3, Insolvency; 22 Cyc. 1256.

It is an established principle of Equity, that when a corporation becomes insolvent, *it is so far civilly dead,* that its property may be administered as a trust fund for the benefit of its stockholders and creditors. Blake v. McClung, 172 U. S. 254, 43 L. ed. 437; Laws 1905, 79, art. 7; Mullins v. Moline M. I. Co., 131 U. S. 352, 33 L. ed. 178; 172 U. S. 254 and cases cited; 114 U. S. 587, 594; 150 U. S. 371, 385.

STATEMENT OF FACTS.

This is an action brought by the defendant in error in the District Court of Chaves County under the provisions of Sections 72 and 73 of Chapter 79 of the Laws of 1905, for an injunction restraining the plaintiff in error, a mining corporation organized under the laws of New Mexico, with its principal office and all of its property within the County of Lincoln, from continuing to exercise its corporate powers and franchises and appointing a receiver to take charge of and administer the properties and effects of the plaintiff in error. Objections were taken to the form and sufficiency of the complaint, but it is not necessary to pass upon such objections at this time, and therefore no further statement of the contents of the pleadings will be made.

Upon the filing of the complaint the court made its order to show cause why the relief prayed for in the com-

plaint should not be granted. Upon the return of the order to show cause, and after answer had been filed and hearing had, the court granted a preliminary injunction restraining the corporation from transferring or disposing of its personal properties, refusing, however, at that time, to grant the statutory injunction prayed for in the complaint and further refusing at that time to appoint the receiver as prayed for in the complaint. Thereafter, after various hearings had been had upon motions for rehearing and new trial, the court, upon the 22nd of June, 1908, filed its findings of fact as follows:

"Upon the pleadings and proofs submitted, it is found by the court that the defendant corporation is insolvent and cannot, as now conditioned, conduct its business in the future with safety to the public or advantage to the stockholders."

"A decree may accordingly be drawn granting the relief prayed in the complaint and as provided by Chapter 79 of the Laws of 1905."

Upon this finding of fact, after considerable delay, on the 18th of September, 1908, the court entered a decree, based upon the foregoing finding of fact, appointing one James Sims of Lincoln County receiver of all and every the estate, real, personal and mixed of the Eagle Mining and Improvement Company, with power to collect and take possession of all the properties and assets of the corporation. That he make an inventory of the same and abide the further orders of the court.

At no time in the proceedings was the injunction provided in Section 72 of Chapter 79, of the Laws of 1905, granted or issued by the court as directed in his findings.

From this decree appointing a receiver the plaintiff in error sued out his writ and brings the matter before this court.

OPINION OF THE COURT.

WRIGHT, J.—1. Before taking up the consideration of the other features of this case it is necessary to dispose of the motion of defendant in error to dismiss the

writ of error for failure to file transcript of the record and assignments of error within the time required by law.

Defendant herein, on January 5, 1910, filed his motion to dismiss the writ of error, as above stated. An examination of the files in this case discloses that plain-
1 tiff in error had filed its transcript of record and assignments of error and thereby cured its default prior to the filing of motion to dismiss for such default. This motion is, therefore, within the rule stated in Armijo v. Abeytia, 5 N. M., and must therefore be overruled.

2. The second contention of the defendant in error is that the decree appointing a receiver, from which the writ of error is taken, is not a final decree and therefore not subject to appeal or writ of error.

The question of the finality of a decree granting the injunction and appointing a receiver as provided in Secs. 72 and 73 of Chapter 79 of the Laws of 1905, has been heretofore considered by the court, at this term, in the case of Sacramento Valley Irrigation Company v. Lee, in which a decree granting the injunction as provided in the statute and appointing a receiver with the powers
2 prescribed in the statute was held to be final and subject to appeal or writ of error. In the case at bar, however, the facts differ from those in the Sacramento Valley Irrigation Company v. Lee, in that at no time was the injunction authorized by Sec. 72 of said Chapter 79 issued by the court as prescribed in such statute. The only injunction granted at any time, as appears from the record, was the preliminary injunction granted upon the return of the order to show cause, restraining the corporation from disposing of its personal property until the further order of the court. It is true that subsequent to the issuing of this preliminary injunction the court by its findings indicated that a decree granting the relief prayed in the complaint might be drawn and submitted to the court for signature, but no such decree was drawn or signed. The decree appointing such receiver is in the usual form of such decrees appointing receivers to conserve property pending final disposition of the case in chief under orders from the court.

Sections 72 and 73 of Chapter 79 of the Laws of 1905 are as follows:

"Sec. 72. Whenever any corporation shall become insolvent or shall suspend its ordinary business for want of funds to carry on the same, any creditor or stockholder may by complaint setting forth the facts and circumstances of the case, apply to the district court for a writ of injunction and the appointment of a receiver or receivers or trustees, and the court being satisfied by affidavit or otherwise of the sufficiency of said application, and of the truth of the allegations contained in the complaint, and upon such notice, if any, as the court by order may direct, may proceed in a summary way to hear the affidavits, proofs and allegations which may be offered on behalf of the parties, and if upon such inquiry it shall appear to the court that the corporation has become insolvent and is not about to resume its business in a short time thereafter with safety to the public and advantage to the stockholders, it may issue an injunction to restrain the corporation and its officers and agents from exercising any of its privileges or franchises and from collecting or receiving any debts, or paying out, selling, assigning or transferring any of its estate, moneys, funds, lands, tenements or effects, except to a receiver appointed by the court, until the court shall otherwise order."

"Sec. 73. The District Court, at the time of ordering said injunction, or at any time afterwards, may appoint a receiver or receivers or trustees for the creditors and stockholders of the corporation, with full power and authority to demand, sue for, collect, receive and take into their possession all the goods and chattels, rights and credits, moneys and effects, lands and tenements, books, papers, choses in action, bills, notes and property of every description of the corporation, and to institute suits at law or in equity for the recovery of any estate, property, damages or demands existing in favor of the corporation, and in his or their discretion to compound and settle with any debtor or creditor of the corporation or with persons having possession of its property or in any way responsible at law or in equity to the corporation at the time of its in-

solvency or suspension of business, or afterwards upon such terms and in such manner as he or they shall deem just and beneficial to the corporation, and in case of mutual dealings between the corporation and any person to allow just off-sets in favor of such person in all cases in which the same ought to be allowed according to law and equity; a debtor who shall have in good faith paid his debt to the corporation without notice of its insolvency or suspension of business, shall not be liable therefor, and the receiver or receivers or trustees shall have power to sell, convey and assign all the said estate, rights and interests, and shall hold and dispose of the proceeds thereof under the directions of the district court; the word receiver as used in this act shall be construed to include receivers and trustees appointed as provided in this act."

In passing upon the question of the finality of a decree appointing a receiver for an insolvent corporation independently and separately from the injunction provided in Section 72 quoted *supra,* Stevenson, V. C., in the case of Pierce v. Old Dominion Copper Mining and Smelting Company, 58 Atl. 319 at 326, uses the following language:

"The order appointing a receiver is not necessarily a part of the final decree. The final decree is the decree for an injunction, this most effective and fatal decree, which virtually destroys the corporation, like a judgment of ouster in a quo warranto case, and prevents the corporation from perpetrating fraud. The order appointing a receiver may be made in connection with and as a part of the final decree, or may be made at any time after the final decree, as the statute expressly provides. The order appointing a receiver may be embodied in the final decree, or may constitute the subject-matter of a separate subsequent order. Considered by itself, the order appointing a receiver is properly to be classified among interlocutory orders. It has never been intimated, so far as I am aware, that the decree of the court of chancery made upon the summary hearing prescribed by the statute, either dismissing the petitioner's petition or the complainant's bill, or ordering that the statutory injunction be issued, disabling the corporation from the exercise of its franchises, is not a

final decree." See also the case of Franklin Electric Light Co. v. Fort Wayne Electric Corporation, 58 N. J. Eq. 543, 43 Atl. 650.

The wording of the decree in the case at bar in itself indicates that the decree appointing such receiver should be merely an interlocutory order. Such being the
3 case the order as it now stands appointing a receiver, being purely interlocutory in form, is not subject to appeal or writ of error. If the decree appointing a receiver in this case had been drawn with an order or decree granting the injunction provided in the statute, there could be no question whatever but what such decree would be a final decree and as such subject to appeal or writ of error.

There may be some question as to just what the *main case is* in which the decree appointing the receiver is deemed interlocutory, but this is not a question we are bound to consider in this court. Such question can be disposed of by the lower court on a motion to reform the decree so as to correspond with the findings of fact made by the court.

In view of the above we cannot go into the merits of the case. The writ of error is therefore dismissed with costs and it is so ordered.

[No. 1213, September 1, 1910.]

MACARIO TORRES, Appellant, v. THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF TORRANCE, NEW MEXICO, Appellees.

SYLLABUS (BY THE COURT.)

1. An action brought by a taxpayer to restrain a board of county commissioners from contracting for or erecting a court house or jail at a certain town because said town was not the lawful county seat of that county, for the reason that the act of the legislature designating said town to be the county seat is unconstitutional and void, is a collateral attack on the validity of the location of said county seat and therefore not maintainable.

Appeal from the District Court for Torrance County before JOHN R. MCFIE, Associate Justice. Affirmed.

A. B. RENEHAN for Appellant.

The functions of county government shall be exercised at the county seat. C. L. 1897, secs. 662, 749; Act of Congress, July 30, 1886, C. L. 1897, p. 45; Act of Congress, July 19, 1888, sec. 2; Laws 1903, ch. 70, sec. 3; Laws 1905, ch. 2; Territory v. Clark, 99 Pac. 698.

Injunction is the proper remedy to prevent the wrongful use or application of public funds and a taxpayer may bring the suit. Rice v. Smith, 9 Iowa 570; Marble v. McKinney, 60 Me. 333; Maloy v. Madget, 47 Ind. 241; Spencer v. School District, 15 Kans. 202; Nunda v. Crystal Lake, 79 Ill. 311; Burness v. Multnomah County, 60 Pac. 1005; Shepherd v. Easterling, 61 Neb. 882; Snyder v. Foster, 77 Iowa 638; Harney v. Railroad Co., 32 Ind. 244; Johnston v. County of Sacramento, 137 Cal. 204; Bradford v. County of San Francisco, 112 Cal. 537; Barry v. Goad, 89 Cal. 215; Winn v. Shaw, 87 Cal. 632; New London v. Brainard, 22 Conn. 552; 2 High on Injunctions, sec. 1298, n. 2; Mayor v. Gill, 31 Md. 371; City of Chicago v. Nichols, 177 Ill. 97; Frederick v. Douglas County, 96 Wis. 411; Muller v. Eau Claire County, 108 Wis. 304; Winston v. Railroad Co., 1 Baxter 60; Rothrock v. Carr, 55 Ind. 334; Brockman v. City of Creston, 79 Iowa 587; Tifft v. City of Buffalo, 65 Barb. 460; Watson v. Sutherland, 5 Wall. 78.

This is not a proceeding to fix the status of a county seat. Rice v. Smith, 9 Iowa 570; Ford v. Farmer, 9 Hum. 152; 29 Cyc. 1393, sec. 5. Estancia is not even a de facto county seat for such office or tenure cannot exist. Norton v. Shelby County, 118 U. S. 426; 29 Cyc. 1391, note 54.

E. C. ABBOTT, F. H. AYERS, C. R. EASLEY and MANN & VENABLE for Appellee.

The location of a county seat cannot be raised in a collateral proceeding by a private individual but can only

be raised by the state in a direct proceeding for that purpose. Robinson v. Moore, 25 Ill. 118; In re Allison, 22 Pac. 820; In re Short, 27 Pac. 1005; Ashley v. Board of Supervisors, 60 Fed. 55; Presidio County v. State National Bank, 20 Texas Civ. App. 511, 44 Southwestern 1069; State v. Rich, 20 Mo. 393; Speck v. The State, 7 Baxt., Tenn., 46; State v. Judges, 43 La. An. 125; Watts v. State, 22 Texas App. 572; Territory v. Clark, 99 Pac. 697.

The question of whether or not Estancia is the county seat of Torrance County can only be raised by the Territory itself by an information in the nature of *quo warranto*. 11 Cyc. 368; 7 Am. & Eng. Enc., 2d ed., 1045; Robinson v. Moore, 25 Ill. 118; State v. Judges, 43 La. Ann. 125; Watts v. State, 22 Tex. App. 572.

The acts of the legislature of 1903 and 1905 should be construed together and, in effect, create a new county and locate the county seat thereof. Laws 1903, ch. 7; Laws 1905, ch. 2; Springer Act, 7 Fed. St. Ann. 264, and amendment 268; 1 Lewis Sutherland Stat. Con., sec. 237.

If the legislature however acts directly, in locating a county seat, no judicial question can be made as to the propriety or validity of its action, and if it acts through the medium of officers or agents, no judicial question can be made as to the propriety or validity of the acts of its officers or agents, unless the legislature makes special provisions therefor, but redress must be had through the legislature. 11 Cyc. 366; Smith v. Adams, 130 U. S. 167, 32 L. ed., 1895; Walker v. Tarrant Co., 20 Tex. 16; Henrick v. Rouse, 17 Ga. 56; McClelland v. Shelby Co., 32 Tex. 17; State v. Dorsey Co., 28 Ark. 378; Lusher v. Scites, 4 W. Va. 11.

OPINION OF THE COURT.

ABBOTT, J.—This is an action brought by appellant, a taxpayer of Torrance County, praying an injunction to restrain the Board of County Commissioners of Torrance County from "building, contracting for or in any manner authorizing, permitting or allowing the construction of a court house or other county buildings for said County of Torrance in or at the town of Estancia," for

the reason that said town is not the lawful county seat of Torrance County. A temporary injunction was granted.

The appellee demurred for the reason, among others, that the action was a collateral attack upon the validity of the location of a county seat. The demurrer was sustained and injunction dissolved.

If this act is a collateral attack on the validity of the location of the county seat of Torrance County, then the judgment of the lower court must be affirmed. Territory v. Clark, 99 Pac. 697; 11 Cyc. 368.

That this is a collateral attack, there can be no doubt. An attack which would not be a collateral attack would be a proceeding in the nature of *quo warranto*. The
1 objection to deciding, or attempting to decide, a question of this kind was forcibly stated by the court in Dean v. Kimmick, et al., 122 N. W. 245, in these words:

"But in this proceeding it is not attempted to show that the right which the petitioner seeks to secure is one which affects him in any way peculiar to himself, and from the nature of the controversy we must assume that it only affects him in the same manner as it affects all other taxpayers and citizens of the county, all of whom are interested in the location of the county seat. In such a case we think the matter should not be litigated in this manner. The public has a right to be heard; and, if we desire to determine the constitutionality of the statute in question, and on which the result may depend, we should have to pass upon the rights of the public at the instigation of a private citizen, in his personal capacity as a private suitor. In the meantime other proceedings by other private individuals, might be instituted, the rights of none of whom would be settled by the decision in this case. Each citizen of the county might see some additional reason why the law should be held constitutional or unconstitutional, and desire to present it to the court."

See also Ashley v. Board of County Com., 60 Fed. 55 (C. C. A.)

The case is distinguishable from Vigil v. Stroup decided at our present sitting. The term of office in question in that case had ended and it had ceased to be a question

of public interest who was entitled to hold the office at the time when the cause of action which was for the emoluments accrued. But the public affairs of Torrance County are being conducted every day at Estancia as the county seat and that has been the case for five years past. Most acts done in the conduct of those affairs pass unchallenged. Occasionally some act is called in question by a private individual for his own purposes, as in the case at bar, but the question of the validity of the statute under consideration will remain without authoritative settlement until it is determined in a direct proceeding.

Counsel for appellant cite the case of Norton v. Shelby County, 118 U. S. 426, as in point and decisive in this case, but we do not consider it in point and believe that it was successfully distinguished and shown not to be inconsistent with the holding such as we have announced in this case in the case of Ashley v. Board of County Co., *supra*.

The judgment of the lower court will be affirmed; and it is so ordered.

[No. 1324, September 1, 1910.]

MICHAEL O'NEILL, Appellant, v. F. J. OTERO, Special Master, Appellee.

SYLLABUS (BY THE COURT.)

1. The attempt of an agent employed to do the annual assessment work on a mining claim, after failure or intentional neglect to do such work, to relocate the claim even though such attempted relocation is made in the name of a third party from whom the agent subsequently obtains title by deed, is fraud upon his principal.

2. One who takes advantage of his position as agent and representative of another and thereby fraudulently obtains title to certain mining claims which in equity and good conscience belong to his principal, will be charged in equity as a trustee ex maleficio of his principal.

Appeal from the District Court for Santa Fe County before JOHN R. MCFIE, Associate Justice. Affirmed.

HANNA & WILSON and N. B. LAUGHLIN for Appellant.

The claims were open for relocation. Rev. St. U. S., sec. 2324; Saunders et al, v. Mackey, 6 Pac., Mont., 361; Doherty v. Morris, 16 Pac., Colo., 911; Lockhart v. Wills, 54 Pac., N. M., 336; Book et al, v. Justice Mining Co., 58 Fed. 106; Belk v. Meagher et al, 104 U. S. 279; Oscamp v. Crystal River M. Co., 58 Fed. 293; Book v. Justice Mining Co., 58 Fed. 106.

If the defendant below, as receiver, was in possession of the property, then the plaintiff had an adequate remedy at law in the form of an ejectment. The Lebanon Mining Co. v. The Con. Rep. M. Co., 6 Colo. 371; Sears v. Taylor, 4 Colo. 38.

Appellant was not a trustee under a constructive trust. 1 Parsons on Contracts 427.

A witness should be permitted to explain the circumstances under which the affidavit was made. Matter of Blain, 16 Daly, N. Y., 540, 16 N. Y. Sup. 874, 879; Perry v. Perry, 2 Bard Ch., N. Y. 285, 288; 2 Moore on Facts, 1106, 1107; Coker v. Dawkins, 20 Fla. 141; Anderson v. Collins, 6 Ala. 783; Muller v. Legendre, La., 17 South. 500.

Fraud must be proven by the preponderance of the evidence. Means v. Flanagan, 79 Ill. App. 246; State Sav. Bank of Missouri Valley v. Emge, Iowa, 108 N. W. 530; Hutchinson v. Poyer, 44 N. W. 327, 79 Mich. 337; Redwood v. Rogers, 53 S. E. 6, Va.; Bowe v. Gage, 106 N. W. 1074, 127 Wis. 245.

Appellant at most was nothing more than an independent contractor. Powell v. Virginia Const. Co., 88 Tenn., 13 S. W. 691; Harris v. McNamara, 97 Ala. 181, 12 So. 103; Barg v. Bonsfield, 65 Minn. 355, 68 N. W. 45; Burns v. McDonald, 57 Mo. App. 599; Casement v. Brown, 148 U. S. 615; Indiana Iron Co. v. Craig, 19 Ind. App. 565, 48 N. E. 803, 807.

Confidential and fiduciary relation. Robins v. Hope,

57 Cal. 493, 497; Story Eq. Jr. 218; McDermott Mining Co. v. McDermott, 69 Pac. 715.

Fraud in securing the property is the essential element, to impose a constructive trust. Crissman v. Keester, 223 Ill. 69, 79 N. E. 58; Scribner v. Meade, Ariz., 85 Pac. 477; Davis v. Davis, Pa., 65 A. 622.

It has been repeatedly held that to show a constructive trust, the proof must be clear and convincing. Schrough v. Anthes, Neb., 98 N. W. 676.

E. W. DOBSON for Appellee.

A fiduciary relationship existed. I Lindley on Mines, 1 ed., sec. 407; Argentine Mining Co. v. Benedict, 18 Utah 183, 55 Pac. 560; Largey v. Bartlett, Mont., 44 Pac. 962, syllabus; Lockhart v. Rollins, 21 Pac. 413; Utah Min. and Man. Co. v. Dickert & Myers Sulphur Co., 21 Pac. 1002; Moore v. Crawford, 130 U. S. 122, 32 Law ed. 878; Butler v. Watkins, 13 Wall. 456, 20 L. ed. 629; Angle v. Chicago St. P. M. & O. R. Co., 151 U. S. 1; Lockhart v. Leeds, 195 U. S. 427, 49 Law ed. 263; Sanders v. Mackey, 5 Mont. 523, 6 Pac. 361; Dougherty v. Morris, 11 Colo. 16 Pac. 911; Lincoln v. Sierra Gold Mining Company, 25 Fed. 337; Wilson v. Castro, 31 Cal. 420; Salmon v. Symonds, 30 Cal. 301; Bludworth v. Lake, 33 Cal. 256; Hardy v. Hardin, 4 Sawy. 549; Hunt v. Patchin, 35 Fed. 816; Fisher v. Bishop, 2 Am. St. Rep. 257, syllabus.

Ejectment. Lockhart v. Johnson, 181 U. S. 561, L. ed., 45, 979.

STATEMENT OF THE CASE.

On the 6th day of April, 1909, appellant filed suit against F. J. Otero, as special master, and alleged that on the 1st day of January, 1908, in the County of Santa Fe, one Joseph DeLallo, a naturalized citizen of the United States discovered and located certain mineral lands in the Los Cerrillos Mining District, Santa Fe County, New Mexico, under the name of the "Square Deal," "York," "Gold Coin" and "Zinc Blend." The complaint then sets

forth the amount and character of work done upon said four mining claims.

That on the 16th day of March, 1909, Joseph DeLallo, as locator of said mining claims, conveyed the same to Michael O'Neill, the appellant in this cause. The complaint then alleges that F. J. Otero, special master and appellee, was on the 7th day of January, 1909, appointed special master in a certain cause then pending in the District Court for Santa Fe County, wherein Thomas K. D. Maddison was plaintiff and the Consolidated Mining & Smelting Company was defendant and as such special master, appellee was authorized to sell at public auction certain lands, mining claims and premises belonging to the defendant corporation, the Consolidated Mining & Smelting Company, and among the property which said special master was directed to sell were the following mining claims: "Tom Paine," "Golden Eagle," "Sukie," "Sukie, Jr.," "Albany" and "Santiago" mining claims also situate in the Los Cerrillos Mining District in said County of Santa Fe; that said six mining claims were valid and existing mining claims containing an area of 300 to 1500 feet surface ground and had been located many years prior thereto; said complaint then alleges that during the year 1907, the annual assessment work or the expenditure of $100 upon each of said mining claims was not done or performed, and by reason of such failure to cause to be done $100 worth of work, the said six mining claims, last above mentioned, became and were abandoned and forfeited and reverted to the United States, and on the 1st day of January became a part of the public unoccupied mineral lands and subject to location by any person or persons qualified under the mining laws to locate mining claims, and that the said Joseph DeLallo located the ground covered by the six mining claims, last above mentioned, in the names of the "Square Deal," "York," "Gold Coin" and "Zinc Blend" mining claims, each of said claims containing an area of 600 by 1500 feet surface ground.

It was further alleged that the said four claims, last above mentioned, covered practically the surface ground that was covered and claimed under the six mining claims,

owned and claimed by the Consolidated Mining & Smelting Company. Said plaintiff further alleged that the said F. J. Otero, as special master, had advertised said six mining claims, together with other property for sale at public auction, under and by virtue of a decree rendered in said cause wherein said appellee was appointed special master; said sale was advertised to take place on the 14th day of April, 1909, at the front door of the court house in Santa Fe County, New Mexico. The plaintiff and appellant prayed for an injunction enjoining and restraining said F. J. Otero, as such special master, from offering for sale and from selling the said six mining claims and from in any manner interfering with or disturbing appellant in his quiet and peaceable possession of said premises, under and by virtue of the location thereof made by the said Joseph DeLallo, who had conveyed the same to Michael ONeill, appellant, by deed March 16, 1908.

Attached to the complaint is a copy of the location notices filed by DeLallo and the deed from DeLallo to appellant. Upon the filing of said complaint, a temporary writ of injunction was issued and made returnable on the 12th day of April, 1909.

The defendant and appellee filed an answer to said complaint on the 10th day of April, 1909, and denied each and every material allegation in said complaint alleged with reference to the location of said premises by Joseph DeLallo and denied that the annual assessment work upon said six mining claims, owned by the Consolidated Mining & Smelting Company, had not been done and performed for the year 1907, and denied that the said ground was on the 1st day of January, 1908, subject to location or that the said corporation had forfeited or abandoned said mining claims.

The appellee admitted that he was appointed special master in that certain suit brought by Thomas K. D. Maddison, as plaintiff, against the Consolidated Mining & Smelting Company, as defendant, and alleged that under and by virtue of the decree and the order appointing him, he was authorized and directed to sell and dispose of at public auction the property in said decree described which

belonged to the Consolidated Mining & Smelting Company and further admitted that included in the advertisement that was then being published in the Santa Fe New Mexican, was the said "Tom Paine," "Golden Eagle," "Sukie," "Sukie Jr.," mining claims and also the "Albany" and "Santiago" mining claims, and defendant denied that the said six mining claims, above mentioned, were abandoned by the owner thereof during the year 1907, by failure to do the annual assessment work required by the laws of the United States and the Territory of New Mexico, and denied that on the 1st day of January, 1908, the ground covered by said six mining claims, last above named, was public domain and subject to location by any person or persons authorized under the mining laws of the United States to explore, discover and locate mineral lands; and said defendant and appellee further denied that the said Joseph DeLallo did on the 1st day of January, 1908, discover and locate said four mining claims, called the "Square Deal," "York," "Gold Coin" and "Zink Blend."

Appellee admitted that he had advertised the said six mining claims for sale, together with other property, and that it was his intention to sell the same at public auction on the 14th day of April, 1909, together with all improvements thereon. He likewise admitted that if the said sale took place and the court approved the same, that he would convey to the purchaser thereof the property described in said notice of sale, and said appellee admitted that unless restrained by the court he would at the time and place in said notice of publication set forth, sell said property at public auction. Appellee in his answer further alleged that the said Michael O'Neill, appellant, in this cause, had ever since the year 1903, performed or caused to be performed the annual assessment work of the value of $100 on each of said six mining claims, owned by the Consolidated Mining & Smelting Company, including the year 1907; and further alleged that the said Michael O'Neill commenced to do the work upon said mining claims in the month of September, 1907, under and in pursuance of an agreement made by and between one W. A. Brown, the agent and representative of the Consolidated Mining

& Smelting Company, with the said Michael O'Neill, and that the said appellant informed the agent of the said Consolidated Mining & Smelting Company on the 27th day of December, 1907, that the annual assessment work upon the said four mining claims had been done and performed for the year 1907, and would be completed on the "Santiago" and "Albany" by the 5th day of January, 1908.

Appellee further alleged that on the 3rd day of January, 1908, he was appointed receiver of all the property belonging to the Consolidated Mining & Smelting Company, under and by virtue of an order made in the case brought by the said Thomas K. D. Maddison, as plaintiff, against the Consolidated Mining & Smelting Company, and as such receiver he duly qualified and took possession of the property belonging to said company and on the 30th day of January, 1908, one W. A. Brown, the agent and representative of appellee, as receiver, in said cause, tendered to the said O'Neill the sum of $200 for and on account of the annual assessment work done for the Albany and Santiago mining claims, and further alleged that appellant in the early part of December, 1907, commenced to do the annual assessment work upon the Santiago and Albany mining claims and if the $100 worth of work had not been completed on the 1st day of January, 1908, that appellant continued to perform the work upon said mining claims, until at least $100 worth of work had been done.

Defendant and appellee further alleged fraud and conspiracy on the part of the said O'Neill and a combination entered into between appellant and DeLallo Bros. and denied that the appellant was entitled to an injunction.

Upon the hearing of the motion to dissolve the temporary injunction, the court continued the injunction until the final hearing of the case and thereafter appellant filed a reply to the answer denying in general all the new matter set up by appellee and especially denied that he had performed any work upon said six mining claims on account of the annual assessment work for the year 1907.

Defendant and appellee was permitted by the court to amend his answer and alleged and charged that appellant, Michael O'Neill, acting as the agent of the Consoli-

dated Mining & Smelting Company, wrongfully, wilfully and fraudulently concealed from said company and its agent and representative W. A. Brown, the fact that the said annual assessment work upon said six mining claims had not been done for the year 1907, and thereafter combined and fraudulently conspired with Thomas DeLallo and Joseph DeLallo, or one or both of them, and procured them to relocate said six mining claims in the names of the "Square Deal," "York," "Gold Coin" and "Zinc Blend" for the purpose of defrauding and defeating the title of said company to the same; and defendant further alleged that the said Michael O'Neill, appellant, in order to wrongfully and fraudulently deceive the said company and its representative, W. A. Brown, falsely represented to said Brown that he had performed the annual assessment work upon said six mining claims, as required by law for the year 1907, and defendant by way of cross complaint alleged that the said Michael O'Neill did on the 5th day of August, 1907, agree to and with W. A. Brown, the agent and representative of the Consolidated Mining & Smelting Company, that he would do the annual assessment work upon said six mining claims for the year 1907, and was to receive the sum of $100 for the work done upon each of said claims, making a total sum of $600, and defendant further alleged that whether or not the said appellant did actually do the annual assessment work upon said six mining claims according to his contract and agreement, that after the 1st day of January, 1908, and after the said Joseph DeLallo had pretended to relocate said six mining claims, the said Michael O'Neill caused to be done at least $100 worth of work upon each of said mining claims owned by the Consolidated Mining & Smelting Company, although he claimed that the work was done on behalf of Joseph DeLallo upon the claims so claimed to have been relocated by him, and defendant alleges that by virtue of the fraud, combination and conspiracy between the said O'Neill and the DeLallo Bros. that the said appellant should be decreed a trustee to have done the work for the use and benefit of the mining company for the year 1907, and the defendant further alleged that the appellant when he acquired title

to said property in March, 1909, by receiving a deed from Joseph DeLallo, did so with full knowledge of all the equities and rights of the Consolidated Mining & Smelting Company in and to the same, and defendant prayed that the pretended location notices alleged to have been posted upon said claims by the said Joseph DeLallo on the 1st day of January, 1908, pretending to locate the same under said four names, be ordered cancelled and that the deed from Joseph DeLallo to appellant be likewise cancelled and held for naught and that appellant be required to quit claim to the Consolidated Mining & Smelting Company or to the defendant as receiver any lien, right, title or interest claimed by him, under and by virtue of the said deed and that he be decreed to be trustee *ex-maleficio* and to hold whatever title he had in said property for the use and benefit of the Consolidated Mining & Smelting Company and for the defendant receiver thereof, and that the work and labor performed upon said mining claims under the pretended re-location thereof by the said Joseph DeLallo be decreed to be done for the use and benefit of said company or the receiver.

Appellant filed a reply to the amended answer denying each and every allegation of new matter therein set forth.

At the close of the evidence the court made nineteen findings of fact and thereafter rendered a decree in accordance with the findings of fact.

Of the said findings two only are necessary to a consideration of this case, as follows:

"That the plaintiff, Michael O'Neill on or about August 5th, 1907, promised and agreed with the Consolidated Mining & Smelting Company through one W. A. Brown, its duly authorized agent and representative, to do and perform the annual assessment work on each of said six mining claims, amounting to not less than one hundred dollars ($100.00) upon each of said claims for the year 1907, and at the time of such promise an agreement to do said work said plaintiff did not demand payment in advance or security for the work proposed to be done, and said plaintiff from time to time thereafter notified said company, through its agent W. A. Brown, that the work

upon four of said claims was being done, and had been done, and that the work upon the Santiago and Albany claims was being done and prosecuted and such work would be continued until the full amount of assessment work of one hundred dollars ($100.00) had been done upon each of them."

"That the Consolidated Mining and Smelting Company and its agent from past business relations with plaintiff, who did the assessment work upon said mines for several years prior to 1907, relied upon the promise and agreement of the plaintiff to do the assessment work upon all of said six mining claims for said year 1907. That the said Michael O'Neill wrongfully, purposely, intentionally and fraudulently failed to do the work upon the said six claims as he had promised and agreed to do, in order to deceive and defraud said company and thereby prevent said Consolidated Mining and Smelting Company from doing or having the work done upon said claims for the year 1907, and that thereafter said plaintiff entered into a combination and conspiracy with Joseph DeLallo and Thomas DeLallo, either one or both of them, to relocate said mines and actually participated, aided and assisted the said Joseph DeLallo and Thomas DeLallo, or either or both of them, in the relocation of said mining claims, after midnight of the 31st day of December, 1907. That with the assistance and aid of the said plaintiff they pretended to have relocated said claims between midnight and four or five o'clock in the morning of the first day of January, 1908."

Two of the conclusions drawn by the court upon the foregoing findings of fact are also necessary to a determination of this case. They are in words as follows:

"The court further finds that the plaintiff Michael ONeill having promised and agreed to do the annual assessment work upon said six mining claims for the year 1907 as herein found, occupied a confidential and fiduciary relation with the Consolidated Mining and Smelting Company and that the relocation of said mining claims in the manner in which the court has found whereby plaintiff participated, that any benefits that accrued therefrom

would and should be for the benefit of the owner, the Consolidated Mining and Smelting Company and not the relocator thereof."

"The court therefore finds as a matter of law that the plaintiff by reason of the facts herein found became trustee of said mining claims for the use and benefit of the Consolidated Mining and Smelting Company, the owner of said Tom Payne, Golden Eagle, Sukie, Sukie Jr., Santiago and Albany claims and that any and all work done or performed upon said claims by plaintiff or under his directions prior to December 31, 1907, or after January 1, 1908, whether claimed or pretended to have been done on the said claims as relocated, be decreed to have been done for the use and benefit of the said six mining claims and the said Consolidated Mining and Smelting Company, the owner thereof."

Upon the statements of facts and conclusions of law the court entered a decree dismissing the injunction and granting the defendant the affirmative relief sought in his amended answer by way of cross complaint. From the decree so entered the plaintiff appealed to this court.

OPINION OF THE COURT.

WRIGHT, J.—Appellant assigns twelve grounds of error, the first ten of which are to the same effect, viz., that the court erred in finding and holding certain facts and conclusions of law set out in its written findings and final decree. The remaining two assignments go respectively to the jurisdiction of the court to try the case without a jury, and the admission of illegal and improper testimony. Upon the hearing, and in the briefs, the appellant abandoned the 11th and 12th assignments of error and therefore the same will not be considered by the court.

1. The third assignment of error sets out that the court erred in finding and holding that the appellant promised and agreed, on or about the 5th day of August, 1907, or at any other time, with the Consolidated Mining and Smelting Company, through its agent, W. A. Brown, or otherwise, to do and perform the annual assessment work upon the six mining claims for the year 1907, and in

finding and holding that the appellant from time to time notified the Consolidated Mining and Smelting Company, through its agent W. A. Brown, or otherwise, that such work was being done, or that any of such work had been done. In discussing this finding of fact the appellant contends that there was no testimony in the record to support such finding, except the testimony of W. A. Brown, the resident agent of the Consolidated Mining and Smelting Company, and further contends that W. A. Brown was a discredited witness before the court and as such, his testimony was not entitled to any weight. This case was tried before the court without a jury and the court had an opportunity to observe the conduct and demeanor of the witness upon the stand and was the judge of the weight to be given to the evidence of such witness as W. A. Brown. The appellant further contends that there is nothing whatever in the record to corroborate the testimony of W. A. Brown.

It appears from the record that upon the trial W. A. Brown, for the purpose of refreshing his memory as to certain dates and circumstances, referred to and read, from his letter press copy book, extracts from certain letters written by him to the officers of the Consolidated Mining and Smelting Company at Erie, Pa. Appellant contends that the very fact that these copies were used instead of the original letters casts suspicion upon such testimony. An examination of the record, however, discloses that counsel for the appellant made *no objection whatever* to the use of such letter press copies, and he cannot be heard to complain of secondary evidence, at this late date. An examination of the record also discloses that the appellant, in March, 1908, went back to Erie, Pa., and entered into negotiations with Mr. Thomas Brown and Mr. Rosenzweig, the president and attorney, respectively, of the Consolidated Mining and Smelting Company, looking to a settlement of certain claims he and DeLallo, who had relocated the six mining claims which are the subject of controversy herein, claimed against the Consolidated Mining and Smelting Company. At such time he made statements to Mr. Brown and Mr. Rosenzweig, as testified to by them by depositions, which are in direct conflict with his testimony given upon

the witness stand, and also, at that time, signed certain instruments introduced in evidence, which are in direct conflict with his testimony given upon the witness stand. The testimony given by Mr. Brown and Mr. Rosenzweig, and the instruments signed by the appellant are directly corroborative of the testimony of W. A. Brown. It therefore appears from a careful examination of the record in this case, that the findings of fact so made by the court are sustained by a clear preponderance of the evidence.

2. The appellant also took an exception to the finding of fact by the court that the appellant wrongfully, intentionally and fraudulently neglected to do the work on said six claims as he had promised and agreed, with the intention of deceiving and defrauding said company, and that thereafter the plaintiff entered into a combination and conspiracy with Joseph and Thomas DeLallo to relocate said mines and actually participated, aided and assisted the said Joseph DeLallo and Thomas DeLallo in the relocation of said mining claims after midnight of the 31st day of December, 1907, thereby fraudulently securing to himself, through a subsequent transfer of title made to him by DeLallo in March, 1908, the said six mining claims formerly owned by the Consolidated Mining & Smelting Company.

In considering this finding the appellant contended that there was no direct evidence whatever in the record upon which such finding could be based; that the court based his finding solely upon suspicion and inference. Upon examining the record, however, we are unable to come to any such conclusion. The testimony of both Thomas and Joseph DeLallo and that of the appellant relating to the circumstances surrounding the relocation made after midnight of December 31, 1907, clearly indicate that such relocation was made in fraud of the rights of the Con-
1 solidated Mining and Smelting Company by the appellant and the two DeLallos working together. The subsequent actions of the appellant, O'Neill at Erie, in the presence of Thomas Brown and Mr. Rosenzweig fully corroborate such a finding so made by the court.

3. The findings of fact by the court being fully sus-

tained by a clear preponderance of the evidence, there remains to be considered the question of whether or not the conclusions of law based thereon are correct.

By reason of his contract and agreement made August 5, 1907, to do the annual assessment work upon the six mining locations involved herein, the appellant became the agent of the Consolidated Mining and Smelting Company for that purpose. An examination of the record discloses the fact that for a number of years prior to 1907, O'Neill had been regularly employed to do this assessment work; that at the time he so conspired with the DeLallos in the relocation of said mining claims he was residing in a house belonging to the Consolidated Mining and Smelting Company upon one of the claims so relocated. It further appears that during the years prior to 1907 the company had placed implicit confidence in O'Neill and relied upon him to do the assessment work. The evidence further shows pears that during the years 1903 to 1906 inclusive O'Neill had faithfully attended to the assessment work and had been paid therefor.

In Vol. 1, Lindley on Mines (1st ed.) Sec. 407, it is held: "An agent, trustee or other person holding confidential relations with the original locator will not be permitted to relocate mining claims and secure to themselves advantages flowing from a breach of trust obligations."

This doctrine is sustained in the case of Argentine Mining Company v. Benedict, 18 Utah 183, 55 Pac. 560; Lockhart v. Leeds, 195 U. S. 427; Lakin v. Sierra Buttes Gold Mining Co., 25 Fed. 337; Lockhart v. Rollins, 2 Idaho 503, 514, 21 Pac. 413; Largey v. Bartlett, 18 Mont. 265, 44 Pac. 962; Fisher v. Seymour, 23 Colo. 542, 49 Pac. 30.

It therefore follows that the appellant having taken advantage of his position as agent and representative of the Consolidated Mining and Smelting Company and thereby fraudulently obtained title to the said mining claims, which in equity and good conscience belong to the
2 Consolidated Mining and Smelting Company, he will be charged in equity as a trustee of the Consolidated Mining and Smelting Company, the equitable owner there-

of. Lakin v. Sierra Buttes Gold Min. Co., cited *supra*. Hunt v. Patchin, 35 Fed. 816.

The attorney for the appellant in his brief contends that the mere fact that the appellant agreed to do the annual assessment work upon these mining claims for the year 1907, created no such confidential or fiduciary relationship as is contended for by the appellee. However, we think that it is clearly settled by the courts that the agreement made by the appellant with the Consolidated Mining and Smelting Company under the circumstances under which the same was made, clearly indicates that such a fiduciary relationship did exist.

We conclude, therefore, that the findings of fact made by the trial court are clearly sustained by the preponderance of evidence and that the conclusions of law drawn therefrom by the court are correct.

There being no error apparent in the record, the judgment of the lower court is affirmed, and it is so ordered.

[No. 1337, September 1, 1910.]

P. H. GOESLING and ADOLPH GOESLING, Partners, Doing Business Under the Firm Name and Style of Goesling Brothers, Appellees, v. GROSS, KELLY & COMPANY, a Corporation, Appellant.

SYLLABUS (BY THE COURT.)

1. Allegations as to time need not be proven with precision.

2. The evidence in this case examined and held that appellant was appellee's factor.

3. Where instructions given by principal to a factor were not contemporaneously with the advancement or consignment, but were given before the sale and were received, accepted and acquiesced in, such instructions were as binding upon the factor as if given at the time of the advancement or consignment.

4. Held there were no disputed questions of fact requiring the submission of the case to the jury.

5. Where a principal instructed his factor to hold wool consigned by the principal at a certain price and factor failed to hold and sold at a lower price. Held, upon suit brought by principal to recover damages from factor the principal is entitled to recover of the factor the difference between what the wool actually sold for, and the highest price attained by the wool up to the date of the trial, not to exceed the limit fixed by the principal.

Appeal from the District Court for Bernalillo County before IRA A. ABBOTT, Associate Justice. Affirmed.

E. W. DOBSON for Appellant.

Appellant was agent not factor. 3 Words and Phrases 2640; 19 Cyc. 186; Eickel v. Sawyer, 44 Fed. 845; Delaune v. Agar, La., McGloin 97, 100; State v. Thompson, 25 S. W. 346, 348, 120 Mo. 12; Story Ag., sec. 33; Edgerton v. Michels, 26 N. W. 748, 750, 66 Wis. 124; Ruffner v. Hewitt, 7 W. Va., 585, 604, 605; Commonwealth v. Keller, 9 Pa. Co., Ct. Rep. 253, 255; Graham v. Duckwall, 71 Ky., 8 Bush. 12, 17; Kellogg v. Costello, 67 N. W. 24, 26, 93 Wis. 232; Higgins v. Moore, 34 N. Y. 417, 418.

Right of factor to control property for his interest and indemnity. Talcott v. Chew, 27 Fed. 276; Heffner v. Gynne-Treadwell Cotton Co., 160 Fed. 635, 87 C. C. A. 606; The Frances, 8 Cranch, 418, 419, 3 L. ed., 609; Brown v. McGran, 14 Peters, 479, 10 L. ed. 550; Field v. Farrington, 10 Wall. 141, 19 L. ed. 923; Eichel v. Sawyer, C. C., 44 Fed. 845, 850; Field v. Farrington, 10 Wall. 141; Brown v. McGran, 14 Pet. 479, L. ed. 10, 550.

Disputed questions of fact should have been submitted to the jury. Aetna Indemnity Co. v. J. R. Crowe Coal & Mining Co., 154 Fed. 545; Etting v. Bank, 11 Wheat. 59, 6 L. ed. 419; Rankin v. Fidelity Trust Co., 189 U. S. 242, 253, 23 Sup. Ct. 553, 557, 47 L. ed. 792; Railway Co. v. Ives, 144 U. S. 408, 417; Chicago & N. W. Ry. Co. v. De Clow, 124 Fed. 142, 145, 61 C. C. A. 34, 37; Trav-

elers' Ins. Co. v. Melick, 65 Fed. 178, 181, 12 C. C. A. 544, 547, 27 L. R. A. 629; Railway Co. v. Jarvi, 3 C. C. A. 433, 437, 438, 53 Fed. 65, 69; Fuel Co. v. Danielson, 6 C. C. A. 636, 57 Fed. 915; Railroad Co. v. Kelley's Adm'rs, 3 C. C. A. 589, 593, 53 Fed. 459, 463; Railway Co. v. Ellis, 4 C. C. A. 454, 456, 54 Fed. 481, 483; McNamee v. Hunt, 87 Fed. 298, 301, 30 C. C. A. 653, 655; West v. Smith, 101 U. S. 263, 270, 25 L. ed. 809; Brown v. McGran, 14 Pet. 477, 493, 10 L. ed. 550; Goddard v. Foster, 17 Wall. 123, 142, 21 L. ed. 589; Blakely v. Gregg, 8 Wall. 242, 268, 19 L. ed. 409; Barreda v. Silsbee, 21 How. 146, 167, 16 L. ed. 86; Turner v. Yates, 16 How. 14, 23, 14 L. ed. 824; Richardson v. City of Boston, 19 How. 263, 270, 15 L. ed. 639; Nash v. Classon, 45 N. E. 276, 277, 163 Ill. 409; Roberts v. Bonaparte, 20 Atl. 918, 73 Md. 191, 10 L. R. A. 689; Eureka Fertilizer Co. v. Baltimore, etc., R. Co., 27 Atl. 1035, 1036, 78 Md. 179; Gassett v. Glazier, 43 N. E. 193, 195, 165 Mass. 373; 1 Thompson on Trials, sections 1086, 1113, 1114; 4 Wigmore on Evidence, sec. 2556; Sigerson v. Pomeroy & Andrews, 13 Mo. 620.

A factor who wrongfully sells goods of his principal below the price limited in his instructions, is presumptively liable for damages as if the limited price were the true value of the goods, but evidence that the factor acted in good faith, and the limited price could not have been realized, and that the property was sold at the full market price at the time of the sale, is admissible and then if the factor is liable at all, he is liable for the highest value that the wool, of the same kind and character of appellee's, was sold for at any time up to the institution of the suit. Frothingham v. Everton, 12 N. H. 239; George McNeill, 26 Am. Dec. 498.

NEILL B. FIELD for Appellees.

Allegations of time, quantity, value, etc., need not be proved with precision. C. L. 1897, sec. 2685, sub-secs. 68, 78, 85, 94, 96; U. S. v. Le Baron, 4 Wall. 648; Grayson v. Lynch, 163 U. S. 476; Marshall v. Russell, 44 N.

H. 509; Little v. Blunt, 33 Mass. 365; Jordan v. Cooper, 3 Serg. & Raw., Pa., 576; Biven v. Bostwick, 70 Cal. 639.

Defendant was plaintiff's factor. Slack v. Tucker, 23 Wall. 330; Heffner v. Gwynne-Treadwell Cotton Co., 160 Fed. Rep. 638, 639; Brown v. McGran, 14 Peters 479; Field v. Farrington, 10 Wall. 141; Gallagher v. Jones, 129 U. S. 193.

There was no conflict of evidence upon any material point. Rankin v. Fidelity Trust Co., 189 U. S. 253; McGuire v. Blount, 199 U. S. 147, 148; Empire State Cattle Co. v. Atchison Ry. Co., 210 U. S. 9, 10; Noble v. Crane & Co., 169 Fed. Rep. 59, 60; Railway Co. v. Lowery, 74 Fed. Rep. 463; Travelers' Ins. Co. v. Randolph, 78 Fed. Rep. 754.

The measure of damages adopted by the court below is not properly reviewable in this court. Cunningham v. Springer, 204 U. S. 647; George v. Emery, 107 Pac. 3; T. & P. Ry. Co. v. Book, 151 U. S. 73; Frothingham v. Everton, 12 N. H. 239; Maynard v. Pease, 99 Mass. 555; Sutherland on Damages, vol. 3, sec. 777, vol. 4, sec. 1119; McKinley v. Williams, 74 Fed. Rep. 103; Loraine v. Cartwright, 15 Fed. Cases 870; George v. Emery, 107 Pac. Rep. 3.

STATEMENT OF THE CASE.

This suit was brought by appellees against appellant to recover damages. The appellees alleging that appellant as their factor had in its possession a large amount of wool, which appellees had instructed appellant to hold for 18 cents per pound, but that appellant had failed to obey said instruction and had sold said wool at a less price to appellee's damage. Appellant denied relation of factor. Case was tried to a jury. Verdict directed in favor of appellees.

OPINION OF THE COURT.

MECHEM, J.—1. As to appellant's first proposition that there was no evidence to support certain allegations of the complaint, we can say that after a careful reading

of the evidence contained in the record, and the
1 pleadings, that there was ample evidence to sustain the allegations of the complaint. True, there were, as pointed out by appellant, variances as to the time appellees gave appellant instructions as to the price at which the wool was to be sold, but such an allegation need not be proven with precision. U. S. v. Le Baron, 4 Wall. 648; Grayson v. Lynch, 163 U. S. 476, 477.

2. The position of appellees below was that appellant was their factor and such was the view of the trial court. The appellant, however, insists that it was only an
2 agent in the transaction and that no other conclusion can be drawn from the evidence.

This question does not seem attended with as much difficulty as appellant endeavors to surround it.

The Supreme Court of the United States, in Stark v. Tucker, 23 Wall. 330, thus distinguishes between a factor and a broker:

"The difference between a factor or commission merchant and a broker, is stated by all the books to be this: A factor may buy and sell in his own name, and he has the goods in his possession; while a broker, as such, cannot ordinarily buy or sell in his own name, and has no possession of the goods sold."

In Words and Phrases, vol. 3, page 2640, the term "factor" is defined as follows:

"A factor is generally defined to be an agent to sell goods or merchandise consigned or delivered to him by or for his principal for a compensation, commonly called 'factorage' or 'commission' citing numerous cases."

The evidence discloses the following facts:

Appellees being desirous of getting a better price for their wool, during the month of September, 1907, opened negotiations with appellant through its Mr. Arnot, manager of its Albuquerque house, with a view of obtaining an advance. Mr. Arnot after a short time informed one of the appellees that Coates Bros. of Philadelphia, Pa., would make an advance of five cents per pound. This being satisfactory to appellees, Mr. Arnot telephoned Mr. McTavish of Becker-Blackwell Co., of Magdalena, where

appellees had their wool stored, to ship same to Philadelphia, Pa., consigned to appellant and send bill of lading to Mr. Arnot at Albuquerque. This being done, appellant drew a draft upon Coates Bros. for the amount of five cents per pound, attached same to the bill of lading, which was assigned by appellant to Coates Bros. The draft was duly paid and appellant upon receiving the proceeds deposited the same to the credit of appellee in the First National Bank of Albuquerque.

Owing to the panic the price of wool was off and it was understood by appellant and appellees that the wool was not to be sold at panic prices. Thereafter appellees say that they by letter instructed appellant to hold said wool at eighteen cents, f. o. b. Philadelphia, Mr. Arnot testifying in behalf of appellant would not deny that appellant had received such instruction by letter, but from numerous letters introduced in evidence, written by appellant to appellee and to Coates Bros., it is evident that appellees had instructed appellant to hold the wool for eighteen cents as above stated and that appellant
3 acquiesced in and accepted such instructions so that the same were as binding upon appellant as if made upon the date of the consignment.

The wool was sold May 22, 1908, and sales statement made by Coates Bros. direct to appellant May 22, 1908, and sales statement made by appellant to appellees July 7, 1908.

Two members of the firm of Coates Bros. testified that they never knew appellees, in the transaction, that they received, advanced money on, held and sold the wool as appellants. Coates Bros. were not appellee's factors. They were appellants', and appellants sustained the same relation to appellee. Had the price of wool fallen to where the advance was used up, Coates Bros. would have looked to appellant to make it up and appellant to appellees. So too, as it is the duty of a factor, before selling at a lower figure than he was instructed to hold out for, to call upon his principal to refund the advances and charges. So Coates Bros. would have called upon appellant and appel-

lees and before ordering Coates Bros. to sell, appellant should have called upon appellees.

3. Appellant by its third assignment of error says the court committed error in not submitting to the jury disputed questions of fact and our attention is called by appellant to three points upon which it claims there was dispute, and we have examined the evidence carefully in relation thereto and find that as to one matter there
4 was no dispute, upon the second the dispute was immaterial and as to the third it was a question of law to be drawn from undisputed facts.

4. The court in rendering judgment in favor of appellees gave them the difference between the amount the wool was sold for and the price appellees directed the appellant to hold it for. Appellant argues that the recovery should have been, if at all, for the difference between what the wool brought and the highest market price up to the time suit was instituted, not to exceed 18 cents.

With this view, we cannot agree. The measure of
5 damages given by the court was correct. The appellants were instructed to hold the wool for eighteen cents per pound, and if appellees could show that within a reasonable time after the sale and before the trial of the cause that the market price of that wool equalled eighteen cents, they were entitled to the difference between what the wool actually brought and the eighteen cents. It was shown that wool of the class of the wool in controversy went to eighteen cents in Philadelphia in December following the sale. Maynard v. Pease, 99 Mass. 355. Also see 28 Am. & Eng. Ency. of Law 719, where it is said:

"In many cases, however, in trover for conversion by reason of the wrongful taking, detention or disposition of chattels, the plaintiff has been allowed to recover, where the value of the chattel fluctuated between the time of such conversion and the time of trial, the highest market value during such time."

In this case, where a limitation was made by contract, it would seem if, before the trial, the article attains the price limited, that recovery can be had up to that figure

or up to any intermediate figure between the price sold for and the limit set.

It may also be suggested that upon the question of the measure of damages, appellant made no intimation at the trial of what it thought the measure should be, nor can we say from the motion for a new trial that the court's attention was directed to what now appellant claims as error.

There being no error the judgment of the lower court is affirmed.

[Nos. 1339 and 1340, September 1, 1910.]

TERRITORY OF NEW MEXICO, ex Rel, FELIX H. LESTER, Appellee, v. A. W. SUDDITH, A. L. HUTCHISON and E. B. CRISTY, Judges, and JAMES HILL and BERNARD CRAWFORD, Clerks of Election in the 2nd Ward of the City of Albuquerque in the Municipal Election Held April 5th, 1910, Appellants.

TERRITORY OF NEW MEXICO, ex rel, FELIX H. LESTER, Appellee, v. N. E. STEVENS, GEO. H. RAMSEY and E. H. DUNBAR, Judges, and HARRY KELLEY and PERCY J. HAWLEY, Clerks of the Election in the 3rd Ward of the City of Albuquerque, in the Municipal Election Held April 5, 1910, Appellants.

SYLLABUS (BY THE COURT.)

1. Where judges in a municipal election show in making their return under C. L., Secs. 1687, 1689, that a certain number of ballots have been cast which they have failed to count for any candidate, mandamus and not quo warranto, is the proper remedy to enforce compliance with the duty to count and make returns of such ballots, imposed by law.

2. After ballots have been tendered by the voter and deposited in the ballot box the quasi judicial function to reject ballots given election judges by C. L., Secs. 1665, 1668, becomes

exhausted and thereafter their powers as to such ballots become purely ministerial.

3. Such ministerial duties include the obligations to count the ballots for the candidates whose names appear thereon and to make return thereof to the city clerk.

4. By making a partial return which, while disclosing the receiving of certain ballots, affirmatively shows that these have not been counted for any candidate and by thereupon adjourning sine die, election judges do not become functi officio but are still subject to mandamus requiring them to reassemble and count such omitted ballots.

5. The writ of mandamus will not require the performance of an act beyond the power of the respondent or dependent upon the will of a third person not a party to the suit.

Appeal from the District Court for Bernalillo County before I. A. ABBOTT, Associate Justice. Reversed and remanded.

MANN & VENABLE for Appellants.

Judges of election are not ministerial officers but quasi judicial officers vested with discretion and involving the exercise of judgment in the counting of ballots, while the canvassing boards is ministerial and has only to compute results from the returns as given to them. C. L. 1897, secs. 2443, 2446, 2447, 692; Bull v. Southwick, 2 N. M. 321; Territory v. County Com., 5 N. M. 1; Re Sloan, 5 N. M. 590.

The writ of mandamus does not lie to direct how judicial officers shall exercise their judgment nor to control their discretion. 26 Cyc. 158 and cases cited; Corbert v. Naylor, N. Y., 57 Atl. Rep. 304; State v. Deane, 23 Fla. 121, 1 So. 698, 2 Am. St. 343; People v. Riordan, 49 Hun. 425, 3 N. Y. Sup. 560.

Upon filing the returns by the judges of election they became functus officio. C. L. 1897, secs. 692, 2447; Bull v. Southwick, 2 N. M. 321; Territory v. County Com.,

5 N. M. 1; Re. Sloan, 5 N. M. 590; State v. Russell, 34 Nebraska 116, 51 N. W. 465; 15 L. R. A. 741; 26 Cyc. 274, n. 44 and cases cited.

Mandamus will not be granted unless some substantial right is involved. The People ex rel Alexander H. Bailey v. The Supervisors of Greene, 12 Barbour 217; 26 Cyc. 156 and cases cited.

The affidavits of judges of election will not be heard to impeach their returns. 10 Am. Enc. Law 829; Ward v. Thompson, 48 Iowa 588; John Nichols v. John Foster, 89 Ill. 386; City of Chicago v. Saldman, 225 Ill. 626, 629; 39 Century Digest 1291, sec. 290 and cases cited.

Evidence other than the returns themselves is not competent to show contents of returns until some foundation is laid for such secondary evidence. Patton v. Coates, 41 Ark. 111; 15 Cyc. 419, 420.

Quo warranto is an adequate remedy. 26 Cyc. 139; 32 Cyc. 1420.

Mandamus can create or impose no powers, rights or duties and may be employed to enforce only such duties as already exist. 26 Cyc. 165 and cases cited; Re Sloan, 5 N. M. 590.

Board of election judges were functi officio. C. L. 1897, secs. 1679, 1687, 1689; Rosenthal v. State Board of Canvassers, 19 L. R. A. 157; McCrary on Elections, 3d ed., sec. 322; 10 Am. & Eng. Enc. of Law, 2d ed., 736; State v. Donnewirth, 21 Ohio St. 216; State v. Knight, 6 Houst., Del. 146; People v. The Board of Town Canvassers, 19 N. Y. Supp. 206; Raemer v. The Board of City Canvassers, 90 Mich. 27.

SUMMERS BURKHART for Appellee.

Mandamus is the appropriate and exclusive remedy to compel a public officer to perform a ministerial duty. 26 Cyc. 139.

The duties of judges and clerks of election are purely ministerial. C. L. 1897, secs. 1665, 1668, 1687, 1689, 2443; Mechem's Public Office and Officers, secs. 491, 511, 522, 657, 660; Bull v. Southwick, 2 N. M. 351; In re Sloan, 5

N. M. 590; 15 Cyc. 379, 380 and cases cited; Corbett v. Naylor, 57 Atl. 304.

A substantial right is involved. 31 Cyc. 337, 606 and cases cited; In re Sloan, 5 N. M. 590, 607.

The presumptions in favor of the performance of official duty and of the validity of official acts are rebuttable. 22 Am. & Eng. Enc. of Law, 2d ed., 1275d and cases cited; 11 Am. & Eng. Enc. of Law, 2nd ed., 488, IV, V, and cases cited.

Quo warranto is an extraordinary legal remedy and not a remedy in the ordinary course of law. High's Extraordinary Legal Remedies, 2 ed., secs. 623 *et seq.*

An election board does not become *functus officio* until it has fully performed the duty prescribed by law. 15 Cyc. 383, 385; Cooley Con. Lim. 936; High Extraordinary Legal Remedies, sec. 56; Re Sloan, 5 N. M. 590, 600; State ex rel. Metcalf v. Garesche, 65 Mo. 480.

STATEMENT OF THE FACTS.

The relator Felix H. Lester was democratic candidate for the office of mayor of the city of Albuquerque at an election held April 5, 1910. He prayed writs of mandamus against the respondents who were judges and clerks of election in the second and third wards of the city of Albuquerque, directing them to reconvene as such election boards and in the second ward count two ballots which he alleged they had failed to count, and in the third ward seven ballots which he alleged they had failed to count. He set up in his information that the respondents had refused to count said ballots; that the returns of the respondents did not correctly state the result of the election; that if said returns had been correctly and properly certified they would have changed the result of the election. In case No. 1339 two of the judges and one of the clerks filed a verified answer admitting all the allegations of the writ except that they did not certainly know for whom one of the ballots not counted was cast. The other clerk did not appear and E. B. Cristy, one of the judges, is the only appellant. He demurred and his demurrer having been overruled answered alleging, first, that the court

had no jurisdiction of the subject matter or of the parties for the reason that having made and certified the return of said election and filed same with the city clerk as required by law and adjourned sine die they became functus officio. Second, that the relator had an adequate remedy at law by quo warranto. Third, that said judges and clerks performed the duties of their office as provided by law. Fourth, denied that there were two ballots cast for the democratic candidate for mayor which were not counted for him, but on the contrary stated that there were two ballots not counted, one of said ballots being for the democratic candidate and one being for the republican candidate for mayor. Fifth, that the ballots not counted were by agreement of said judges and clerks decided by them to be invalid and not entitled to be counted in said election. Sixth, he denied all of the other material allegations of said writ.

In case No. 3940, G. H. Ramsey and E. H. Dunbar, and Harry Kelley, one of the clerks, filed a verified answer to the writ admitting all its allegations. N. E. Stevens, the other judge, filed an affidavit in support of the writ and afterwards filed a demurrer to the application on the ground that the court had no jurisdiction and that the application and alternative writ did not state facts sufficient to state a cause of action. His demurrer being overruled he did not further answer.

J. P. Hawley, the remaining clerk, filed an answer practically in the same form as appellant's answer in the other case, adding on information and belief that the relator's name appeared on no Socialist ticket for mayor but alleging that seven Socialist ballots were cast and counted but not credited to any one for the office of mayor because all the respondents agreed that the said ballots were illegal for the reason that the ticket had not been filed with the probate clerk ten days before the election; he then denied generally every other allegation of the writ. In each case the relator filed a motion for judgment on the pleadings based on the ground that the pleadings affirmatively showed that the respondents had not performed the duties imposed by law. The court sustained said motions, peremptory

writs were allowed and appeals taken in case No. 1339 by E. B. Cristy, and in case No. 1340 by N. E. Stevens and J. P. Hawley.

The remaining facts appear in the opinion.

OPINION OF THE COURT.

POPE, C. J.—The present case involves the efficacy of the writ of mandamus to reach the conditions complained of. The utility of this writ was considered by this court in Delgado v. Chaves, 5 N. M. 646, 648, where, in an opinion written by Mr. Justice Freeman, the ends which the writ has accomplished were very lucidly exemplified and it was remarked that "it would be a vain and useless exhibition of research to undertake to point out the almost innumerable instances in which this writ has been successfully invoked." As applied to matters of elections this writ has been found to be of special efficacy. The adequacy and especially the promptness of the relief afforded by it has made it a favorite and valuable method of redress for the omission or violation of legal duty by election officers, and these qualities have led the courts to deal with the writ liberally in the interest of honest elections and a fair count. While so treating the writ, however, in this class of cases it has not been forgotten that its use is limited by well settled principles, among others the axiom that the writ will not be allowed to control a discretion; that while it will enforce, it will not create a duty, and that it will not be granted where it is manifestly beyond the power of the respondent to perform the duties enjoined. Bearing in mind the uses and the limitations of the writ we are called upon to determine whether in the present instance its issuance was justified. To determine this we must first ascertain what were the duties of the territorial judges of election. These duties of course flow solely from the provisions of statute. It is provided (C. L., Sec. 1687) that "the judges shall close the election at six o'clock in the afternoon and immediately thereafter shall open the ballot boxes and publicly count the votes cast for each candidate, certifying the poll books as provided by law." By C. L. 1689, such certificate "shall contain the number

of votes cast for each candidate, setting forth the same in writing and in figures, without there being any alteration or change." Sec. 2447 provides: "The returns of all municipal elections shall be made to the clerk or recorder of the corporation, and shall be opened by him on the third day after election. He shall call to his assistance the mayor of the corporation, or if the mayor shall have been a candidate at such election, then any justice of the peace of the county, and shall, in his presence, make out an abstract and ascertain the candidates elected in all respects as required by law for the canvass of the returns of county elections, and shall in like manner make out a certificate as to each candidate so elected, and cause the same to be delivered to him or to be left at his place of abode."

It is clear that under the foregoing it was the duty of the judges, among other things not here material, (a) to count the votes cast for each candidate, and (b) to set forth the number of votes cast for each candidate in writing and in figures in a return to the city clerk.

It appears from the record in this case that the judges counted the votes and reported, as to the ward involved in case 1339, 537 votes cast, and reported as to the ward involved in case 1340, that seven socialist tickets had been cast. It affirmatively appeared from the return in the first case, however, that while 537 votes were cast, only 535 were included in the vote declared for the two candidates and that in the second the seven socialist tickets were not counted at all. The relator, Lester, alleging that these nine ballots if counted would have been favorable to him to an extent such as to insure his election, prayed that the judges be required to extend upon their returns the names of the persons for whom these uncounted votes had been cast. Since the law as we have seen requires the judges not only to count the votes but to declare upon their return the number of votes for each party, and since upon their own attempted return it is evident that while the judges have counted, they have, to the extent of nine ballots, not declared, the primary impression upon the average mind would be that they had to that extent omitted to perform their legal duty. This being true, and since the

very essence of the writ of mandamus is to require the performance of such a duty, it would seem as a matter of impression that this was a proper case for the allowance of such a writ and that the court below acted properly in ordering the judges of election to declare for whom these nine votes were cast.

Having thus stated the matter as one of impression it remains to be determined whether or not upon a full consideration of the several objections here urged to the writ of mandamus as the proper remedy for the vindication of such an apparent right, the proceedings below may still be sustained. The objections presented by appellant to the decision appealed from are not without force and have been given the consideration which their importance demands. It is urged at the outset that the mandamus will not lie because there is a plain adequate and complete remedy in the writ of *quo warranto*. The doctrine on this special subject is thus stated in Spelling on Injunctions and other Ex. Rem., Sec. 1375.

"In order that the existence of another remedy shall constitute a bar to relief by mandamus, such other remedy must not only be an adequate remedy in the general sense of the term, but it must be specific and appropriate to the circumstances of the particular case. It must be such a remedy as is calculated to afford relief upon the very subject of the controversy. For if it is not adequate to afford the party aggrieved the particular right which the law accords him, mandamus will lie, notwithstanding the existence of such other remedy."

It is difficult to see how the remedy of *quo warranto*—even ignoring the fact that it is in this Territory a writ not of right but issuable only by consent of the attorney general—could afford an adequate substitute for the writ here sought. The specific remedy here sought was to secure a declaration upon the face of the returns as to the contents of certain ballots in order that the election of relator might prima facie appear and he be thus awarded a certificate of election. *Quo warranto* would manifestly not be adequate to the vindication of such a right and therefore would not preclude mandamus.

1

It is next urged that the court below should not have ordered the respondent to declare the ballot for the reason that it was within the discretion of the judges of election to reject votes; and that in holding, as shown by the record that the two ballots in case 1339 should not be counted because upon forms for the wrong ward and in further holding that the seven ballots in the other case should not be counted because upon Socialist tickets and illegal in not having been filed with the probate clerk of the county for ten days, the judges were exercising simply the discretion allowed them by law. We fail, however, to perceive any force in this position. Our territorial statutes give election judges no discretion in the matter of counting or declaring ballots once received. There is a discretion, it is true, at the moment a ballot is tendered. Comp. Laws, Secs. 1665, 1668 and 2443, expressly declares the right of judges of election to reject ballots when tendered. Thus Sec. 1665 is as follows: "When any person offers to vote, whose qualifications, as required by this law, are not personally known to any of the judges, he may be examined under oath as to said qualifications and those who take a false oath shall suffer the penalty prescribed by law for perjury."

Sec. 2443 contains the following proviso to the municipal laws: "Provided, That nothing in this act shall be so construed as to prevent any or all persons so registered from being challenged at the polls as to their right to vote, or to prevent the judges of election from rejecting the vote of any person so registered, for cause, at the polls."

But even in these cases it is provided by section 1668 that a record must be made showing the persons for whom the vote is tendered. That section reads as follows: "When any person offers to vote and is rejected, his name shall be registered in the poll book, and all the names of the persons he offers to vote for, and the word, rejected, shall be written opposite the name of the person offering to vote."

But this discretion exists only when the ballot is ten-
2 dered. Once received, the duty of the judges becomes ministerial and threefold, to count, to declare by return
3 and deliver the ballots to the city clerk. Whether a vote once received is in proper form and may legally be counted is a matter for a tribunal other than the election judges. We think, therefore, that there was no question of judicial discretion involved.

It is insisted, however, that the writ will not lie because the defendant board, having in part counted the votes and having made a return and having adjourned *sine die,* is no longer a board, that it has thereby become *functus officio,* and it may not be reassembled and required to perform further duties; or, as said in one of the cases cited by appellant, the court "cannot animate its dead body with the breath of life."

The defect in this last argument lies in a failure to recognize that official boards, differing from natural persons, cannot commit suicide. Election judges created
4 for a specific purpose and to perform certain public duties have no definite tenure of office. Their life is until their duty is performed or until the performance of that duty is rendered impossible by intervening events. But until such duty is performed or such events intervene the board's existence continues and this, even though through inadvertence or purpose it may have adjourned *sine die.* The performance of a public duty by such a board cannot be avoided or the public interests defeated by a voluntary attempt to terminate its own life. Even where the board says its work is over the law keeps it in existence to complete that work if unfinished. For example, had the board in the present case adjourned *sine die* without counting the votes at all, would it have been *functus officio* so that it could not be reassembled for that purpose? Or had it counted the votes but adjourned without day, before making any return to the city clerk, would the whole election be defeated upon the plea that the board has become dead and therefore cannot be called together to make the return? These observations show that the power to reassemble the board depends not upon whether it has declared

itself adjourned but upon whether it has completed its statutory duty. If the latter has been accomplished the board dies by force of that very fact, whether it has declared itself adjourned or not; if on the other hand it has not been accomplished no resolution to adjourn *sine die* can render the board *functus officio*. If therefore the continuance of the board's existence depends upon whether it has completed its work, upon what principle can it be held that that existence has expired when the board (as shown by its own return) still has unperformed the statutory duty to declare the contents of ballots sufficient in number to turn the election?

The conclusion is, we believe, inevitable that so long as the board has a specific statutory duty imposed upon it still unperformed it continues to exist and is subject to the call of the law for a completion of that duty. An illustration will be found in certain duties imposed upon this court. It has been the practice of congress in creating additional associate justices from time to time to make it the duty of this court to redistrict the Territory, for judicial purposes and to assign the judges to the several districts. Such duty when performed has been considered as exhausting the power of the court as conferred by the several acts. But suppose the court failed, in meeting for this purpose, to assign one of the judges or omitted to include certain counties in any district and then adjourned? Would it be contended that it could not reassemble and fully perform its duty? We think not. Neither do we deem the adjournment of the respondent boards as controlling but they are subject to the mandate of the court to reassemble and complete their legal duties. True, this court in the illustration just given, is a permanent body whereas a board of election judges is temporary—and this circumstance is mentioned in some of the authorities as controlling the right to reassemble, as for instance where one or more of the election board are county officials. We fail, however, to recognize the distinction. A temporary function imposed upon a board otherwise permanent does not make it otherwise than temporary as to that function. These views constitute a sufficient answer to several of the further arguments for

appellant. It is said that by adjournment these judges have become mere individuals and not subject to a writ. But if as we have seen their board is yet existent they are still officials subject to mandate. It is also said that the mandamus will not lie to create a duty but simply to enforce performance of it, and arguing that these judges were under no obligation after making their return to amplify it, it is contended that the writ of mandamus might not be invoked to require them to do what they were not obliged to do without it. But if, as we have seen, there was a clear omission remaining to be remedied and if as we have seen, the judges still remain officers for that purpose, it follows that there was an obligation upon them to remedy the return, if still in their possession, independent of any order to that effect. Indeed, in People v. Nordheim, 99 Ill. 553, it was held that the city clerk who had possession of such returns would be required by mandamus to permit such judges to amend them, so as to comply fully with the law. By this last we do not desire to be considered as holding that election judges should, after making their returns, be permitted at their discretion to withdraw them and make new returns. We can see that in the case of a close election such a course might lead to grave abuses. It will be sufficient to pass upon cases differing from the present one as they reach us and it will be assumed that right minded officials will as in the present case require an order of court before permitting a change in returns already made. But the case now before us is one in which no such danger lurks. The return itself shows that the contents of certain ballots have not been extended and the request is simply that this omission shall be remedied by a supplemental return. To do this will import no new ballots into the return. It will simply, as the statute requires, declare the contents of those already there and thus give relator, if his contention of fact be correct, the prima facie showing of election necessary to a certificate to that effect. This we think he was, so far as the present objection is concerned, entitled to.

This position we consider sustained not only by principle but by precedent. The general doctrine is declared in

15 Cyc. 383, 384 as follows: "But on the other hand it has been repeatedly decided and seems to be the better doctrine that after canvassers have made one canvass, declared the result, and adjourned, they may be compelled by mandamus to reassemble and make a correct canvass of all the returns, where it appears that upon the first canvass they neglected or refused fully to perform their duty. It is settled by abundant authority that where the board refused to canvass any of the votes it may be compelled so to do by mandamus, even though it has adjourned *sine die,* and there can be no difference in principle between a refusal to canvass any and a refusal to canvass a part only of the returns."

The text is sustained by numerous citations. Fair samples of the expressions in these supporting authorities are found in State ex rel. Rice v. The County Judge, 7 Ia. 200, where it is said: "The next subject of examination is the answer that the duty had already been performed. Inasmuch as the canvassers have rejected the returns from three of the townships, which they should have counted, it is legally true that the duty has not been discharged; and when the writ now commands it is not, in a proper legal sense, to recanvass, but to canvass the returns of that election. It is to do that which was before their duty, but which they omitted. What has been done is as if it had not been done, and the judge is now commanded to proceed as if no former steps had been taken."

And in Lewis v. Marshall County Com'rs., 16 Kan. 102, 22 A. R. 275, where speaking through Mr. Justice Brewer, the court says: "It is the duty of the canvassers to canvass all the returns and they as truly fail to discharge this duty by canvassing only a part and refusing to canvass the others as by refusing to canvass any."

While it is true that upon examination some of the authorities cited in support of the text in 15 Cyc. 384 *supra,* are found to be qualified and in some instances are influenced by local statute, we find that many of them give ample support for the position here assumed. It does not seem necessary to consider or quote these in detail. We do not feel inclined in deference to what we deem ill advised

precedents, which may be found to the contrary, to abdicate for the courts a power so conducive to the purity of elections. Where as here that power is sustained by ancient and eminent authority, followed by numerous modern courts, judicial retreat is no less to be deprecated than on the other hand would be judicial encroachment.

While upon all the foregoing grounds the writ below was properly granted the remaining assignment of error impresses us as more serious. It proceeds upon the contention that the writ should not have been granted because it is manifestly beyond the power of the respondent to obey it. The information upon which the writ issued shows that the ballots with the imperfect return complained over "were deposited in the ballot box with the ballots cast at said election in said ward and the said box locked and sealed up and returned to the clerk of the city of Albuquerque and that the said judges have had no opportunity to inspect or correct the same for that reason." It is said by appellants that this averment admits the relator out of court since it discloses the returns, which it is sought to correct, to be in the hands of a third party not a party to the suit. It is argued that there is no assurance that the writ if granted can be obeyed and that courts will not grant the writ in doubtful cases where a compliance with it depends upon the caprices of a third person not before the court. This argument impresses us as sound and its
5 conclusion unavoidable. It is fundamental that to authorize the writ it must appear that if granted it will be effectual as a remedy and that it is within the power of the defendant, as well as his duty, to do the act in question. 2 Spelling on Injunction and other Extraordinary Remedies, Secs. 1369, 1377.

Such power does not appear from this record, but the very contrary. If as relator alleges the records were, when the information was filed, so far beyond the power of the respondents that "they have had no opportunity to inspect or correct the same," how will the granting of the writ give them that opportunity? Mandamus does not confer power nor create opportunity. It enforces the exercise of an existing power, the improvement of opportunity already present.

This view of the matter constrains us to the view that the writ was improvidently granted, at least insofar as it directs returns not within the power of respondents to be amplified by them. The cause must accordingly be remanded. Whether by amendment in this suit or by further proceedings otherwise the defect now held to exist can be remedied so as to bring the returns back into the power of the respondent in order that a writ may operate upon them we need not here determine or intimate. In order, however, that the trial court may be free to deal with the matter unhampered by explicit directions in the mandate we reverse and remand the cause for further proceedings not inconsistent with this opinion, and it is so ordered.

Associate Justices McFie and Wright concur.

Associate Justices Parker and Mechem concur in the reversal. Associate Justice Abbott having tried the case did not participate.

[No. 1350, September 1, 1910.]

S. T. GRAY, et al, Appellants, v. ROBERT H. TAYLOR, et als, Appellees.

SYLLABUS.

1. There is no legislative requirement that any bill shall receive the signature of the respective presiding officers of the two houses. The journals of the two houses may be judicially noticed in aid of the act.

2. In the absence of any evidence to the contrary it is assumed that the executive acted lawfully and his message stating that he had allowed the act to become law by limitation will be assumed to imply the receipt by him of the act more than three days prior to the message.

3. Petition for election on proposition to remove county seat held sufficient.

4. By the terms of the statute, (Laws 1909, Chapter 80), it is impossible to have registration within the time following the petition and the election.

5. Held that only one illegal vote was cast and that was in favor of Lincoln.

6. Subsequent repairs to public buildings at county seat should not be counted in determining whether cost of buildings was less than $30,000.

7. Laws 1909, Chapter 80, not special or local by reason of the twenty mile limitation.

8. Held that ballot used at election for removal of county seat, which read "For County Seat....." was in exact accordance with C. L. 1897, sec. 631.

9. Whether this is a collateral attack upon the location of the county seat, quaere.

Appeal from the District Court for Lincoln County before MERRITT C. MECHEM, Associate Justice. Affirmed.

T. B. CATRON and GEORGE B. BARBER for Appellants.

Laws 1909, Chapter 80, is local and special legislation in violation of Springer Act. People v. Supervisors, 43 N. Y. 16; Matter v. Henneberger, 155 N. Y. 424, 427; People v. O'Brien, 38 N. Y. 193; Ferguson v. Ross, 126 N. Y. 464; Com. v. Patten, 88 Pa. St. 260; Davis v. Clark, 106 Pa. St. 260; McCarthy v. Com. 110 Pa. St. 246, et seq.; Montgomery v. Co., 91 Pa. St. 125; Devine v. Commissioners, 84 Ill. 591, et seq.; State v. Herman, 75 Mo. 346; Scowdens App. 96 Pa. St. 424-5; Klokke v. Dodge, 103 Ill. 125; State v. Mitchell, 21 Ohio St. 592; State v. Judges, 21 Ohio St. 11; Strange v. Dubuque, 62 Iowa 205; Suth. on Stat. Const., secs. 127, 128, 129, and cases cited; Smith's Com., secs. 595, 596; Sedg. Const. Law 32; 1 Potters Dwarris on Stats. 354, 355; Ex-Parte Westerfield, 55 Calif. 552; Desmond v. Dunn, 55 Calif. 251; Zeigler v. Gadis, 44 N. J. L. 363; Hammer v. State, 44 N. J. L. 669; Bouvier Law Dictionary "local"; 1 Kent Comm. 415; 3 Bouvier's Institutes 95; Jacobs Law Dict. "statute"; 2 Dwarris on Stat. 463; Van Giessen v. Bloomfield, 47 N. J. L. 442; Closson

v. Trenton, 48 N. J. L. 440; Wheeler v. Philadelphia, 27 P. F. S. 338; Kilgore v. MaGee, 4 Nor. 401.

Laws 1909, chapter 80, never was legally enacted. U. S. R. S., sec. 1842; Field v. Clark, 143 U. S. 671; Pangborn v. Young, 32 N. J. L. 30; Cooley on Con. Lim., 7 ed. 124; U. S. Constitution, article 1, sec. 7; 3 Wigmore, sec. 1684; 23 A. & E. Enc. of Law, 1 ed. 192.

Ballot was misleading and deceiving. C. L. 1897, sec. 631, par. 2; C. L. 1897, secs. 1701, 1706, 1801; Laws 1903, chap. 64, sec. 1; Tally v. Grider, 66 Ala. 122; Lanier v. Padgett, 18 Florida, 843, 844; McKinney v. Commissioners, 26 Fla. 264, et seq.; Zeiler v. Chapman, 54 Mo. 305-6; State v. Woodson, 67 Mo. 336; State v. Albin, 44 Mo. 349; Pitkin v. McNair, 56 Barb. 77-8; People v. Kopplekom, 16 Mich. 342; Nefzger v. Railway, 36 Ia. 644; State v. Piper, 17 Neb. 618, 619.

The election was void because there was no registration of voters. Laws 1909, ch. 80, C. L. 1897, secs. 1709, 1710; McCrary on Elections, secs. 135, 193; State v. Scarburox, 110 N. C. P. 232; Smith v. Board of Co. Comms., 45 Fed. 725.

The legislature of the Territory cannot confer judicial power to determine the validity of an election upon the board of county commissioners. U. S. R. S. 1874; Hunike v. Dold, 7 N. M. 11, 12; Garcia y Barela v. Barela, 6 N. M. 245; Payne v. Hook, 7 Wall. 430; Barry v. Hull, 6 N. M. 643.

It is upon defendants to show that expenditures for public buildings made by the name of repairs were not such repairs as added or changed the old buildings in a manner to adapt them for use as a court house and offices. Pipeline Co. v. R. R. Co., 67 N. J. L. 278; City of Catlettsburg v. Self, 74 N. W. 1064.

Material allegations not controverted. C. L. 1897, sec. 2665, sub-sec. 67.

HEWITT & HUDSPETH for Appellees.

The legal enactment of Council Bill No. 86 was not called in question by the plaintiff in the court below and

cannot be raised for the first time in an appellate court. Nall v. Wabash & St. L. & P. Ry. Co., 97 Mo. 75; Commissioners of Highways v. Chicago & N. W. Ry. Co., 34 Ill. Appeals 35; Bennett v. Mo. Pac. Ry. Co., 105 Mo. Rep. 642, 645; Transfer Co. v. Canty, 103 Ill. 423; Carlile, 18 Colo. 461.

Question of conflict of laws 1909, ch. 80, with Springer Act was not raised in court below and should not be considered on appeal. Nall v. Wabash, 97 Mo. 75; Com. v. Ry. Co., 34 Ill. Ap. 35; Bunnell v. Ry. Co., 105 Mo. Rep. 642, 645; Transfer Co. v. Canty, 103 Ill. 423; Hunel v. Carlile, 18 Colo. 461.

Laws 1909, ch. 80, is valid. Codlin v. Board of County Commissioners, 9 N. M. 565.

The approval or non-approval by Governor of Laws 1909, ch. 80, not in issue. Nall v. Wabash, etc., 97 Mo. 75; Com. v. Ry. Co., 34 Ill. App. 35; Bennett v. Ry. Co., 105 Mo. Rep. 642, 645; Transfer Co. v. Canty, 103 Ill. 423; Hunel v. Carlile, 18 Colo. 461.

If a later act covers the whole subject of the first and embraces new provisions, plainly showing that it was intended as a substitute for the first act, it will operate as a repeal of that act. U. S. v. Tynen, 11 Wall. 88, 89; Bartlett v. King, 12 Mass. 545; Commonwealth v. Cooley, 27 Mass., 10 Pick. 37; Tracy v. Tuffy, 134 U. S. 206.

The mere showing that the act as deposited in the secretary's office fails to show compliance with a rule of each house as to authentication in the place of the journals of each house, in the face of the message of the governor, the endorsements of the chief clerks of each branch of the legislature to the effect that the bill was passed by the legislature, is not sufficient to justify the holding that the law is invalid. Cottrell v. State, 9 Nebr. 125; Leavenworth Co. v. Higenbothem, 17 Kans. 74; Taylor v. Wilson, 17 Nebr. 88; McDonald v. State, 80 Wis. 407; In re Ryan, 80 Wis. 414.

The court was without jurisdiction in this case. 10 A. & E. Enc. of Law, 2d ed., 816; Parmenter v. Bourne, 35 Pac. 586; Hipp v. Charlevoix Co., 62 Mich. 456 and cases cited.

OPINION OF THE COURT.

PARKER, J.—This is an equitable action brought by plaintiffs as tax payers of the County of Lincoln, to restrain and enjoin the erection of a court house and jail at Carrizozo in said county, and to enjoin the paying out and expenditure of $28,000 of money in the treasury of the county, proceeds of bonds issued and sold by the board of county commissioners for the purpose of erecting a court house and jail at Carrizozo in said county. The action of the board of said county was based upon Chapter 80 of the Laws of 1909, which was initiated in the legislature of 1909 by Council Bill No. 86. Trial was had in the court below which resulted in a denial of the injunction and dismissal of the bill. Appellants make various complaints of the action of the court below.

1. Counsel for appellants argues against the validity of the act because it fails to bear the signatures of the presiding officers of the legislative council and house as required by the respective rules of each house, and cites Field v. Clark, 143, U. S. 671. In that case the specific question presented was whether the journals of the two houses of congress, which contradicted the terms of the act by showing that a certain section of the act, not appearing in the act had in fact been passed by both houses, would control the terms of the act, or whether the engrossed bill, signed by the presiding officers of each house and the president, found in the archives of the office of the secretary of state, would control the recitals of the journal. The court held the latter would control. It held that the journals could not contradict the act but did not hold that they might not be read in aid of the act. Counsel also cites Harwood v. Wentworth, 162 U. S. 557, in which case the holding was the same.

But the question in this case is whether the journals may be resorted to in aid of the act in order to show that it in fact passed both houses. There is no legislative
1 requirement that any bill shall receive the signature of the respective presiding officers of the two houses. The only requirement is found in a rule adopted separately by each house. The journals of the two houses show the

passage of the bill and in such case they may be judicially noticed in aid of the act. McDonald v. State, 80 Wis. 507; Gardner v. Collector, 6 Wall. 499; 7 Ency. Ev. 991, n. 18.

Objection to the validity of the act is made on account of the absence of the signature of the governor and certificate by him of the date when he received the same. The statutory requirements in this regard is found in Sec. 1842, U. S. R. S., which provides:

"That 'every bill which has passed the legislative assembly of any territory shall, before it becomes a law, be presented to the governor; if he approve he shall sign it; but if not, he shall return it, with his objections, * * * If any bill is not returned by the governor within three days, Sundays excluded, after it had been presented to him, the same shall be a law in like manner as if he had signed it, unless the legislative assembly by adjournment *sine die* prevent its return, in which case it shall not be a law.'"

It appears from the journals that the act was passed many days before March 18, the last day of the session and the day upon which the governor sent a message to the legislature stating that he had allowed the act to become law by limitation. We have examined the original engrossed bills on file in the office of the secretary of the Territory and find that this was the uniform practice of the governor in regard to acts allowed to become laws by limitation, and on none of them does he show the date of receipt of the act by him. In the absence of any evidence to the contrary we are compelled to assume that the executive
2 acted lawfully and his message will be assumed to imply the receipt by him of the act more than three days prior to the message.

2. The contention is made that the petition for the election was not in accordance with the act and that, consequently, the county commissioners had no power to call the election.

The act provides:

"Sec. 2. That Sec. 630 of the Compiled Laws of the Territory of New Mexico, of 1897, be, and the same is, hereby amended so as to read as follows:

"Sec. 630. Whenever the citizens of any county in

this Territory shall present a petition to the Board of County Commissioners signed by qualified electors of said county, equal in number to at least one-half the legal votes cast at the last preceding general election in said county, asking for the removal of the county seat of said county, to some other designated place, which petition shall be duly recorded in the records of said county, and said board shall make an order directing that the proposition to remove the county seat to the place named in the petition, be submitted to a vote of the qualified electors of said county at the next general election, if the same is to occur within one year of the time of presenting said petition, otherwise at a special election to be called for that purpose at any time within two months from the date of presenting said petition: *Provided,* That whenever it is proposed to remove a county seat of any county which has public buildings consisting of a court house and jail, the original construction of which cost said county more than the sum of thirty thousand ($30,000) dollars, such cost to be ascertained from the records of the Board of County Commissioners of said county, then before said board of commissioners shall make such order so submitting such proposition to remove the county seat, to the qualified voters of said county, shall require from the petitioners or the persons interested in the removal of said county seat a deposit of forty thousand dollars ($40,000) in money, which said deposit shall be placed in the treasury of said county, which said sum of money when so placed in said treasury shall be used in the construction of a court house and jail in the event that the proposition for the removal shall receive a majority of the votes cast at such election, but such deposit shall not be required as a condition precedent to submitting such proposition for the removal in counties which have no court house and jails, the cost to the county of which, as ascertained from the records of said county commissioners is less than said sum of thirty thousand dollars ($30,000) as aforesaid; but the same shall be required in all cases when it is proposed to remove a county seat from a point situated on a railroad to another point also so situated. *Provided, further,* That the city, town, vil-

lage or place named in the petition to which it is proposed to remove said county seat shall be at least twenty miles distant from the then county seat of said county and said petitioners or persons interested in the removal of said county seat shall cause to be conveyed to said county by a good and perfect title, in the event of the proposition for the removal shall receive a majority of the votes cast at such election, sufficient suitable land to be accepted, if containing as much as three-fourths of an acre for court house, jail and other buildings for such county, the deed for which shall be filed with and accepted by the Board of County Commissioners before calling said election which deed to be re-delivered to the grantor therein named in case said proposition to remove said county seat fails to receive a majority of the votes cast at such election, and that no proposition to remove a county seat from a city, town, village or place, situated on a railroad, to one not so situated, shall be entertained or voted upon, and that no vote shall be ordered on substantially the same proposition more than once in ten years."

The petition presented to the Board of County Commissioners in this case was as follows:

"County Seat Petition."

"To the Honorable Board of County Commissioners, of Lincoln County, Territory of New Mexico:

We, the undersigned, qualified electors of the County of Lincoln, in the Territory of New Mexico, respectfully petition you to call an election and submit to a vote of the qualified electors of said Lincoln County, the proposition to remove the county seat of said Lincoln County to Carrizozo, a town situated on the El Paso and Southwestern railroad."

Counsel urges that this petition does not meet the requirements of the statute. He says that this was not a petition to remove the county seat to Carrizozo, but
3 we are unable to agree with the conclusion urged. The proposition was not to submit the question of locating the county seat generally, thus calling for signatures of persons who were opposed to, as well as in favor of the removal. It presents the specific proposition *to remove*

the county seat to Carrizozo. Thus no signer to the petition, and they were largely in excess of the required number, could have been deceived by the petition. Counsel cites Lanier v. Padgett, 18 Fla. 842, and McKinney v. Meyers, 26 Fla. 267. In the first case the statute provided for a petition praying for a change. The petition in that case was "for the purpose of legally locating the court house." The court held properly that the petition was fatally defective because signers might easily have been secured to such a petition who really favored the retention of the county seat at its then location. In the second case the facts were similar and the same decision reached. In this latter case, however, the court uses the significant expression: "If there was in the petition any prayer, or expression of desire, *for a change of location* of the county site, the bill does not inform us of it." In the case at bar the desire to remove the county seat by the signers is apparent.

We therefore hold that the petition was sufficient.

3. Objection is made to the election held at which a large majority of the people of the county determined that the county seat should be located at Carrizozo, on the ground that there was no registration of the voters.

4 By the terms of the statute it is impossible to have registration within the time following the petition and the election. This alone disposes of this contention.

4. The next contention is that there were frauds in

5 the election, but as found by the court below, there was only one illegal vote cast and that was in favor of Lincoln.

5. The act requires that when public buildings at the old county seat cost by way of original construction $30,000, the petitioners for the new county seat must deposit $40,000 in money for the erection of the new county buildings. The court below found that the original

6 cost of the old buildings was less than $30,000 and, as we think, correctly held that subsequent repairs should not be counted.

6. Counsel urges that the law in question is local and special and that no town within twenty miles of a

county seat can ever be a county seat no matter what its qualifications may be. Without reviewing the cases cited it is sufficient to say that this case was considered in Codlin v. Kohlhousen, 9 N. M. 565, and the act was held
7 not to be special or local by reason of the twenty mile limitation. We see no reason to depart from the holding in that case.

7. Counsel for appellants complains that the ballots submitted to the people at the election were misleading and not in accordance with the requirements of the provision of Sec. 630, above quoted, which requires that the board shall make an order directing that the proposition to remove the county seat to the place named in the petition be submitted to a vote of the qualified electors of said county. The ballot provided for in the order was "For County Seat———" and was in exact accordance with the terms of section 631, C. L. 1897. We see no reason why this
8 ballot was calculated to deceive the voter and there is no evidence that the voters were thereby deceived.

8. The point is not raised in this case as to whether this is not a collateral attack upon the location of the county seat. *Quaere,* whether this cause should not be
9 affirmed upon the doctrine announced in Torres v. Board of County Commissioners decided at this term.

For the reasons stated the judgment of the lower court will be affirmed and it is so ordered.

Ira A. Abbott, A. J., concurs.

Chief Justice Pope and Associate Justice Wright, concur specially and file separate opinion.

Associate Justice Mechem having tried the cause below and Associate Justice McFie not having heard the argument did not participate in this decision.

POPE, C. J.—[Concurring specially.] While agreeing with most of the opinion, I do not concur in the conclusion announced in the second paragraph. I am of opinion that the form of the petition for the election did not comply with the terms of the statute. The latter clearly requires that the petitioners must ask for the removal of the county seat to some other designated place. The petition to my mind asks simply for a vote on the proposition

to change. A person opposing Carrizozo but desiring an election simply to settle the question between Carrizozo and Lincoln once for all, might with perfect consistency have signed the petition. Such a petition does not comply with the law and is not a valid initiation of the proceedings for an election. I concur, however, in the result upon the ground that the case is within the holding of the court this day announced in Torres v. Board of County Commissioners, that where the proceeding is practically an attempt to settle a county seat controversy the exclusive method is *quo warranto*. I am authorized to say that Mr. Justice Wright concurs in these views.

See Opinion rendered on rehearing, Gray et al v. Taylor et al, 16 N. M. Rep., and 113 Pac. 591.

Thomas v. Gavin, page 660, should be Thomas v. Cavin.

4 SLIP
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